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CALIFORNIA REPORTER

185 PACIFIC REPORTER

181 Cal. 467

In re TURNER'S ESTATE.

(Supreme Court of California. Oct. 24, 1919.)

1. PROHIBITION ⟸9—ANTICIPATED RULINGS ON OBJECTIONS TO PROCEEDINGS NOT GROUND FOR RELIEF.

On an application for a writ of prohibition to prevent confirmation of a sale of real estate, anticipated rulings on objections which should be presented at the hearing of the application for confirmation will not be considered.

2. PROHIBITION ⟸3(2) — REMEDY BY APPEAL.

Under Code Civ. Proc. § 1068, if the superior court hearing objections to confirmation of the sale of decedent's realty acts adversely to such objections, the remedy of the party objecting is by appeal, and not by application for prohibition to prevent confirmation of the sale.

In Bank.

In the matter of the estate of Mary E. Turner, deceased. Application for writ of prohibition against the Superior Court of the City and County of San Francisco to prevent confirmation of a sale of real estate. Application denied.

See, also, 172 Pac. 759; 177 Pac. 854.

H. S. Herrick, of Bakersfield, in pro. per.

PER CURIAM. [1, 2] The application for a writ of prohibition is denied upon the ground that such objections as petitioner has to urge to the confirmation of the sale referred to in the petition should be presented to the superior court at the time fixed by the clerk of said court for the hearing of the application for confirmation. We cannot properly anticipate the action of the superior court in regard to such objections. It may be further noted that, in the event of adverse action by the trial court, petitioner's remedy is by appeal. See section 1068, Code Civ. Proc.

181 Cal. 472

RAGGIO v. SOUTHERN PAC. CO. et al.

(Sac. 2753.)

(Supreme Court of California. Oct. 28, 1919.)

1. DISMISSAL AND NONSUIT ⟸60(1) — DISMISSAL FOR LACK OF PROSECUTION.

A court has power to dismiss a pending action on the ground that it has not been diligently prosecuted.

2. DISMISSAL AND NONSUIT ⟸60(1)—DISCRETION OF COURT ON DISMISSAL FOR LACK OF PROSECUTION.

Though the question of diligent prosecution of an action to avoid dismissal is largely committed to the discretion of the trial court, the discretion intended is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles.

3. APPEAL AND ERROR ⟸962—ERRONEOUS ORDER OF DISMISSAL FOR LACK OF PROSECUTION.

Where it clearly appears to an appellate court on the particular facts that the trial court erred in dismissing a pending action for lack of diligence in its prosecution, it is the appellate court's duty to reverse the order.

4. DISMISSAL AND NONSUIT ⟸60(2) — DUTY OF PLAINTIFF TO MAKE DECISION ON HIS DEMURRER POSSIBLE.

Plaintiff's duty to use diligence to expedite his case to final determination requires him, even after submission of his demurrer to the court for decision, to take such steps as may reasonably be necessary to make it possible for a decision to be rendered, where to his knowledge something has intervened to render a decision impossible without action by the parties.

5. DISMISSAL AND NONSUIT ⟸60(2)—DISMISSAL FOR LACK OF DILIGENCE AN ABUSE OF DISCRETION.

Dismissal of action for lack of diligence in prosecution, because nonresident attorneys for nonresident plaintiff, without being guilty of bad faith, did not bring on again for hearing defendant's demurrer after great delay in decision thereon, after argument, and notification from the clerk of court of the retirement of the judge before whom argument had been had, *held* erroneous.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Luigi Raggio against the Southern Pacific Company and the Dozier Construction & Engineering Company. From an order dismissing the action for lack of diligence, and from the judgment of dismissal, plaintiff appeals. Judgment and order of dismissal reversed.

O'Gara & De Martini, of San Francisco, for appellant.

Hudson Grant and A. G. Bailey, both of Woodland, T. T. C. Gregory, of San Francisco, and Thos. A. Allen, of Albany, N. Y., for respondents.

ANGELLOTTI, C. J. Plaintiff appeals from an order dismissing his action on the ground that he had not used due diligence in its prosecution, and also from a judgment of dismissal based on such order.

The action was one to recover damages for personal injuries alleged to have been sustained as the result of negligence of the defendants. It was instituted September 12, 1912. Demurrers were interposed by both defendants. These demurrers were argued and submitted for decisison to the superior court of Yolo county on December 9, 1912, Hon. N. A. Hawkins, then judge of said court, presiding. On the first Monday of January, 1915, the term of Judge Hawkins, as such judge, expired, without any decision on the demurrers having been given by the court and without any order vacating the submission having been made. Plaintiff's attorneys, who resided and had their offices in San Francisco, did not know of the judge's retirement until some time in May, 1916, when, in response to an inquiry by letter of the clerk of the court as to whether a decision had been rendered, they were informed that no ruling had been made, and that there had been a change in the judgeship, which would probably necessitate a resubmission of the demurrers. Accordingly, in December, 1916, no order of any kind having been made in the meantime, they requested the clerk to place the demurrers on the calendar for hearing on the next law and motion day. They were placed on the calendar for hearing on December 26, 1916, and notice was given to the adverse parties. At the request of the attorney for the Southern Pacific Company, consent to a continuance of the hearing on its demurrer to January 8, 1917, was given. On January 8, 1917, the attorneys for the plaintiff and the defendant Southern Pacific Company appeared in court, and said defendant made its motion for dismissal, the same being made without previous notice, plaintiff waiving such notice. Time was given for the filing of affidavits, and the matter was finally heard, argued, and submitted on January 29, 1917. A similar motion was made by, or at least in the name of, the other defendant, which was heard, argued, and submitted on February 5, 1917. On May 31, 1917, an order granting the motions was made and entered, and a formal judgment of dismissal was made and entered June 1, 1917.

No stress is laid in the briefs on the delay of a little over six months following the acquirement of knowledge by plaintiff's attorneys that a resubmission of the demurrers was necessary, owing to a change in the incumbent of the office of judge, as to much of which period the affidavits showed that the attorney having the matter specially in charge was sick and unable to attend to business. The real claim is, first, that plaintiff should have done something looking to the obtaining of a decision on the submitted demurrers during the two years and a little over of Judge Hawkins' incumbency and the further period during which they believed him to be still an incumbent; and, second, that in any event they should have learned earlier of his retirement from office and should thereupon have brought the demurrers on for reargument and resubmission. In this connection it should further be stated that on May 7, 1913, one of the attorneys for plaintiff wrote to the clerk of the court, asking whether the court had rendered its decision, and received a reply, stating that the demurrer was taken under advisement by the court and that no decision had been rendered; also that such attorney again wrote to the clerk on January 6, 1915, making similar inquiry, and received a reply from the clerk, dated January 8, 1915, four days after Judge Hawkins' retirement, stating that no ruling "has been made as yet," and containing no intimation that Judge Hawkins had retired from office; also that on May 23, 1916, one of said attorneys again wrote to the clerk in regard to the case, stating that "up to six months ago" they were informed that there had been no decision on the demurrer, and asking whether any decision had been rendered, to which the clerk replied that no ruling had been made, that there had been "a change in the judge of the superior court since the demurrers were submitted," and that he thought the demurrers would have to be resubmitted. It should also be stated that the plaintiff resided in San Mateo county, and his only knowledge in regard to the status of the case was that given him from time to time when he made inquiries of his attorneys, and expressed his anxiety for a speedy trial. The affidavits, except for the mere lapse of time during which the demurrers remained under submission, fail to disclose the slightest showing of any disposition on the part of the attorneys to unduly delay a hearing on the merits. To the contrary, they indicate that, in view of the fact that the matter had been submitted to the court for decision, the attorneys considered it inadvisable and improper to press the court for a decision, beyond bringing the matter to the attention of the clerk by the inquiries made.

[1-3] The power of a court to dismiss a pending action upon the ground that it has not been diligently prosecuted cannot, in view of our decisions, be denied. See Witter v. Phelps, 163 Cal. 655, 126 Pac. 593. And it has often been said that the question of diligent prosecution is one largely committed to the discretion of the lower court. But, as said in Ferris v. Wood, 144 Cal. 426, 428, 77 Pac. 1037, quoting from Bailey v. Taaffe, 29 Cal. 423:

"The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its ex-

ercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice."

And where it clearly appears to an appellate court upon the facts of the particular case that the court below has come to an erroneous conclusion, it is its duty to reverse the order of dismissal.

[4, 5] As has frequently been said, the duty rests upon a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination. Under this rule it has been held that it is incumbent on a plaintiff to use due diligence in the matter of pressing to a hearing a demurrer filed by a defendant. Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971; Kubli v. Hawkett, 89 Cal. 638, 27 Pac. 57; Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 Pac. 481. This obligation undoubtedly requires the plaintiff, even after submission of the demurrer to the court for decision, to take such steps as may reasonably be necessary to make it possible for a decision to be rendered where, to his knowledge, something has intervened to render a decision impossible without action by the parties. Such was the situation in Gray v. Times-Mirror Co., supra, where subsequent to submission of the demurrer all of the records were destroyed in the general conflagration of April, 1906, and it was known to all parties that a restoration of the records was a prerequisite to a decision. The lack of diligence was in the matter of the restoration of the records essential to a decision on the demurrer. It has, however, never been held that where a plaintiff has with diligence pressed a demurrer to hearing before and submission to a court, he is charged with any duty to the defendant of attempting to hasten a decision by the court, in the absence of knowledge of some intervening event that renders it impossible for a decision to be rendered upon the pending submission as the matter stands, as, for instance, such an event as happened in the case of Gray v. Times-Mirror Co., supra, or, we may concede, such an event as happened in this case, viz., the retirement from office of the judge before whom the demurrer was argued, rendering it necessary to vacate the submission and bring the demurrer to another hearing.

[6] In this case, excluding from consideration for the moment the fact that the judge before whom the demurrers were argued retired from office January 4, 1915, there was nothing to indicate to the attorneys for plaintiff that a decision would not ultimately be rendered on the pending submission, other than the undue delay on the part of the court. This delay was, it must be confessed, very great, so great, in fact, as to suggest that the fact of submission might have been overlooked and forgotten by the judge. But as against this was the undisputed evidence of the inquiries by mail by the attorneys for plaintiff of the clerk of the court, the first within five months of the submission, which they might well assume would be brought to the attention of the judge, and the answers to which, prior to the answer of May, 1916, were of such a nature as to indicate to them that it was simply a matter of delay on the part of the judge. While they might have written directly to the judge inquiring why a decision was not rendered, or even have made a formal demand for a decision as a basis for a proceeding in mandate, we can well understand that considerations of delicacy and expediency may have reasonably influenced them to refrain from doing more than to make their polite inquiries of the clerk of the court, with the hope that some time a decision on the pending submission might be made in plaintiff's favor. In so far as any duty to the defendant of diligent prosecution is concerned, we do not think it should be held that a plaintiff is bound to press the court for a decision upon a pending submission, simply because there is undue delay on the part of the court in rendering a decision. His full duty in this respect is discharged when he diligently presses the matter to hearing and submission to the court. As we have noted, there is not the slightest indication of any bad faith in the matter on the part of the attorneys for the plaintiff or the plaintiff himself. While there is no evidence as to the cause of delay in the matter of the decision, it is probable that the learned judge of the trial court had completely overlooked and forgotten the matter of these demurrers, but plaintiff should not be held accountable for this.

As to the additional fact of the retirement of the judge on January 4, 1915, which, it may be conceded, rendered it necessary that the submission be vacated and another hearing had. Admittedly plaintiff's attorneys had no actual knowledge or intimation of this situation until, in response to their letter of inquiry of May 23, 1916, they received such information from the clerk of the court. It is suggested that in view of section 1875, Code of Civil Procedure, relative to "knowledge of the court," providing that "courts take judicial notice of the following facts: * * * 5. The accession to office * * * of the principal officers of government in the legislative, executive and judicial departments of the state and of the United States," they were bound to know of the change in the office of judge of Yolo county. Manifestly this provision has no application to such a situation as we have here. Section 1875, Code of Civil Procedure, simply specifies certain classes of

facts which courts take judicial notice of, without the introduction of any evidence relative thereto, resorting for that purpose, if necessary, to "appropriate books or documents of reference." It is a rule of evidence for the government of courts in the determination of matters coming before them. In the case at bar its utmost effect on the motion to dismiss was to require the lower court to take judicial notice of the fact that on January 4, 1915, the judge before whom the demurrer was argued retired from office, and it did not require plaintiff's attorneys to know, or to resort "to appropriate books or documents of reference" to ascertain whether any change had occurred in the incumbency of the office.

Under the circumstances we can see no good foundation for a conclusion that, in so far as defendants are concerned, there was any duty resting on plaintiff's attorneys to make inquiry as to whether Judge Hawkins had retired from office. Especially is this true in view of the fact that the letter from the clerk of the court, written several days after the first Monday of January, 1915 (the date of retirement), contained no intimation of such retirement, and stated that no ruling "has been made as yet," which rather intimated the contrary. It is to be borne in mind that, under our Constitution, the six-year term of office of judges of the superior court always expires on the first Monday of January. If there had been anything to reasonably suggest to these attorneys, residing and having their office in another county, some considerable distance removed from Yolo county, that the judge had retired from office, it might reasonably be held that some obligation of inquiry ensued. However, there was nothing of this nature in this case, and, in so far as the particular question we are discussing is concerned, there was no obligation of inquiry whatever. There being no such obligation of inquiry, the fact that an examination of the list of judges in the California Reports would have shown the fact is immaterial. It may be suggested that it would have been a simple matter for the attorney of defendant railroad company, who resided and had his office in Yolo county, if he desired to hasten disposition of the demurrer, to have brought to the knowledge of plaintiff's attorneys the fact of change in the judgeship and the consequent necessity for another hearing.

On the whole case we are of the opinion that the learned judge of the trial court erred in granting the dismissal.

The judgment and order of dismissal are reversed.

We concur: SHAW, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.; MELVIN, J.

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BRAZIL et al. v. SILVA. (S. F. 8373.)

(Supreme Court of California. Nov. 7, 1919.)

1. LIMITATION OF ACTIONS ⟸127(2) — COMMENCEMENT OF ACTION; FILING OF ORIGINAL COMPLAINT.

Where the original complaint endeavored to set up the same cause of action as the amended complaint, the critical date on the question of the statute of limitations is the date of filing of the original complaint.

2. JUDGMENT ⟸729—CONCLUSIVENESS; MATTERS NOT DECIDED BY ORDER ADMITTING WILL TO PROBATE.

In a proceeding to charge the defendant as sole distributee under a will with a constructive trust in favor of plaintiffs, where the facts presented by the complaint were presented by way of contest of the will and were held no ground for refusing the probate of the will on appeal to the Supreme Court, which further held that, if present plaintiffs were entitled to relief, it would have to be sought outside of the probate proceedings, plaintiffs are not concluded by the order admitting the will to probate.

3. TRUSTS ⟸97 — CONSTRUCTIVE TRUST; FRAUDULENT PRESERVATION OF WILL BY DISTRIBUTEE DIRECTED BY TESTATOR TO DESTROY IT.

Where the sole distributee under a will fraudulently pretended to testator that the will was in an envelope, which she burned when he requested her to destroy the will, equity will declare that she holds the property under a constructive trust for the other heirs, whether it involved a promise upon the part of such trustee or not, in view of the equitable maxim, carried into Civ. Code, 3517, that no one may profit by his own wrong, notwithstanding testator failed to revoke his will by following procedure prescribed by the statute.

4. TRUSTS ⟸110—NECESSITY OF SATISFACTORY PROOF.

In a proceeding to declare that a sole distributee under a will holds the property with constructive trust for the heirs, on the ground of fraudulently deceiving testator into thinking his will had been destroyed, as he requested of distributee, the fraud must be clearly and satisfactorily proven.

5. LIMITATION OF ACTIONS ⟸19(3), 20—APPLICABLE STATUTE; RECOVERY OF REAL AND PERSONAL PROPERTY.

Even though gravamen of the cause of action in an equitable suit is fraud, yet where it sought to recover realty and personalty, the period of limitations applicable is as to the personalty the period allowed for actions to recover personalty, and as to the realty the period allowed for actions to recover realty.

6. LIMITATION OF ACTIONS ⟸44(6), 45—ACCRUAL OF RIGHT OF ACTION; RECOVERY OF REAL AND PERSONAL PROPERTY.

Right of action by heirs at law against sole distributee under a will, to recover real and personal property on ground of constructive

trust in heirs' favor, in that defendant deceived testator by pretending to destroy the will, as desired by him, and preserving it and thereby acquiring legal title, did not accrue until distributee's possession vested by the decree of distribution; her possession up to that time having been in her capacity as administratrix, under Code Civ. Proc. § 1452.

In Bank.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Antonio Da Rosa Brazil and others against Luiza Rosa Silva. Judgment for defendant, and plaintiffs appeal. Reversed, with directions to overrule demurrer and permit defendant to answer.

Everts & Ewing, of Fresno, for appellants.

James Gallagher, M. B. Harris, and E. M. Harris, all of Fresno, for respondent.

OLNEY, J. The plaintiffs and appellants in this action claim to be the heirs at law of one Frank V. Silva, deceased. The defendant is the sole distributee of Silva's estate under a decree of distribution made pursuant to his will, duly probated, whereby he gave all his property to the defendant. The estate was of very considerable value, and comprised both real and personal property. By the action the plaintiffs seek to charge the defendant with a constructive trust in their favor as to the property which she so received. The original complaint was amended, and to the amended complaint a demurrer was interposed, which was sustained by the lower court, and, the plaintiffs failing to amend again, judgment was entered against them. From this judgment they appeal. Two grounds are relied upon before us to support the demurrer: First, that the complaint does not state a cause of action; and, second, that any cause of action is shown on the face of the complaint to be barred by the statute of limitations. The facts as set forth in the complaint are:

[1] Frank V. Silva died in May, 1910. Four years before he had made a will leaving all his property to the defendant whom he described as his wife. The will was admitted to probate in April, 1912. Thereafter the plaintiffs commenced a contest to revoke its probate and the contest was decided against them. In April, 1915, a decree of distribution was made distributing the estate to the defendant. The present action was commenced November 20, 1915. The amended complaint was not filed until February, 1917, but inasmuch as the original complaint endeavored to set up the same cause of action as the amended complaint, the critical date on the question of the statute of limitations is the date of filing of the original complaint.

[2] The constructive trust with which it is sought to charge the defendant is based upon her alleged fraud. It is averred that the defendant was not in fact the wife of Silva and that the plaintiffs are his sole heirs at law; that Silva, when he made his will, delivered it to the defendant; that thereafter he demanded it back from her, for the purpose of destroying it, and thereby revoking it; that she thereupon in the presence of Silva and at his request destroyed by burning an envelope which she falsely stated to him to contain his will, but which in fact did not; that this false statement was made by the defendant for the purpose of preserving the will without the knowledge of Silva, so that she might take advantage of its terms in case of his death; and, finally, that Silva from that time on believed that the will had been destroyed and that he had no will, and died in that belief. In other words, to put it more briefly, the alleged fraud, by reason of which it is sought to charge the defendant with a constructive trust, consisted in her preventing by deceit the actual destruction animo revocandi of the will in which she is the sole beneficiary, with the result that it was preserved contrary to the intention and belief of the testator, and the defendant has now acquired the legal title to his property, which otherwise would have gone to the plaintiffs.

In support of their contention that the complaint does not state a cause of action, counsel for the defendant advance two propositions. The first is that the matter is determined by the order admitting the will to probate. The soundness of this position depends upon whether or not the issues presented by the present complaint are questions going to the final question before the probate court; that is, the question as to the instrument being the legal and valid will of the decedent unrevoked at the time of his death. If the issues presented by the complaint are not of this character, it is plain that they could not be passed on in the probate proceedings, and are not concluded by the result of those proceedings. But this point was determined in Re Estate of Silva, 169 Cal. 116, 145 Pac. 1015, on appeal from the very order of probate here relied on, and that decision must be taken as overruling anything to the contrary in Del Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049. It was held that the facts now presented by the complaint and then presented by way of contest were not a ground for refusing probate of the will, and could not be considered, and that if the present plaintiffs were entitled to any relief it would have to be sought outside of the probate proceedings. It follows that plaintiffs are not concluded by the order admitting the will to probate.

[3] The second point urged by defendant's counsel in support of their position that the complaint does not state a cause of action

is that no relief against the result of such a fraud as that here alleged can be granted; that the wrong done is one for which there is no remedy. There is quite a little dicta to the effect that, where the revocation of a will is prevented by fraud, a trust may be imposed upon the beneficiary of the will in favor of the injured heir. Estate of Silva, supra; Blanchard v. Blanchard, 32 Vt. 62; Gains v. Gains, 9 Ky. (2 A. K. Marsh.) 190, 12 Am. Dec. 375; Graham v. Burch, 53 Minn. 17, 55 N. W. 64.

But so far as we are aware the only decision directly upon the question is Kent v. Mahaffey, 10 Ohio St. 219, which is to the contrary. As the matter is there put quite strongly, we quote from it at some length:

"The statute was designed to prevent the frauds and perjuries arising out of mere parol revocations, and to sanction a recovery in this case would open the door for the very evils which the statute intended to exclude. If one who fraudulently prevents the revocation of a will may be treated as trustee for the heir at law, it would seem to follow, by a parity of reasoning, that where an heir at law, by force or fraud, prevents the execution of a will, he should also be held as a trustee for the beneficiary of the unexecuted will. No lawyer would, I think, hazard the opinion that the heir at law could, in such case, be declared a trustee; and why not, if the general principle adverted to is applicable to the defendants in this case? Both alike would be holding the legal title to estates, which, in equity and good conscience, they ought not to retain. If it is said that the heir is in by the statute of descent, so, too, it may be said that the devisee claims under a will made before the fraudulent interference. The reason is obvious why the heir could not be so regarded, and the same reason must also exculpate the devisee. The heir at law cannot be so treated, because the law, for wise purposes, has prohibited a will, except it be executed under certain formalities; and the statute has also prohibited the revocation of a will, except under certain formalities. To permit a recovery in either case would be to make a will, or, as the case may be to revoke one, in a manner which the statute forbids. Is it not obvious that to hold either liable would, in effect nullify the statute?"

Now it is to be noted that the opinion quoted does not controvert, as it could not well do, the general principle upon which relief is asked for in such cases as the present, namely, that where the defendant has by his own wrong obtained the legal title to property, a trust as to such property will be imposed upon him in favor of the party injured. This principle is a familiar one, and is based upon the maxim, which has been carried into our Code (section 3517, Civ. Code), that no one may profit by his own wrong. The instances of its application are as various nearly as the ways in which property can be wrongfully acquired. A most common illustration is the imposition of a trust upon a party holding under a deed fraudulently obtained from the grantor, where admittedly the deed is valid to the extent of conveying the legal title. Nor can there be any doubt that such a case as the present comes within this principle. If the facts alleged in the complaint are true, the defendant has by the grossest fraud acquired the legal title to property which, but for her fraud, would have gone to the plaintiffs. The opinion quoted does not deny this general principle, nor its application normally in the circumstances here presented. The reason advanced for not applying it in those circumstances is that by statute a will can be revoked only in certain prescribed ways, that no such revocation was in fact made, and that to impose a trust upon the defendant would be in effect to evade the statute, and make the equivalent of a revocation something which by statute is not a revocation. In other words, the position of the court in the opinion quoted is that in face of the statute equity is helpless to grant the relief which otherwise it would grant upon the facts being proven almost as a matter of course. If this position be not sound, no reason is advanced, and we do not see that any can be advanced, why the general principle mentioned should not be applied, and relief granted here as in other cases where the defendant has acquired the legal title to property by his own wrong.

But the position so taken is not sound. It is in fact directly contrary to the established rule of equity. It is a familiar function of equity, and one very characteristic of its peculiar province, to refuse to permit, and affirmatively to prevent, a statute being used as a means whereby to perpetuate a wrong. A common and very plain illustration is the specific enforcement of a partially performed oral contract which is within the statute of frauds. Equity does not stay its hand in such a case because, forsooth, the statute requires a contract in writing, and there is none, and whatever may have been the historical reason why courts of equity granted such relief originally, the reason now universally assigned is that not to grant it would be to enable the defendant to perpetrate a fraud by means of the statute.

Another illustration is that of reforming a contract and enforcing it as reformed, although it is within the statute of frauds. This, in its final analysis, is the enforcing of a contract, where the statute requires a written one, and no such written contract as that finally enforced exists.

Another illustration of the same thing is found in the origin of the doctrine, now incorporated in most recording acts, but originally not found there, that where two deeds to the same property are made by the same grantor, the second, although recorded first, will yet be inferior to the first, if the second grantee took with notice of the rights of the

first. By the statute of 7 Anne, c. 20, 91, all unregistered conveyances were made void as against subsequent purchasers for value. No exception to the rule was made in case the second purchaser took with notice of the previous conveyance. Because of this it was held in Doe v. Alsopp, 5 B. & Al. 142, that the legal title passed to the second purchaser, although he had taken with notice. But in equity relief was given under such circumstances by imposing upon the legal title of the second grantee a trust in favor of the first, on the ground that the action of the second grantee in purchasing the property with notice of the rights of the first and recording his deed was, in effect, a fraud and an attempt to use the statute to perpetrate a wrong to his advantage. Neve v. Neve, 1 Ves. 64, Amb. 436. See, also, 1 Pomeroy's Eq. Jur. §§ 430, 431. An illustration of the same principle in connection with a homestead statute is Fox v. Hubbard, 79 Mo. 390, and in connection with a statute of limitations is Vane v. Vane, L. R. 8 Ch. 383. See, also, In re McCallum [1901] 1 Ch. Div. 143.

In Kent v. Mahaffey it is said that, where the execution of a will has been prevented by force or fraud, "no lawyer would * * * hazard the opinion that the heir at law could * * * be declared a trustee." But Lord Thurlow, in Dixon v. Olmius, 1 Cox, 414, 29 Eng. Rep. 1227, and in Luttrell v. Olmius, stated by Lord Eldon with approbation in Mestaer v. Gillespie, 11 Ves. 638, 32 Eng. Rep. 1236, did that very thing. He enforced in equity against the heir on whose behalf the republication of a will had been prevented by force and fraud, the rights which would have existed under the will if republished.

Finally, upon this point we see no real distinction whatever between the present case and those wherein a decedent has either been prevented from making a will by the promise of the heir that he will carry out the decedent's wishes, or has been prevented from revoking a will by a similar promise of the beneficiary. In such a case, if the heir or beneficiary as the case may be, does not carry out the promise, a trust will be imposed upon him in equity in favor of those who would have received the property, except for his promise. This is no longer questionable. And it makes no difference whether the promise be oral or in writing, or within the statute of frauds or not. Furthermore, the reason for granting the relief in such cases, the gravamen of the cause of action, is held to be, not the promise, but the fraud of the defendant, of which the promise is but a part. If the fraud be there, as it certainly is in the present case, according to the averments of the complaint, it would seem to be immaterial whether a promise be a part of it or not. In Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157, a gift was made by will upon the oral promise of the beneficiary to distribute it in a certain manner. As reported, the argument of counsel was that "the trust, not having been evidenced by a writing, was void as a testamentary disposition. Civ. Code, § 1276." This court, however, held that it made no difference whether the promise was in writing or not, and then quoted at length from In re O'Hara, 95 N. Y. 403, 47 Am. Rep. 53, saying that it did so because of the lucid statement there of the principles applicable. A portion of this quotation is so pertinent here that we repeat it (the italics are ours):

"If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary, and enforce it, if needed, on the ground of fraud. Equity acts in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the devisor, which equity will not endure. The authorities on this point are numerous. [Here follows a long list of cases.] The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state. Brown v. Lynch, 1 Paige [N. Y.] 147; Williams v. Fitch, 18 N. Y. 546. In the last of these cases the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff, and the English cases were cited with approval and the trust enforced. *All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched, that it was not at all modified, that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust, ex maleficio, instead of resting upon one as created by the testator.*"

We can but conclude that Kent v. Mahaffey proceeds upon a failure to recognize and appreciate a fundamental principle of equity jurisprudence, and one, as we have said, characteristic of the peculiar province of equity. We hardly need point out that equity does not in such a case as this grant relief simply because there has been an abortive attempt to comply with the statute. Equity will not, in effect, make a revocation where there was none under the statute merely because the decedent desired or actually attempted to make one. It grants relief only in case and because of a wrong done by the defendant of which he seeks to reap the fruit. In such a case equity will not permit him to have safe shelter under the formal requirements of the law, either statutory or other. It follows that the complaint in this

case states a cause of action, and the demurrer cannot be sustained on that ground.

[4] In this connection, since the cause must go back for trial, it may not be amiss to call attention to the rule that, because of the very nature of these cases, the fraud or other wrong relied on must be proven clearly and satisfactorily. The relief asked for is so extraordinary, and the opportunity for false testimony so great, since the evidence in most cases must be largely parol, that it is only where it is fairly certain that the circumstances calling for the relief actually exist that the extending of it may be justified.

[5] As to the statute of limitations the question is concluded by Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820. It was there held that even as to a suit in equity, where the gravamen of the cause of action was fraud, the period of three years allowed by the Code for the commencement of an action based on fraud was not the only period permissible, where it was sought by the suit to recover the title to or possession of real property, and that in such a case the five-year period allowed for actions to recover real property also applied. The reason given in Murphy v. Crowley for this ruling was that, whatever might be the merits of the question, it was concluded by previous decisions in this state. The force of this reason is now doubly strong, and we can but follow the rule, although, viewed as a new question, its correctness is exceedingly doubtful, to say the least.

While Murphy v. Crowley involved realty alone, there is no reason why it should not apply where personalty is involved. In the present case both real and personal property are involved, with the result that, while the action could be brought within the period permitted for actions on the ground of fraud, it could also be brought as to the personalty involved within the period permitted for actions to recover personalty, and as to the realty involved within the period permitted for actions to recover realty.

[6] The present action was brought within both of these latter periods. While an action to impose a trust because of fraud could be maintained as soon as the wrongdoer consummated his fraud and obtained the legal title to the property involved, which in this case would be when the original order probating the will was made, unless the order was suspended by appeal, and then when affirmed on appeal, an action for possession of the property could not be maintained against the defendant as long as the property was in the possession of the personal representative of the decedent for purposes of administration. Where, as in this case, the defendant was the administratrix of the estate, her possession up to the time of distribution must be taken to have been in her capacity as administratrix. Section 1452, Code Civ. Proc. It was only upon her possession ceasing to be of this character that it could be attacked by the plaintiffs. This would be when distribution was had, and under Murphy v. Crowley, and the decisions which precede it, it must be held that the present action, even though based exclusively upon fraud, can be maintained as to personalty within the period after distribution allowed for actions for the recovery of personalty and as to realty within the period after distribution allowed for actions for the recovery of realty. As already stated, the complaint shows that the property involved was distributed in April, 1915. Within a few months thereafter the present action was commenced. It follows that upon the point of the statute of limitations as well the demurrer was not well taken.

Judgment reversed, with directions to the lower court to overrule the demurrer of the defendant and permit her to answer.

We concur: ANGELLOTTI, C. J.; SHAW, J.; MELVIN, J.; WILBUR, J.; LAWLOR, J.; LENNON, J.

181 Cal. 509

Ex parte LAPIQUE. (Cr. 2276.)

(Supreme Court of California. Oct. 24, 1919. On Rehearing, Nov. 14, 1919.)

1. HABEAS CORPUS ⟸54 — SUFFICIENCY OF APPLICATION.

An application for writ of habeas corpus, which does not sufficiently show in what the alleged illegality of petitioner's imprisonment consists, and does not clearly and definitely show that he is in fact held in custody by virtue of any order based on the proceeding for an adjudication of contempt of court referred to in his petition, is insufficient.

On Application for Rehearing.

2. HABEAS CORPUS ⟸92(1) — SCOPE; INSUFFICIENCY OF EVIDENCE TO WARRANT INDICTMENT.

Any question of insufficiency of evidence to warrant an indictment is not a proper subject of inquiry on habeas corpus.

In Bank.

Application by John Lapique for writ of habeas corpus, directed against John C. Cline, Sheriff of the County of Los Angeles. Application denied.

John Lapique, of Orange, in pro. per.

ANGELLOTTI, C. J. [1] The application for a writ of habeas corpus does not sufficiently show in what the alleged illegality of petitioner's imprisonment consists; nor, indeed, does it clearly and definitely show that

he is in fact held in custody by virtue of any order based on the proceeding for an adjudication of contempt of court referred to in the petition.

The application for a writ must be denied; and it is so ordered.

On Application for Rehearing.

PER CURIAM. [2] Any question of insufficiency of evidence to warrant an indictment is not a proper subject of inquiry on habeas corpus. In re Kennedy, 144 Cal. 634, 78 Pac. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840. In so far as appears, the sufficiency of the indictment in this matter cannot be examined into on habeas corpus. In re Ruef, 150 Cal. 665, 89 Pac. 605.

The application for a rehearing is denied.

ANGELLOTTI, C. J., and LAWLOR, WILBUR, and OLNEY, JJ., concur.

181 Cal. 500

BETHLEHEM SHIPBUILDING CORPORATION, Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 9145.)

(Supreme Court of California. Nov. 8, 1919.)

1. MASTER AND SERVANT ⟸417(7)—WORKMEN'S COMPENSATION; REVIEW OF FINDING OF COMMISSION.

The finding of the Industrial Accident Commission that a streptococcic infection in an injured toe was transferred to the face of the deceased employé by external means, and that the death was proximately caused by the original injury, being based on the testimony of medical experts grounded on medical science, cannot be overturned, in view of Code Civ. Proc. § 1826.

2. MASTER AND SERVANT ⟸374—WORKMEN'S COMPENSATION; INJURY AS PROXIMATE CAUSE OF DEATH.

The fact that a streptococcic infection reached the deceased servant's face from a discharging and infected wound in his toe, thus giving him erysipelas and septicemia, from which he died, did not, as a matter of law, break the chain of causation between the death and the original wound to the toe, so that the death was not proximately caused by the original injury.

3. MASTER AND SERVANT ⟸374—WORKMEN'S COMPENSATION; INJURY PROXIMATE CAUSE OF DEATH DESPITE SELF-TREATMENT.

If an employé whose toe had been wounded, and which was infected and discharging, conducted himself, in attempting to treat it, as would a reasonably prudent person in his situation, and thereby innocently enhanced the original injury, so that the infection was communicated to his face, and he developed erysipelas and septicemia, from which he died, the Industrial Commission could find that the original injury continued to the end, and accomplished the final result of death, and was its proximate cause.

4. MASTER AND SERVANT ⟸405(4)—WORKMEN'S COMPENSATION; EVIDENCE JUSTIFYING A FINDING AS TO CAUSE OF INJURY.

In proceedings under the Workmen's Compensation Act, evidence *held* not to warrant the conclusion that the Industrial Accident Commission was bound to find that the transfer of streptococcic germs from the injured toe of an employé to his face, where they caused erysipelas and fatal septicemia, was due to his own negligence.

Shaw, J., dissenting.

In Bank. Proceedings under the Workmen's Compensation Act by Mary Caffrey, an incompetent, and Elizabeth Caffrey, a minor, by Myra Daly, their guardian ad litem and trustee, opposed by the Bethlehem Shipbuilding Corporation, Limited, the employer. Compensation was awarded by the Industrial Accident Commission, and the employer applies for certiorari to review its order. Award affirmed.

Wilson & Wilson, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondent Industrial Accident Commission.

Maurice T. Dooling, Jr., and F. R. Devlin, both of San Francisco, for respondent Daly.

LENNON, J. Certiorari directed to the Industrial Accident Commission. The return of the respondent commission reveals the following facts:

The proceeding was instituted by an application for benefits under the Workmen's Compensation Act (St. 1917, p. 831), presented by the guardian ad litem and trustee of the incompetent wife and minor child of John Caffrey, deceased, whose death was alleged to have been caused by an injury received in the course of his employment and arising out of the employment. It appears that on Friday, July 26, 1918, Caffrey sustained a contused wound on the great toe of his right foot while engaged in the service of the petitioner. He continued at his work on Saturday, and also on the following Monday. On Monday he had the toe dressed by Dr. Marvin at the emergency hospital of the Union Iron Works. On Tuesday, July 30th, the foot was so painful that after starting to work he returned home and undertook to treat the toe himself. He first complained of a swelling of the face on August 1st. On the following day, the symptoms of the face becoming alarming, Caffrey was removed to a hospital, where it was discovered that there was a streptococcic infection of the injured toe. The skin surrounding the toe was in an erysipelatous condition and there was a development of erysipelas on the face. The facial infection resulted in septicemia, from which Caffrey died on August 8, 1918.

The commission found that the germs which caused the facial infection were carried from the toe to the face by external means, and that Caffrey's death was proximately caused by the original injury. It is contended on behalf of petitioner that these findings are not justified by the evidence.

The medical testimony upon which the commission based its finding that the germs which caused the facial infection were carried from the toe to the face by external means was, in effect, that such a method of transfer was exceedingly common, the transmission of the germs being very readily accomplished, that there was no reason to suppose that the infection had come from another source than the toe, and that, while it was was within the realm of possibility for the infection to have come from another source, such hypothesis was so very much the least probable that it seemed useless to theorize as to such possibility in the face of facts indicating that the germs "certainly must have been carried" from the foot.

[1] It is contended on behalf of petitioner that this evidence shows that the opinion of the experts that the infection of the face was due to germs carried from the toe was pure "guesswork." The testimony shows, however, that the experts were not indulging in mere conjecture or speculation. They were giving what, on the facts before them, and in the light of medical science, appeared to be the most probable explanation of the event. The theory that germs were carried from the toe to the face was "guesswork" only in the sense that there was no direct evidence of the source of the facial infection. In the view of the experts, other admittedly possible causes were so far excluded by the conditions which were shown as to make the one which they advanced by far the more probable one. As stated in Santa v. Ind. Acc. Comn., 175 Cal. 235, 165 Pac. 689:

"This was a sufficient basis for the action of the commission. Absolute proof or mathematical demonstration is not required. Code Civ. Proc. § 1826. The commission is the final judge of the facts, and its findings cannot be overturned where they have the support of evidence upon which a reasonable man could come to the conclusion which was reached."

Petitioner, however, insists that, even if it be assumed that the facial infection was caused by germs carried from the toe by external means, the chain of causation was so broken that the original injury of the toe could not reasonably be said to have been the proximate cause of Caffrey's death. The rule of law which must guide us in the determination of the question thus presented is stated in Head Drilling Co. v. Ind. Acc. Comn., 177 Cal. 194, 170 Pac. 157. In that case it appeared that a workman sustained a fracture of the leg in the course of his employment. Three days after his discharge from the hospital, he sustained a second injury, causing a displacement of the bones by reason of accidentally striking the heel of the foot of the injured limb against a piece of furniture. The chief justice said:

"We are of the opinion that a subsequent incident or accident aggravating the original injury may be of such a nature, and occur under such circumstances, as to make such aggravation the proximate and natural result of the original injury. Whether the subsequent incident or accident is such, or should be regarded as an independent, intervening cause is a question of fact for the commission, to be decided in view of all the circumstances, and its conclusion must be sustained by the courts whenever there is any reasonable theory evidenced by the record on which the conclusion can be upheld. * * * Our conclusion is not at all opposed, in our opinion, to what is said in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 Pac. 24. The question there was whether the commission is authorized by the act to award compensation to the employé 'for an additional injury sustained by him afterward, not in the course of his employment, by an accident or act which aggravates the first injury and prolongs the disability.' The answer was that it had no such authority if the subsequent injury 'is neither the natural nor the proximate result of the injury received in the course of the employment.' It was fully recognized in that case, we think, that the subsequent injury may be the proximate result of the injury received in the course of the employment, and compensable under the act, and the finding to that effect in this matter has sufficient support in the evidence."

In a concurring opinion in that case, Mr. Justice Shaw added that—

"The award for the further disability here under review can be sustained only upon the ground that the subsequent accident and resulting displacement of the fractured bone was not the result of a lack of ordinary care on the part of the injured employé. An injury so occurring subsequently may be regarded as a part of the proximate consequences of the original accident. The finding of the commission is in effect a finding that at the time of the second accident Scott was not guilty of a lack of the ordinary care which reasonably prudent persons in his condition exercise for their own safety from injury. I think it cannot be said, as matter of law, that such finding is without any evidence to support it."

The rule announced in Head Drilling Co. v. Ind. Acc. Comn., supra, is well established in all cases where it becomes necessary to determine whether or not there is evidence to justify a finding that a subsequent injury or disease is part of the proximate consequences of an injury for which the defendant is responsible. In Dickson v. Hollister, 123 Pa. 421, 16 Atl. 484, 10 Am. St. Rep. 533, erysipelas followed a flesh would received in the course of a fall occasioned by the defendant's negligence. At the time of the decision, the causes of erysipelas were not understood, but

the mere fact that it frequently developed from personal injuries was held to warrant an instruction that the disease might be regarded by the jury as part of the injury itself. To the same effect is H. & T. C. Ry. Co. v. Leslie, 57 Tex. 83, 85. The reluctance of the courts to determine the question of proximate cause as a matter of law in cases similar to the instant case is illustrated by Baltimore City Passenger Railway Co. v. Kemp, 61 Md. 619, 48 Am. Rep. 134, wherein it was held that it was properly left to the jury to determine whether or not a supervening cancerous growth was caused by injuries sustained by plaintiff as a result of defendant's negligence. The evidence in this behalf was to the effect that the personal injury might have superinduced and contributed to the production and development of the cancer. The court quoted with approval from Beauchamp v. Saginaw Mining Co., 50 Mich, 163, 15 N. W. 65, 45 Am. Rep. 30, wherein it was held that it was for the jury to determine whether or not a blow on the head was a proximate cause of death from pneumonia, the evidence being to the effect that the personal injury had so reduced the vitality of the deceased as to render him more susceptible to disease and less able to resist it. See, also, Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Terre Haute, etc., Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Eicholz v. Niagara, etc., Co., 68 App. Div. 441, 73 N. Y. Supp. 842; Id., 174 N. Y. S. 519, 66 N. E. 1107; L. & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902.

[2, 3] It only remains to apply the above reasoning to the facts of the instant case. In the light of medical knowledge properly presented to the commission that such a transfer of a streptococcic infection from a discharging wound as that found to have taken place in Caffrey's case is not only possible, but highly probable, we are of the opinion that the fact that the germs reached the face by external means and not through the system cannot, as a matter of law, be said in itself to have broken the chain of causation. But petitioner contends that Caffrey's conduct was such as to require a finding of negligence on his part. Caffrey was, of course, under a duty to use reasonable care to restore himself to health. But if he conducted himself as would a reasonably prudent person in his situation and circumstances, and innocently enhanced the original injury, it was within the province of the commission to find that the original cause continued to the end and accomplished the final result, and was therefore the proximate cause. Dunham v. Clare, [1902] 2 K. B. 292; Hodgson v. Robins, 7 B. W. C. C. 232, 233; Bailey v. Ind. Comn., 286 Ill. 623, 122 N. E. 107; Hope v. Troy, etc., R. Co., 40 Hun (N. Y.) 438, 440; Batton v. Public Service Corp., 75 N. J. Law, 857, 69 Atl. 164, 18 L. R. A. (N. S.) 640, 127 Am. St. Rep. 855. Under all of the circumstances, we are not prepared to say that the commission was not justified in the instant case in finding that his original injury was the proximate cause of Caffrey's death.

It appears that when the toe first troubled him Caffrey had it dressed by Dr. Marvin at the emergency hospital at the shipbuilding plant. When called as a witness, the doctor did not recollect the case, but the hospital record as explained by him indicated that the toe was not in a very serious condition, that Caffrey was given no special warning, and that he was told to go to another hospital in a day or two when the dressing needed to be changed. The next day he started to work, but, on account of the pain in the foot, he returned home. He might have had free treatment at the hospital maintained by petitioner for its employés, but he chose instead to remain at home and treat the foot himself with witch hazel and iodine. In the light of subsequent events, this was an unfortunate decision. We are, however, unable to say as a matter of law that the commission was bound to find that, under all the circumstances appearing at the time, it was a decision so unreasonable and imprudent as to amount to a breach of his duty to use due care to restore himself to health. There is no further fact in the case upon which negligence can be predicated. It is not suggested that Caffrey failed to use due care in his own treatment of the foot. It was not until the third day of his absence from work that he first noted a swelling of the face, which he at that time attributed to a cold in the head. The toe, however, was improving, and he wrote to his foreman on that day that he was a little better, and that he would try to return to work as soon as possible. Serious symptoms first developed on the face on the following day and without further delay he was removed to a hospital for treatment.

[4] The facts of the case are not such as to warrant the conclusion that the commission was bound to find that the transfer of the germs from Caffery's toe to his face was due to his own negligence. It follows that we cannot disturb the finding that his death was the natural consequence of the original injury.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; MELVIN, J.; LAWLOR, J.; OLNEY, J.

SHAW, J. I dissent. Caffrey, while at work for his employer, had an accident which abraded the skin of his toe. From that abrasion natural causes which he could not control brought on an infection in the toe. The infection and consequent diseased condition of the toe were the proximate results of the abrasion and of the accident. But the infection did not reach his face by the operation of natural causes. The commission so

found. It reached the face by being subsequently carried there, either from some other source, or by some agency entirely disconnected with the infected condition of the toe, or by his own act in carelessly or accidentally touching his face with something which had been in contact with the infection in the toe. Any one of these causes would be an independent intervening cause and not a cause arising proximately from the injury.

It makes no difference, with respect to this question, whether the act of Caffrey which carried the infection to his face, if it was so carried, was negligent or merely accidental; in either event it was a cause independent of the original injury and intervening it and the deposit of the infection on the face. The opinion of the majority appears to assume that an act of the injured person cannot be an independent intervening cause unless it is a negligent act. This, of course, cannot be correct. The question whether or not it is negligent has no place in an inquiry whether or not it is an independent intervening cause.

The decision and the reasons therefor stated in Head Drilling Co. v. Ind. Acc. Comn., 177 Cal. 194, 170 Pac. 157, are not applicable to the present case. The facts were materially different. There the injured person, Scott, had a fracture of the leg. He was put in the care of a physician engaged by the insurance carrier of the employer. He had been discharged from the hospital, but was still acting under the supervision of the physician, and had been directed by him to begin to use the fractured leg. It was while he was obeying these instructions and in his usual habits of going about in his home, as the directions contemplated he should do, that his foot slipped on a rug. The leg, owing to the injury, was not yet capable of free motion. This caused an involuntary outward motion of that foot, which struck a table or chair near by, and brought about the additional injury for which the second award was made. There was therefore an unbroken chain of causation from the original injury to the second injury. The original injury was one of the direct causes of the second injury. Scott was following the advice of the physician to accelerate recovery, and because of his doing so he received the second injury. In such cases it is always conceded that the second injury is not produced by an independent, intervening cause. It may be an intervening cause, but is not an independent cause. In the case at bar the original injury had no connection whatever, natural or artificial, with the transmission of the infection from the toe to the face. It was not directly or indirectly the result of treatment or advice of the physicians in charge of the case, nor the necessary or natural result of the infection in the toe. For these reasons I am of the opinion that the employer was not liable for the additional award.

181 Cal. 484

ENGELS COPPER MINING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

(Sac. 2972.)

(Supreme Court of California. Nov. 4, 1919. Rehearing Denied Dec. 4, 1919.)

MASTER AND SERVANT ⊂=375(1) — DEPUTY SHERIFF, EMPLOYED BY CORPORATION, EMPLOYÉ WITHIN COMPENSATION ACT.

A deputy sheriff, employed by a mining company to keep order about its premises, killed in quelling a disturbance, acted in the course of his employment, so that his widow was entitled to compensation from his employer, despite Workmen's Compensation Act, § 8(a), defining the term "employé," and including all elected and appointed paid public officers, but excluding any person holding an appointment as deputy sheriff, but receiving no compensation from the county or municipal corporation, with a proviso that the exclusion should deprive no person so deputized from recourse for injury in the course of employment against any private person employing him.

In Bank.

Proceeding for compensation under the Workmen's Compensation Act by Mrs. Eva A. Smith, widow of Franklin H. Smith, the employé, opposed by the Engels Copper Mining Company, the employer. Compensation was awarded by the Industrial Accident Commission, and the employer applies for certiorari to review its action. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LENNON, J. Certiorari to review the action of the Industrial Accident Commission in awarding death benefits to Eva A. Smith, widow of Franklin H. Smith, deceased. Smith was an employé in the service of petitioner and was also a deputy sheriff. He was killed on the evening of August 4, 1918, while attempting to quell a drunken disturbance in a shack owned by petitioner and situated adjacent to its premises. The single question presented is whether or not Smith was killed while "performing service growing out of and incidental to" his employment. The return to the writ discloses the following facts:

At the time of Smith's death, petitioner was operating a mine in Plumas county. Upon its land were situated the various shops, machines, and buildings appropriate to such an operation, together with bunkhouses for the use of such of the men as did not choose to rent private houses, which were also situated on the premises. The shack where the disturbance occurred was located just below the petitioner's machine shop. It was a frame and canvas structure, and, while it

does not appear who owned the land upon which it stood, it appears that the petitioner owned the frame and that the occupants were under its control; one of them, an Indian named John Smith, being in its employ.

At the time of his death, the deceased, Franklin H. Smith, was employed by petitioner as a general utility man, to look out for its interests on and off the company's property. He acted as fire warden, but his duties in this connection consumed on the average of less than an hour a day. He was required to meet trains and look after arriving employès, to remove women of questionable character from the premises, to watch prostitutes who established camps outside the company's property, and, where they were making trouble, or were supposed to be selling liquor, to have them move on. He was, moreover, required to keep down disorder from drunkenness, to settle disturbances among the men, and to do the work of a regular police officer in keeping order. Smith was also a deputy sheriff. During the period of his employment by petitioner as watchman or special officer, he had been called upon several times by the sheriff to act in civil matters, but he had rendered no service as deputy sheriff in criminal matters under the sheriff's orders. His activities were confined to matters going on around the mine, and concerning these matters it was his duty to report to the superintendent of the mine, rather than to the sheriff.

On the evening in question, a Mexican had brought some whisky to John Smith's shack, and a drunken orgy ensued, in the course of which one of the occupants of the shack threatened gun play. One of the other occupants of the shack sent for the deceased. It does not appear exactly what information the deceased received, but one Greaves testified at the coroner's inquest that he saw the deceased, who said, "I have got to go down and see about a drunken Indian or buck." He then went down to the shack and was shot and killed.

These facts warrant a finding that in going to the shack to quell the disturbance the deceased was doing exactly what he was hired by petitioner to do. This conclusion is further fortified by the fact that the deceased had been expressly required to quell or prevent disturbances adjacent to the company's premises. The reason for these directions was explained by the company's superintendent as follows:

"If a man got killed, and there was a big row, and it was an employé of the copper company, there would be a loss to us, if a court trial came up."

[1] Petitioner does not deny that the deceased had acted to quell or prevent disturbances before under the direction of the superintendent of the company. It is insisted, however, that in so doing he was "of course" acting in an official capacity as deputy sheriff. This raises the only serious question presented by the petition. Where a private company or individual employs a watchman or special officer, and in making its selection deliberately chooses an officer of the law, in order to take advantage of his authority, as did petitioner in the instant case, and where such officer performs acts advantageous to and expressly or impliedly directed by the employer, which happen at the same time to be acts which it would be his official duty to perform, is such an employè acting in the course of employment within the meaning of the Workmen's Compensation Act? Respondent relies upon section 8(a) of the statute (St. 1917, p. 835), which defines the term "employé" and includes "all elected and appointed paid public officers," but excludes "any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of the appointee, but receives no compensation from the county or municipal corporation, or the citizens thereof for the services of such duty." The section, however, provides:

"That such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment."

The question presented in the instant case involves the construction to be placed upon the words of the proviso above quoted. Petitioner contends that the "employment" referred to in the proviso has no relation to the performance of official acts, and that a deputized person can be an employé only when performing some act in no wise connected with his official duties. With this construction we cannot agree. It would not, we think, require an express statutory reservation to secure to a deputy sheriff the right to compensation for an injury received in the course of working at a mechanical art or trade. The clause in question should not be regarded as intended to effect this purpose, and thereby be interpreted as a purely superogatory enactment, if it may fairly be construed in such a manner as to give it a rational purpose. In our opinion the statute is to be construed in the light of the common practice of property owners to choose as watchman or special officers men who are deputized officers of the law and to secure the deputization of such watchman or special officers engaged by them as are not already deputies. It is obviously to this class of deputies that the excluding clause of the statute refers in sharp contrast to the provisions of the including clause. It is in the light of the meaning of the excluding clause that

the proviso in question must be read. So read, its clear effect is to provide that, where a deputy performs acts which, while official in their nature, are advantageous to the employer and directed by him, not incidentally merely, but as part of the duties prescribed and contemplated in the contract of employment, then such deputy is acting in the course of his private employment within the meaning of the provisions of the Workmen's Compensation Act.

Upon this view of the statute, petitioner cannot escape liability to compensate the widow for the death of Franklin H. Smith on the plea that in performing the duties incident to his employment he was also fulfilling a duty to the county.

The award is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.; MELVIN, J.

(181 Cal. 454)

RICHMOND WHARF & DOCK CO. v. BLAKE et al. (S. F. 8217.)

(Supreme Court of California. Oct. 24, 1919. Rehearing Denied Nov. 21, 1919.)

1. LANDLORD AND TENANT ⟸5(1) — PRIVITY OF CONTRACT.

Where, as partial compensation to the contractor for improvements to be made by him on the owner's land, the owner was to permit a company to build and occupy a wharf upon the property, rent free, for five years, the company to have the right to sublet, but in the event of subletting one-half the rent from subletting to be paid to the owner, and the wharf was built and sublet, there was privity of contract between the owner and the company from the time the latter accepted the consideration moving to it under the contract.

2. USE AND OCCUPATION ⟸2 — HOLDING OVER; RIGHTS OF LANDLORD.

Though the landlord, after holding over of defendants, never changed the tenancy by sufferance into a tenancy at will upon like terms with the original tenancy, he may sue for use and occupation, in view of Code Civ. Proc. § 1161, and Civ. Code § 3334.

3. USE AND OCCUPATION ⟸8—PLEADING; ALLEGATIONS OF COMPLAINT.

An owner, who brings a suit for use and occupation, need only allege his ownership of the land, occupancy of the land by defendant, the reasonable value of the use of the land for the period of occupancy, and that such sum is unpaid; allegation of permission being unnecessary.

4. APPEAL AND ERROR ⟸1170(3)—HARMLESS ERROR; VARIANCE.

Even if owner's action against occupant of his land erroneously sounded in contract, but the proof was of use and occupation without contract, this, under Const. art. 6, § 4½, would not be ground for reversal of judgment for the owner; the substance of the contention and the measure of the amount of property, recoverable being essentially the same.

5. USE AND OCCUPATION ⟸8 — PLEADING; AVERMENT OF PERMISSION.

Complaint alleging that occupancy of premises was with acquiescence, permission, and sufferance of plaintiff, and plaintiff's assignors and predecessors in interest, would, if the word "permission" were eliminated, state a good cause of action under Civ. Code § 3334, which abolishes the rule that a trespasser may be sued only for "mesne profits."

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Richmond Wharf & Dock Company against Anson S. Blake, the San Pablo Quarry Company, the San Francisco Quarries Company, and others. There was a judgment against the named defendants, and they appeal. Affirmed.

See also (App.) 185 Pac. 186; 177 Pac. 508.

Sterling Carr, of San Francisco, for appellants.

Reed, Nusbaumer & Bingaman, Johnson & Shaw, and H. W. Pulcifer, all of Oakland, for respondent.

MELVIN, J. Plaintiff, as assignee of one A. S. Macdonald, sued for the value of the use of certain real property. There were five defendants, as indicated by the title of the cause. Judgment was recovered against Anson S. Blake, San Pablo Quarry Company, and San Francisco Quarries Company for $6,809.12 as the value of the use of said land. It was adjudged that plaintiff take nothing by the action from either of the other two defendants. The three defendants against whom the judgment was given have appealed, but the appeal which we are now considering is that of the quarry companies. The appeal of Anson S. Blake is separate from this and will be separately determined.

The land, occupation of which is involved in this action, is a portion of lot No. 16, in section No. 16, township 1 north, of range 5 west, Mt. Diablo base and meridian, being a tract of tideland in the bay of San Francisco. Compensation was also demanded for the use of a wharf and the approach thereto situated upon said land.

Appellants, by their answers, denied that plaintiff owned the land and improvements described in the complaint. They denied that they occupied the designated premises, except that the San Francisco Quarries Company, as tenant of the San Pablo Quarry Company, and by virtue of the right of said San Pablo Quarry Company, as littoral owner of the upland lying adjacent to the

Bay of San Francisco, to build a wharf out to navigable water, did occupy the wharf and use the approach thereto. The appellants also denied that such use or occupation was with the acquiescence or permission or sufferance of the plaintiff or any of its predecessors in interest. The court found that San Pablo Quarry Company did not construct or occupy the wharf in the exercise of any asserted right as owner of the upland, but only by reason and under authority of a contract between A. S. Macdonald and Anson S. Blake, dated August 3, 1906. This finding is supported by the evidence.

It was found by the superior court that appellants occupied the premises during the term for which compensation is demanded with the acquiescence, permission, and sufferance of plaintiff and its predecessors in interest. Appellants insist that this finding is without sufficient support in the evidence—a contention which we shall proceed to examine.

[1] The contract between Macdonald and Blake authorized the latter to occupy the land for a period of five years from August 3, 1906. Blake promised to do certain work on the property, including the construction of a seawall and other important improvements. In compensation for such work Macdonald was to convey to Blake an undivided one-half interest in the land after it should have been filled and walled, and was to allow Blake to occupy, rent free, such part of the land as might be required for the prosecution of the work, during the five years of the life of the agreement. As further consideration Macdonald was to permit San Pablo Quarry Company to build and occupy a wharf upon the southerly portion of the property, rent free, during the life of the agreement. San Pablo Quarry Company, however, might sublet the wharf, with consent of all parties to the contract, but in the event of such subletting one-half of the rent was to be paid to Macdonald, the owner of the land. San Pablo Quarry Company did build the wharf and sublet it to San Francisco Quarries Company, becoming bound thereby to pay one-half of the rental to Macdonald. There was privity of contract between Macdonald and San Pablo Quarry Company from the time the latter accepted the consideration moving to it under the contract. That company and the sublessee were in possession of the property so demised when Blake's five-year contract expired August 2, 1911, and they continued to occupy the premises from August 3, 1911, until July 23, 1913.

[2] It is contended by appellants that because Macdonald, after the holding over of appellants, never by contract changed this tenancy by sufferance into a tenancy at will upon like terms with the original tenancy, the landowner cannot sue for use and occupation, but must sue for mesne profits. Even if we concede that this is the doctrine prevailing in other jurisdictions, we are bound by positive statutes in California to hold that such an action as this will lie. There are two Code sections which are applicable to the problem presented by this appeal. Section 1161 of the Code of Civil Procedure, so far as pertinent, is as follows:

"A tenant of real property, for a term less than life, is guilty of unlawful detainer:

"When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be. * * *"

Section 3334 of the Civil Code, in its material part, is as follows:

"The detriment caused by the wrongful occupation of real property * * * is deemed to be the value of the use of the property for the time of such occupation."

[3] The complaint alleged that the occupancy of the premises was with the "acquiescence, permission and sufferance of plaintiff and plaintiff's assignors and predecessors in interest." The court found this allegation to be true. In this the court erred, so far as the finding of "permission" is concerned, for, although it appears that Macdonald told Blake that he would not interfere with Blake or his business, and although it appears that Blake was president of the San Pablo Quarry Company, it was not shown that permission if any was expressed by Macdonald's remark, was communicated to that corporation. But the allegation of permission and the finding thereon were both unnecessary in a suit for the value of the use and occupation of the property. A landowner, who brings a suit for the use and occupation of his property, need only allege his ownership of the land, occupation of said land by defendant, the reasonable value of the use of the property for the period of occupation, and that such sum is unpaid. If demurrer for uncertainty were based upon the failure of the pleading to indicate whether the occupation was with or without the plaintiff's permission, such demurrer would be properly overruled, because the liability would be the same in either event. As this idea was well expressed by counsel for respondent in one of the briefs, "the gravamen of the action and the measure of recovery are precisely the same in tort as in contract."

[4] Conceding that plaintiff's action erroneously sounded in contract, but the proof was of use and occupation without contract, the substance of the contention and the measure of the amount of property recoverable were essentially the same, and it would be a manifest injustice to reverse the cause because of error in procedure. Section 4½ of article 6 of the Constitution of California

would be properly applicable to the judgment in this case.

[5] It will be noticed, however, that although the complaint alleged permission, it also alleged sufferance. If we should eliminate the word "permission," and should allow the associated words of the complaint to remain, we would have a well-stated cause of action under section 3334 of the Civil Code, which abolishes the rule that a trespasser may be sued only for "mesne profits." The complaint merely stated more than was necessary to allege, namely, that the occupancy was with permission. Permission or lack of it being immaterial, both the pleading and finding in that regard may be disregarded, and the judgment upheld upon the findings, sustained by the proof of the fact, term, and value of the occupation of the land.

In South Dakota a statute identical with section 3334 of the Civil Code of California has received judicial construction in cases very similar to the one at bar. The statute to which we refer is section 2313 of the Civil Code of South Dakota (formerly section 4601 of the Compiled Laws of that state). In Parkinson v. Shew, 12 S. D. 171, 80 N. W. 189, the lower court had sustained a demurrer to a counterclaim to recover "for the use and occupation of the premises, * * * which it is alleged plaintiff wrongfully and without authority entered upon, occupied, and retained for his own use and benefit." In reversing this ruling the Supreme Court used the following language:

"Plaintiff relies wholly upon the insufficiency of facts stated therein, and maintains that the relation of landlord and tenant is vitally essential to a recovery for the use and occupation of land. By the demurrer it is admitted that the appellants were the owners and entitled to the possession of the premises which respondent tortiously entered upon and wrongfully occupied during all the time mentioned in the complaint. In such a case the tort may be waived, and an action based upon implied assumpsit is usually maintainable to recover the value of the use of the property for the time of such occupation, together with the costs of recovering possession. Olson v. Huntamer, 6 S. D. 364, 61 N. W. 479. Although the averments of the counterclaim negative the implication of a contract to pay rent, proof of the facts therein stated would entitle appellants to recover under section 4601 of the Compiled Laws, and the order appealed from is reversed."

The case of Baldwin v. Bohl, 23 S. D. 395, 122 N. W. 247, is authority for the same interpretation of the statute.

Appellants contend that since Blake, under the contract of August 3, 1906, was vendee of the land in controversy, this suit was improper, because, as they assert, an action for use and occupation will not lie against a vendee pending the performance of the contract of sale. The answer to this contention is that the contract had expired and was no longer in force during the period for which compensation for use and occupation was sought and recovered.

No other matters discussed in the briefs require analysis or comment.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; LAWLOR, J.

OLNEY, J., deeming himself disqualified, does not participate.

39 Cal. App. 5

RICHMOND WHARF & DOCK CO. v. BLAKE et al. (Civ. 2542.)

(District Court of Appeal, First District, Division 1, California. Nov. 26, 1918.)

1. LANDLORD AND TENANT ⟸5(1) — THIRD PARTY BECOMES TENANT ON ACCEPTANCE OF BENEFIT OF CONTRACT.

Where contractor was to do certain work on land of plaintiff's predecessor, in consideration in part that a named company be permitted to construct a wharf at one end of the land and to use and occupy same rent free during the life of the contract, with right to sublet, in which case the owner was to have one-half of the rent, the company became a party to the contract, and, when it went into possession, erected a wharf, and sublet to another, it became a tenant.

2. USE AND OCCUPATION ⟸5—LIABILITY.

Where, on expiration of a contract whereby contractor's consideration was, in part, that a named company be permitted to construct a wharf on premises where the work was to be done and use and occupy the wharf rent free during the life of the contractor's contract, the contractor surrendered the possession he had of the land individually, he cannot be charged with the occupation of the company, which held over by its tenant.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the Richmond Wharf & Dock Company against Anson S. Blake and others. Judgment for plaintiff, and the named defendant appeals. Reversed.

See, also, 183 Pac. 681; 185 Pac. 184.

Johnson & Shaw, of Oakland, for appellant Blake.

Sterling Carr, of San Francisco, for appellants San Pablo Quarry Co. and others.

Reed, Nusbaumer & Bingaman, of Oakland, for respondent Richmond Dock & Wharf Co.

H. W. Pulcifer, of Oakland, for Blake & Bilger Co.

LENNON, P. J. This is an appeal by defendant Blake from a judgment for the plaintiff in an action brought to recover from defendants the value of the use and occupation of a certain lot of tide land in San Francisco Bay, designated as a portion of tideland lot No. 16, and a certain wharf and approach to said wharf situated upon said land.

The several defendants answered separately. Appellant, Blake, by his answer denied that plaintiff or its predecessors was the owner of said lot of land, wharf, and approach to said wharf, and denied that he or any of said defendants ever used said wharf or approach to said wharf for any purpose whatsoever, except that defendant San Francisco Quarries Company, as tenant of said San Pablo Quarry Company, used and occupied said wharf and approach thereto, and denied that he ever conveyed any rock or materials over said wharf or said approach.

[1, 2] The appellant objects to all the findings of the trial court as being unwarranted under the evidence. The numerous arguments advanced by both appellant and respondent in support of their respective positions are almost all based upon divergent theories of the relationships of the parties involved in this action. It seems to us that, if the relationships of these parties can be properly determined, all other questions involved will be settled thereby; and for this it is necessary to examine the contract of August 3, 1906, between one A. S. Macdonald, plaintiff's assignor, and defendant Anson S. Blake, which is a part of the record, and which was the inception of the relationships of the parties. Under that contract, the appellant was to do certain work upon the land of Macdonald, such as building a seawall, filling, etc., and as compensation therefor Macdonald was to transfer to Blake, after the completion of the work, an undivided one-half interest in the land so improved. As another consideration, Blake was to have the right to use and occupy the land for the period of the contract, rent free, for the purpose of building wharfs and trestles necessary to the prosecution of his work; also, as an additional consideration, the San Pablo Quarry Company, one of the defendants herein, was to have the right to construct a wharf 200 feet long at the southerly end of of said land, and to use and occupy the same, rent free; also, said San Pablo Quarry Company was to have the right, with the consent of all parties, to sublet said wharf, if so constructed, provided, however, that, in the event of a subletting, one-half the rent received from the lessee was to be paid to Macdonald, the owner of the land.

As pointed out in appeal No. 2543[1] by the other defendants to this action, the San Pablo Quarry Company was not originally a party to this contract and there was no privity between it and Macdonald. However, it had the privilege of availing itself of the consideration reserved to it under the contract, which it saw fit to do. Thereupon, we think, it became a party to the contract, and that when it went into possession of the southerly portion of the land, and built its wharf thereon, and sublet to the defendant, San Francisco Quarries Company, it became the tenant of Macdonald and there was privity between the two. Its possession was independent of and entirely unconnected with the possession of the defendant Blake. The contract itself recognizes Blake and the Quarry Company as different parties and accords them different rights. By its terms Blake was to have the right to erect wharves and trestles of any length at any place on the land, and the Quarry Company was to have the right to erect one wharf at the southerly end of the land 200 feet in length. After the expiration of the contract, the San Pablo Quarry Company held over by its tenant, San Francisco Quarries Company. We think, however, that this was not a holding over of Blake individually. Blake surrendered the possession he had of the land individually, and abandoned his work on the wall, which he had started to build. We think he cannot be charged with the occupation of the other defendants.

An examination of the other points raised by appellant becomes unnecessary under this conclusion.

The judgment is reversed.

We concur: BEASLY, Judge pro tem.; STURTEVANT, Judge pro tem.

[1] Richmond Wharf & Dock Co. v. Blake, the opinion in which was superseded by an opinion of the Supreme Court on rehearing. The opinion of the Supreme Court is published at 185 Pac. 184.

43 Cal. App. 353

SECURITY COMMERCIAL & SAVINGS BANK OF SAN DIEGO v. SEITZ et al. (Civ. 3037.)

(District Court of Appeal, First District, Division 2, California. Sept. 24, 1919.)

1. MORTGAGES ⊂=78 — MORTGAGEE NOT CHARGEABLE WITH VENDOR'S FRAUD.

Where the original mortgagee was not interested in the land purchased and had no knowledge of the representations of the vendor, who was not mortgagee's agent, mortgagee was not chargeable with vendor's fraud in an action for mortgage foreclosure.

2. FRAUD ⊂=31—ELECTION OF REMEDY AS TO DAMAGES.

In seeking affirmative relief, cross-complainants in an action to foreclose a mortgage were required to elect which one of the two remedies they intended to seek, damages after rescission or damages after affirmance.

3. LIMITATION OF ACTIONS ⊂=100(11)—DISCOVERY OF FRAUD; NECESSITY OF DILIGENCE.

Whether a cross-complaint be treated as pleading a cause of action for rescission of a land sale, or one for fraud after affirmance, it was necessary to allege and prove, not only that the fraud was not discovered within the three-year period, but that it could not have been discovered within that time with the exercise of reasonable diligence.

4. MORTGAGES ⊂=86(1) — PRESUMPTION AGAINST FRAUD.

In a mortgagee's action to foreclose, defended on the ground of fraud of mortgagor's vendor, the mortgagee, not being connected with the alleged fraud, was justified in relying upon the presumption against fraud, and the long acquiescence of the parties claiming to be the victims of the fraud, unexplained by the acts which would overcome the presumption.

5. GUARANTY ⊂=16(4)—CONSIDERATION; FORBEARANCE.

Guaranty of note given in consideration of dismissal of a pending action against guarantor's son and another, in which action there was under attachment property of which the guarantor had previously become the title owner, was supported by full and adequate consideration.

6. GUARANTY ⊂=25(1)—GUARANTY IN WRITING IMPORTS CONSIDERATION.

Where the guaranty of a note was in writing, the writing itself imports a consideration.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Security Commercial & Savings Bank of San Diego against Wm. Seitz and others. Judgment for plaintiff against all three defendants, from which they severally and separately appeal. Affirmed.

Hendee & Rodabaugh and Henry C. Ryan, all of San Diego, for appellants.

Ray M. Harris, of San Diego, for respondent.

NOURSE, J. This is an action to foreclose a mortgage given to secure the payment of a promissory note for $10,000 executed by the defendants A. F. Mack and Wm. Seitz, Jr., and to enforce the payment of a written guaranty for the payment of said note subsequently executed by the defendant Wm. Seitz, Sr. The note was executed and delivered to the Blochman Banking Company, a copartnership consisting of L. A. Blochman and J. A. Heap. This bank was subsequently incorporated under the name of Blochman Commercial & Savings Bank, and thereafter the name was changed by a decree of court to Security Commercial & Savings Bank of San Diego, the plaintiff and respondent herein.

The circumstances surrounding the execution of the note and mortgage are as follows:

One Del Fungo, a real estate operator, induced the defendants Mack and Seitz, Jr., to purchase some 90 acres of land situated in San Diego county at the agreed price of $22,500. Payment therefor was made by these defendants by the execution and delivery of three promissory notes, dated November 15, 1912; one for $6,000, which was delivered directly to Del Fungo; one for $6,500, due in six months; and one for $10,000, due in two years. The two latter notes were executed in favor of and delivered to the Blochman Banking Company. The one for $6,500 was unsecured and has been paid, and the one for $10,000 was secured by a mortgage on the land purchased, and is the subject of this litigation. At the time of this transaction Del Fungo was indebted to the Blochman Banking Company in the sum of $14,520. When the notes above mentioned were executed, they were deposited in escrow with a trust company in San Diego, together with the evidences of indebtedness of Del Fungo to the bank, an additional cash advance from the bank to Del Fungo, and the deed of Del Fungo, the owner, conveying the property to Mack and Seitz, Jr., with instructions to the trust company to deliver the documents to the parties entitled thereto upon the deposit of the respective evidences of indebtedness. Through this transaction the indebtedness of Del Fungo to the bank was canceled. In lieu thereof the bank took the two notes, amounting to $16,500, and Mack and Seitz, Jr., took a deed transferring the title of the property to them.

The note for $6,500 was not paid when due, and the Blochman Commercial & Savings Bank, as assignee, commenced an action to enforce its collection against Mack and Seitz, Jr., on the 10th day of March, 1914. On the 27th day of March, 1914, Wm. Seitz, Sr., guaranteed in writing the payment of both notes. In consideration of this guaranty the action on the $6,500 note was dismissed and the bank agreed to extend for one year the time of payment of the $10,000 note, provided

certain other conditions were complied with. On the day before this guaranty was made, the title to the land covered by the mortgage passed by regular transfer to the guarantor, Wm. Seitz, Sr. The trial court found that the guaranty was given in consideration of the dismissal of the action mentioned, and that Wm. Seitz, Sr., received adequate consideration therefor. Judgment went for plaintiff against all three defendants, from which they gave notice of their desire to severally and separately appeal.

No answer appears in the record, but by way of cross-complaint defendants set up fraud in the purchase of the land, asked damages against Blochman and Heap, who composed the copartnership known as the Blochman Banking Company, and demanded the cancellation of the note and mortgage as against the plaintiff, Security Commercial & Savings Bank of San Diego. The allegations of fraud are that Del Fungo took defendants Mack and Seitz, Jr., out to see the land sold and pointed out to them other and better land than that described in the deed and mortgage. It was also alleged that Del Fungo represented to said defendants that the land he was offering them for $22,500 was worth more than $50,000, whereas in fact the land actually conveyed was worth much less than $22,500, the purchase price paid by defendants. In order to state a case against the cross-defendants, Blochman and Heap, it was alleged that Del Fungo was their agent and employé, that the false representations were made in their behalf, and that they knew they were false.

Treating the alleged cross-complaint as an equitable defense to plaintiff's cause of action because of the allegations of fraud in the execution and delivery of the note and mortgage (and we assume this was what was done by the trial court, although the record is silent upon this point), it is evident that this defense rests entirely upon the proposition that Del Fungo was the agent of Blochman and Heap, that the false representations were made in their behalf, and that they knew them to be false. The trial court found against defendants on all these allegations, and this finding is amply supported by the evidence.

Appellants' position seems to be that, the note being nonnegotiable, the respondent is charged with knowledge of all of the legal defenses available to the mortgagors. In support of this they cite numerous authorities holding that one who is about to take the assignment of a mortgage is bound to inquire of the mortgagor if he has any legal defenses to the mortgage, and that if he fails to do this he takes the mortgage subject to all legal objections or infirmities which could have been set up against it in the hands of the original mortgagee, being charged with all facts which such an inquiry would have disclosed.

[1] The facts of this case, as found by the trial court, show clearly that the rule of these decisions is not applicable here. The original mortgagee was the Blochman Banking Company, a copartnership, and not Del Fungo, the party who is alleged to have committed the fraud. Against the bank appellants could raise no different defenses than they have raised against the assignee of the bank. If, as is found by the court, the original mortgagee was not interested in the land purchased and had no knowledge of the representations of Del Fungo, and he was not its agent in this transaction, it was not chargeable with the fraud of Del Fungo.

[2, 3] All that has been said herein regarding the defense of fraud has been said on the assumption that the alleged fraud was properly pleaded. But the cross-complainants in the same pleading and in the same cause of action set up the alleged fraudulent representations and the damages resulting therefrom, seeking a rescission or cancellation of the note and mortgage as against one cross-defendant and damages for the fraud as against the others. They alleged that they did not discover the fraud until more than three years after it was committed, but did not explain why an earlier discovery was not made.

In seeking affirmative relief cross-complainants were required to elect which one of two remedies they intended to seek—damages after rescission or damages after affirmance. They could not seek both. Hines v. Brode, 168 Cal. 507, 512, 143 Pac. 729. Whether the pleading be treated as a cause of action for rescission or one for fraud after affirmance, it was necessary to allege and prove, not only that the fraud was not discovered within the three-year period, but that it could not have been discovered within that time by the exercise of reasonable diligence. Montgomery v. Peterson, 27 Cal. App. 671, 676, 151 Pac. 23; Truett v. Onderdonk, 120 Cal. 581, 589, 53 Pac. 26.

[4] The presumption is always against fraud. This presumption is as strong as that of innocence of crime. One who seeks relief against the effects of fraud must allege it and prove it by clear proof and satisfactory evidence. "They must clearly show that they did not discover the existence or commission of the alleged frauds until within a reasonable time before the action was begun, that they proceeded promptly upon such discovery, and that their failure to make the discovery sooner was not due to their own lack of diligence. All this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking a discovery." Del Campo v. Camarillo, 154 Cal. 647, 657, 98 Pac. 1049, 1054. Cross-complainants not only failed to

allege why they did not sooner discover the fraud or that they exercised diligence in seeking a discovery, but they wholly failed to make any offer of proof upon either of these matters. The trial court was fully justified in denying them affirmative relief upon this plea. As a defense to the main action they are in no better position. The trial court having found that respondent's assignor was not connected with the alleged fraud, respondent was justified in relying upon the presumption against fraud and the long acquiescence of the parties who claim to be the victims of the fraud, unexplained by any acts which would overcome this presumption.

[5] In support of the appeal on behalf of the appellant Seitz, Sr., it is urged that there was no consideration for his guaranty of payment except that based on fraud; but the facts are, as the trial court properly found, that this guaranty was given in consideration of the dismissal of a certain action then pending in San Diego county in which Mack and Seitz, Jr., were defendants and this property was under attachment, Seitz, Sr., having previously become the title owner of the property. These facts clearly support the finding of the court that Seitz, Sr., received full and adequate consideration for the guaranty.

[6] Furthermore, the complaint alleges that the guaranty was in writing and sets it forth in hæc verba. The writing itself imports a consideration. The allegations of the complaint are not denied, and the want of consideration for the guaranty is not put in issue by the defendants.

For the reasons given the judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

43 Cal. App. 309

TURNER et al. v. BUSH et al. (Civ. 2006.)

(District Court of Appeal, Third District, California. Sept. 19, 1919. Hearing Denied by Supreme Court Nov. 17, 1919.)

1. APPEAL AND ERROR ⊜1010(1)—REVIEW; FINDING ON SUBSTANTIAL EVIDENCE CONCLUSIVE.

If there is any substantial evidence from which a rational inference may be drawn that the elements of prescriptive right to waters exist in defendants as found by the trial court, the finding is binding on the appellate court.

2. WATERS AND WATER COURSES ⊜152(8) — EVIDENCE; PRESCRIPTIVE TITLE TO WATERS OF STREAM.

In an action for permanent injunction to prevent defendants from using or interfering with plaintiff's use of a third of the waters of a creek, evidence *held* sufficient to sustain trial court's finding that defendants through their own use and that of their predecessors for at least five years had acquired title by prescription to all the waters of the creek.

3. WATERS AND WATER COURSES ⊜137—TITLE BY PRESCRIPTION TO WATERS OF NATURAL STREAM.

Landowners who used all the waters of a natural stream continuously, openly, and under a claim of right for at least five years, paying taxes, acquired title by prescription.

Appeal from Superior Court, Modoc County; Clarence N. Raker, Judge.

Action by Raymond J. Turner and others against F. E. Bush and others. From judgment for defendants and an order denying new trial, plaintiffs appeal. Affirmed.

Sharp & Henderson, of Alturas, and Dodge & Barry and N. J. Barry, all of Reno, Nev., for appellants.

D. B. Robnett, of Alturas, for respondents.

BURNETT, J. The action was brought to secure a permanent injunction to prevent the defendants from using or from interfering with the use by plaintiffs of one-third of the waters of a certain South Deep creek, which is a natural stream of water in Surprise valley, Modoc county. Plaintiffs based their claim upon an alleged prior appropriation by the patentee of their lands, one Jacob F. Bittner, and in a separate count set up the claim of title by prescription. Defendants answered separately and denied all the material allegations of the complaint except the ownership of the lands by plaintiffs, and they filed a cross-complaint in which they claimed all the waters of said creek, first by virtue of prior appropriations, second by adverse user for the prescriptive period of five years, and defendant Bush made a further claim to said waters of said stream as riparian proprietor. Judgment was for defendants, and the appeal is by plaintiffs from said judgment and from the order denying their motion for a new trial. There is really no controversy over the Bush claim to one-third of the water, the evidence all showing that he was and is entitled to it, and therefore, concededly, the judgment as to him must be affirmed. The only dispute is as to the two-thirds of the water claimed by defendant K. M. Lester, plaintiffs insisting that they are entitled to one-half of that two-thirds, it being admitted by them that said defendant owns and is entitled to the use of the other one-half, or one-third of the whole flow. There was no evidence of any appropriation of any of the water by said Jacob F. Bittner, so that it may be said there was a failure of proof as to this allegation of the complaint. It appeared, however, that for more than 30 years prior to March 15, 1912, all the lands involved herein and all the waters of said creek were owned and used by one Christo-

pher T. Sharp. There is evidence that said Sharp used and appropriated said water equally for the irrigation of said three tracts, and hence the contention is made by appellants that one-third of said flow became appurtenant to the land now belonging to plaintiffs and passed with the deed to George Turner and Sallie C. Turner executed by said Sharp on said March 15, 1912, and thereafter to plaintiffs through the deed executed to them by said George Turner and Sallie C. Turner on the 1st day of May, 1915. This is the theory upon which plaintiffs relied in the court below. In that respect there was a departure from the scheme of the complaint; but no objection was made to the course pursued, and it cannot be urged now as a sufficient reason for the affirmance of the judgment. In opposition to this claim of plaintiffs, it was the contention of defendants, especially defendant Lester, that Sharp reserved the water right attached to the land conveyed to plaintiffs' predecessors in interest, and transferred the entire water right in and to the use of said stream to the defendants or their grantors. This claim was and is based upon the peculiar language of the deeds executed by Sharp to the respective parties on said March 15, 1912, and also certain parol evidence of the intention of the parties, which was allowed over the objection of appellants. It may be said that it is at least questionable whether the lower court's ruling as to the admissibility of this evidence was correct, and also whether there is sufficient competent evidence to support the finding of the court that—

"Said Jacob F. Bittner did not, nor did any other grantor of plaintiffs, ever divert from said stream into any ditch by means of any dam, or otherwise, or by means of any ditch, or otherwise, convey an amount of water equal to one-third of the greatest flow of the waters of said stream, or convey any amount of the waters of said stream to or upon the above-described lands of plaintiffs."

We think, though, that we may forego the consideration of these and some other questions discussed by counsel. We reach this conclusion by virtue of the fact that the court found that defendants have acquired a title by prescription to all the waters and that there is sufficient evidence, as we are required to view it, to support said finding. It will not be disputed that this finding in connection with the undisputed facts is sufficient upon which to base the judgment, and that, if supported, it renders immaterial other findings to which objection is made.

[1] In considering the sufficiency of the evidence to support said finding we are not unmindful of the rule as thus stated in Clarke v. Clarke, 133 Cal. 667, 66 Pac. 10:

"The burden is upon the party who claims title by prescription to clearly prove by competent evidence all of the elements essential to such title. The user must have been adverse to the true owner and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession. * * * It must in some way be asserted in such manner that the owners may know of the claim."

But that rule is especially for the guidance of the trial court. The principle which controls us is that, if there is any substantial evidence in the record from which a rational inference may be drawn that said elements of prescriptive right exist, then this court as an appellate tribunal is bound by the finding of the trial court.

It is also to be remembered that the initiation of the "adverse possession" could not be earlier than March 15, 1912, nor could it continue beyond the month of June, 1917; that being the time when this controversy over the ownership of the water arose. But as seen this period covers more than five years.

[2] With these preliminary observations, we herewith set out the principal evidence upon which is based the claim of title by prescription.

One W. A. Mickle, who was the immediate predecessor in interest of defendant K. M. Lester as to a portion of her lands and who managed the lands which Mr. Bush then owned and afterward sold to Miss Lester, testified in part as follows:

"From March 15, 1912, I continued to own the land until about the first of April, I think it was 1917. I occupied the land from March 15, 1912, to April, 1917. During that time I was familiar with the Bittner pre-emption. In 1912 Stewart had it leased. George Turner, I think, was the owner of it. From 1912 until 1917 I used water on the land that was conveyed to me. I got the water from South Deep creek. I used it continuously, for the purpose of irrigating alfalfa, grain, garden, and orchard. The waters were necessary for the watering of crops on the land. I am familiar with the Sharp pre-emption. During the time that I had charge of the land, I had charge of the portion of the Sharp pre-emption that Mr. Bush had purchased and I used a portion of the water of South Deep creek on that land. My use was open. Whenever I wanted water I took it. I do not think any one was living on the Bittner land (land of plaintiffs) the first year. Mr. Stewart was living on the adjoining land and had it leased. During the year 1912 neither Stewart nor Turner used any water on the Bittner land from South Deep creek to my knowledge. The ditch that they used to take the water to the Bittner tract is not far from my house, and I had occasion to cross the ditch frequently, and I crossed the ditch occasionally and observed it, and they used water through that ditch that season. I cannot give the exact date, but it was early in the spring, shortly after I moved on the place. I think John Stewart turned the water into the ditch. Prior to the water being turned into the ditch, I had a conversation with Mr. George Turner, who was

then owner of the Bittner land. He came to my place and asked me if I would go with him up to Mr. Stewart's place and tell him to turn the water from South Deep creek down through that place, as he wanted to take the water to what was known as the big Turner ranch. He had just sold that ranch to Mr. Alvord, and he wanted the water on it in order to make a good showing on that place. I told him that I was not using the water and that we would both go up there, and then we went to Mr. Stewart and told him to take the water and run it down there, which he did. I cannot tell exactly how long the water ran down there because I was busy. I had plowing to do and I could not use the water. It might have run down there a week or two weeks. When I got my plowing done, I took the water and irrigated my alfalfa and grain. I turned all of the water off of the Turner ranch and used it on the land I had leased from Mr. Bush and on the land I owned. * * * I used all the water from South Deep creek except the one-third that went to the Dodson lands (lands of defendant Bush) continuously on the lands described in the deed to me and the deed to Mr. Bush from 1912 to 1917, without interference or interruption by any one. * * * During the time I was farming the Sharp land I bought, and that which Bush bought, I used all the water in South Deep creek on those lands, except one-third that went to the Dodson place, and I used it continuously, openly, notoriously, and under claim of right. No one interfered with me, except through my permission, and I asked no one's permission to use it."

The foregoing would justify the trial court's finding under the doctrine of Gurnsey v. Antelope Creek, etc., Co., 6 Cal. App. 387, 92 Pac. 326; Silva v. Hawn, 10 Cal. App. 544, 102 Pac. 952; Hesperia, etc., v. Rogers, 83 Cal. 10, 23 Pac. 196, 17 Am. St. Rep. 209; and many other decisions.

It is true that in the cross-examination of the witness he qualified his testimony by stating that it did not apply to the year 1917, so that, if there were no other testimony of a similar nature extending over a sufficient period in 1917 to complete the five years, it might be said that the time was too short. But one A. K. Sweet testified, among other things, as follows:

"During the year 1917 I have been running the land formerly owned by Bush and now by Miss Lester, and I have used water from South Deep creek this year. Had two-thirds of it, as near as I could guess, and Hussa took over the other one-third for the Bush lands; that is, the Dodson land. Raymond Turner was using water from South Deep creek this year some time about the first of June. I think it was the first day of June it was turned on. I turned it all away."

W. A. Hussa testified that for three years he had been living on the Dodson land, and—

"During the times that I have been there Mickle took two-thirds of the water, and I took one-third. He took two-thirds of the water to his place and the Bush place, and I took the other one-third to the Dodson place."

[3] We may add that there is further evidence in the record that the use of said water by plaintiffs was permissive and that defendants used it as if it belonged to them, and, since there is no controversy as to the payment of the taxes, we are satisfied that there is legal justification for the conclusion that defendants and their predecessors in interest used all the water continuously, openly, and under a claim of right for at least five years, and therefore acquired a title by prescription.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

43 Cal. App. 342

W. W. KIMBALL CO. v. READ. (Civ. 2919.)

(District Court of Appeal, First District, Division 2. California. Sept. 22, 1919.)

1. CORPORATIONS ⊂⊃641—FOREIGN CORPORATIONS; REPEAL OF STATUTORY LIMITATIONS ON RIGHT TO DO BUSINESS IN STATE.

Civ. Code, §§ 405, 406, 408, and 410, prescribing conditions under which foreign corporations might do business within state, are clearly inapplicable to an action where they were all repealed before it was instituted, and before assignment of the contract of sale under which plaintiff claims was made.

2. COMMERCE ⊂⊃46—FOREIGN CORPORATIONS; REGULATION OF RIGHT TO SUE AS BURDEN ON INTERSTATE COMMERCE.

If a foreign piano company was engaged exclusively in interstate commerce the statute providing that a foreign corporation which has failed to file a copy of its articles, designate agent, etc., cannot maintain or defend any action is inapplicable, because, in view of commerce clause of federal Constitution, the state cannot burden persons or corporations engaged wholly in interstate commerce.

3. COMMERCE ⊂⊃40(2)—SALES IN INTERSTATE COMMERCE; DELIVERY ON ORDERS SENT TO ANOTHER STATE.

Sales of pianos, followed by the delivery in California on orders sent from California to the seller company in Illinois, were transactions in interstate commerce, beyond the scope of the statute providing that a foreign corporation which has failed to file a copy of articles, designate agent, etc., cannot maintain or defend any action in California.

4. CORPORATIONS ⊂⊃642(6)—FOREIGN CORPORATIONS; TAKING ASSIGNMENT NOT DOING BUSINESS IN STATE.

The assignment to an Illinois piano company by a retail firm in San Francisco of an installment contract of sale, being outside the ordinary business of the Illinois piano company, *held* not to constitute doing business in

California; the taking of a single assignment not being an intrastate transaction.

5. COMMERCE ⊂=46—RIGHT OF FOREIGN COMPANY TO COLLECT PRICE OF SALE IN INTERSTATE COMMERCE.

A foreign corporation has the right to sue in the courts of a state to collect the purchase price of merchandise sold in interstate commerce, irrespective of any state statute requiring the filing of a copy of articles of incorporation, etc., as a condition to the right to do business.

6. CORPORATIONS ⊂=673—FOREIGN CORPORATIONS; BURDEN TO SHOW BAR AGAINST DOING BUSINESS IN STATE.

The burden is on the party pleading against plaintiff foreign corporation the bar of the statute prohibiting its doing business in the state without complying with the statute requiring filing of copy of articles of incorporation, etc., to show that the case comes within the terms of the statute.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the W. W. Kimball Company against Alice Read, sued as Mrs. A. Read. From judgment dismissing the action, plaintiff appeals. Reversed.

Willard P. Smith, of San Francisco, for appellant.

Franklin P. Bull, of San Francisco, for respondent.

NOURSE, J. Plaintiff is a foreign corporation organized under the laws of the state of Illinois and having its principal place of business in Chicago. For some time prior to the institution of this proceeding it had been selling pianos to a retail firm located in San Francisco. This local firm sold these and other pianos to its customers in this state upon conditional lease contracts providing for progressive payments. One such contract was made between this local firm and the respondent herein covering a piano not sold to the local firm by appellant, and this contract was assigned to appellant. Respondent defaulted in her payments on this contract, and appellant commenced this action in replevin. Respondent interposed the special defense that appellant was without capacity to sue because it "has not complied with the laws of the state of California, in regard to foreign corporations doing business in this state." This issue was tried on the theory that the rights of plaintiff to maintain the action depended upon a compliance with the provisions of sections 405, 406, 408, and 410 of the Civil Code. The trial court found that plaintiff had not complied with these sections of the Code, and accordingly dismissed the action.

[1] All of the briefs on this appeal are concerned with the interpretation and constitutionality of these sections of the Code. These sections are clearly inapplicable to this case, because they were all repealed before this action was instituted and before the assignment of the contract of sale was made. Stats. 1917, p. 381. Accordingly the findings of the trial court based upon the noncompliance with these repealed sections of the Code do not support the judgment of dismissal.

The existing statute, which was enacted before the assignment of the contract, provides that a foreign corporation which has failed to file a copy of its articles, designation of agent, etc., cannot maintain or defend "any action or proceeding concerning its property in this state or any intrastate business or transaction, in any court of this state."

This was the law of the state which respondent unknowingly alleged appellant had not complied with. Though the statute was thus put in issue, it was not called to the attention of the trial court, and has not been referred to on this appeal. Without the aid of argument by counsel, no attempt will be made in this opinion to interpret the existing statute or to determine its constitutionality. However, certain rulings were made during the trial on the question of the right of the state to close its courts to foreign corporations, and, as these questions will necessarily arise again at the retrial of the action, it may be of some assistance to the parties to make the following general observations on this proposition:

[2, 3] If appellant was engaged wholly in interstate commerce, and was not doing any intrastate business, the statute is inapplicable, because, in view of the commerce clause of the federal Constitution, the state cannot put any burden upon persons or corporations engaged wholly in interstate commerce. Manifestly the sales, followed by the delivery of the pianos in this state, upon orders sent from this state to the appellant in the state of Illinois, are transactions in interstate commerce and beyond the scope of the statute. Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57, 59 L. Ed. 193; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. 189; American Amusement Co. v. East Lake Chutes Co., 174 Ala. 526, 56 South. 961.

[4] It appears without conflict from the evidence that such was the ordinary business of the appellant corporation. Therefore the assignment of respondent's sale contract to appellant was outside the ordinary business of appellant, and, as the trial court correctly ruled, did not constitute doing business in this state. General Conference Free Baptists v. Berkey, 156 Cal. 466, 470, 105 Pac. 411;

Ichenhauser Co. v. Landrum's Assignee, 153 Ky. 316, 155 S. W. 738, 740; A. Booth & Co. v. Weigand, 30 Utah, 135, 83 Pac. 734, 737, 10 L. R. A. (N. S.) 693. In other words, the taking of the single assignment was not an intrastate transaction, but was a transaction incidental to the interstate business of the corporation.

[5] The right of a foreign corporation to sue to collect the purchase price of merchandise sold in interstate commerce is succinctly stated by the United States Supreme Court in Sioux Remedy Co. v. Cope, 235 U. S. 197, 204, 35 Sup. Ct. 57, 60 (59 L. Ed. 193):

"We think that when a corporation goes into a state other than that of its origin to collect, according to the usual or prevailing methods, the purchase price of merchandise which it has lawfully sold therein in interstate commerce, it is there for a legitimate purpose of such commerce, and that the state cannot, consistently with the limitation arising from the commerce clause, obstruct or hamper the attainment of that purpose."

Here the assignment of the sale contract was taken in part liquidation of the indebtedness owing from the local firm to appellant arising from interstate commercial transactions. As appellant could sue the assignor for the collection of the original debt, so it may sue the respondent in this action upon the assigned contract, unless it is shown to have been also engaged in intrastate business.

[6] The burden is on the party pleading the bar of the statute to show that the case comes within its terms. For the want of such showing the judgment must be reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

43 Cal. App. 349

SIDLER v. CITY COUNCIL OF CITY OF BAKERSFIELD et al. (Civ. 3119.)

(District Court of Appeal, Second District, Division 1, California. Sept. 23, 1919. Rehearing Denied Oct. 22, 1919; Hearing Denied by Supreme Court Nov. 21, 1919.)

1. MUNICIPAL CORPORATIONS ⟸159(1)—OFFICERS; DUTY OF COUNCIL TO ORDER RECALL ELECTION.

On being presented with a duly certified recall petition, the duty of a city council, under the recall provisions of the charter, to order a recall election to be held, is mandatory; but only where a petition sufficient in form and substance is presented, and if any requisite and material statement is omitted therefrom, so that the petition is invalid, the council is justified in refusing to act.

2. MUNICIPAL CORPORATIONS ⟸159(1)—OFFICERS; SUFFICIENCY OF PETITION FOR RECALL.

Under Charter of City of Bakersfield (St. 1915, p. 1552) §§ 86, 87, 88, 90, and 161, section 87 paralleling the provisions of Deering's Gen. Laws 1915, Act 2555, § 1, on the recall of officers, it is not necessary that the affidavit to be filed by an elector as a condition precedent to the issuance of recall petition papers set forth any grounds on which the removal is sought, and a petition containing no statement of the ground on which removal of an officer of the city was sought was sufficient in form and substance, so that the mandatory duty rested with the council to order and fix a day for the holding of a recall election.

Petition for writ of mandate by Adolph H. Sidler against the City Council of the City of Bakersfield and Jay A. Hinman and others, members of the Council. Peremptory writ ordered.

Irwin & McNamara, of Fresno, for petitioner.

Kaye & Siemon, of Bakersfield, for respondents.

JAMES, J. [1] Mandate to compel the respondent, city council of the city of Bakersfield, to order and fix a day for the holding of a recall election. A petition, duly certified by the clerk of the municipality to be sufficient and asking for the recall of a councilman, was submitted to the respondent council. Notice of the certification and submission of such petition was also given to the officer sought to be recalled by said clerk, as the city charter provided, and said official failed to take advantage of the option given him by the charter to resign. Nevertheless, the city council continued and still continues to refuse to order and fix a day for the holding of the recall election. The alternative writ was issued herein and, by way of return, demurrer and answer were filed. The answer raised no issue of fact, and the entire cause was submitted after argument by counsel. The sole point relied upon by respondents as justifying the refusal of the council to order the recall election is that the petition contained no statement of the ground upon which the removal of the officer was sought and hence was insufficient. Upon being presented with a duly certified recall petition, the duty of the city council under the provisions of the charter to order an election to be held is a mandatory one. This duty, however, is mandatory only where a petition sufficient in form and substance is presented. If any requisite and material statement was omitted therefrom so as to make it appear that the petition was invalid, the council would be justified in the action taken. Conn. v. City Council of the City of Richmond, 17 Cal. App. 705, 121 Pac. 714, 719. The charter of the city of Bakersfield (Stats. 1915, p. 1552) contains provisions authorizing the recall of municipal officers. Sections 87, 88, and 90 read as follows:

"Sec. 87. Any officer elected or appointed for a definite term may be recalled, after the expira-

tion of three months from the commencement of his term, by the electors entitled to vote for his successor. When a petition for the recall of a councilman is presented signed by electors of the ward which he represents, equal in number to twenty-five per cent. or more, of the total vote cast for councilman in such ward, at the last general election, and certified by the clerk, and his resignation shall not have been received, as herein provided, the recall of such councilman shall be submitted to a vote of the electors of said ward. When the officer sought to be recalled is not a councilman, the recall of such officer shall be signed by electors of the city equal in number to twenty-five per cent., or more, of the number of votes cast at the last general election. The signatures to such petition need not be all appended to one paper.

"Sec. 88. Petition papers shall be procured only from the clerk, who shall keep a sufficient number of such blank petitions for distribution, as herein provided."

"Sec. 90. Each signer of a recall petition shall sign his name in ink or indelible pencil and shall place thereon after his name his place of residence by street and number. To each such petition paper shall be attached an affidavit of the circulator thereof, stating the number of signers to such part of the petition and that each signature appended to the paper was made in his presence and is the signature of the person whose name it purports to be."

By section 161 of the charter it is provided that—

"Whenever any municipal function or affair arises, for which no provision is made by this charter or ordinances, the law of the state applicable thereto shall govern."

Section 86 of the same law provides that—

The provisions of the state law "relating to the qualifications of voters, the manner of voting, the duties of election officers, the canvassing of returns, and all other particulars in respect to the management of elections, so far as they may be applicable and not inconsistent or in conflict with this charter shall govern all elections."

[2] Viewing these provisions of the charter, respondents insist: First, that the charter does not contain complete direction as to what shall be the contents of recall petitions; second, that the charter being deficient in the respect last noted, the general state law governing the recall of municipal officers becomes applicable by reason of the references made in the provisions of section 161, above quoted. We may assume at the outset for the purposes of this case that the general laws of the state are applicable and control in the municipal affairs of the city of Bakersfield wherever it has been omitted by the charter to cover the same matters. But it appears that the framers of the charter did make specific provision, not only for the manner of the recall of the municipal officers, but gave sufficient direction as to what the substance of the recall petition should be. Referring to the general law on the same subject (see Deering's Gen. Laws [1915 Ed.] Act No. 2555), we find that paragraph 87 of the charter in general parallels the provisions of section one of the general law, but omits therefrom the direction found in the general law that a recall petition "shall contain a statement of the grounds on which the removal or recall is sought, which statement is intended solely for the information of the electors." That this omission was intentional is borne out by the further requirement in section 89 of the charter relative to the filing of an affidavit by an elector—a condition precedent to the issuance of petition papers—which affidavit is required to state "the name and office of the officer sought to be removed." It is not required that this affidavit shall set forth any grounds upon which the removal is sought, and to us it appears to have been the clear intention of the framers of the charter that no such ground need be stated. For the reasons given, it is not made to appear that the petition, as certified to the council by the clerk, was insufficient in form or substance; hence the mandatory duty rested with respondents to "order and fix a day" for the holding of the recall election as the charter provides.

The demurrer of respondents to the petition is overruled. Peremptory writ of mandate is ordered to be issued as prayed for in the petition, petitioner to have his costs.

I concur: SHAW, J.

(43 Cal. App. 332)

YOLO WATER & POWER CO. v. SUPERIOR COURT IN AND FOR LAKE COUNTY et al. (Civ. 2034.)

(District Court of Appeal, Third District, California. Sept. 22, 1919. Hearing Denied by Supreme Court Nov. 17, 1919.)

1. PROHIBITION ⟸5(1)—ACTS OF COURTS; SUFFICIENCY OF COMPLAINT TO STATE CAUSE OF ACTION.

The question of the sufficiency of the complaint to state a cause of action cannot be tested by defendant on an application for writ of prohibition, as its sufficiency as a pleading must be determined by the court in which it is filed.

2. PROHIBITION ⟸5(3)—INJUNCTION SUIT; AMOUNT OF DAMAGES INVOLVED AFFECTING DISCRETION.

The amount of damages that would accrue to an irrigation company, applying for writ of prohibition against the state, and to the landowners it is serving with water, should preliminary injunction be issued against it in the state's suit, is a proper matter for the consideration of the lower court in exercising its discretion in granting or refusing to grant a temporary injunction; but the size of the interest

involved is not a factor in determining the power of the superior court to hear and decide the state's suit.

3. INJUNCTION ⊂=110—JURISDICTION; NOT AFFECTED BY SUFFICIENCY OF DEFENSE.

The existence of facts constituting a good defense on the merits to an application for writ of injunction does not oust the superior court of power to hear and decide the case.

4. CONSTITUTIONAL LAW ⊂=56—ENCROACHMENT ON POWERS OF COURT; LAW DEPRIVING PARTY OF POWER TO SUE.

A law taking away from a party the power to institute a suit is not a law diminishing the powers conferred on the superior court by the Constitution, and cannot have such effect.

5. PROHIBITION ⊂=3(1)—EXISTENCE OF OTHER REMEDY; BRINGING ACTION WITHOUT AUTHORITY.

If the district attorney or other officer or person brings an action that the law does not permit him to bring, the court in which it is brought has jurisdiction to dispose of it, and any one aggrieved has his proper remedy in the court in which it is pending by motion to dismiss, recognized as the proper procedure, instead of application of prohibition.

6. COURTS ⊂=52—JURISDICTION OF SUPERIOR COURT OF INJUNCTION SUIT AGAINST PUBLIC UTILITY NOT TRANSFERRED TO RAILROAD COMMISSION.

Under Const. art. 6, § 5, vesting the superior court with full equity powers, such court has jurisdiction of a suit brought in the name of the people by the district attorney of a county at the request of its board of supervisors against an irrigation company, to enjoin it from committing a public nuisance by diversion of water, despite Const. art. 12, § 23, creating the power of the railroad commission over public utilities, and despite Public Utility Act, § 75, particularly in view of section 74.

Application for writ of prohibition by the Yolo Water & Power Company against the Superior Court of the State of California in and for the County of Lake, and Hon. M. S. Sayre, Judge of such court, and Hon. E. T. Zook, now presiding therein. Writ denied.

C. E. McLaughlin and C. P. McLaughlin, both of Sacramento, Arthur C. Huston, of Woodland, and R. B. McMillan, of Sacramento (Theo. A. Bell, of San Francisco, of counsel), for petitioner.

H. B. Churchill, of Lakeport, and Robt. Duncan, of Ukiah, for respondents.

PER CURIAM. The opinion filed in this matter on the 7th day of August, 1919, ruling upon the demurrer to the petition is vacated and set aside and the following opinion of the court in said matter is hereby substituted therefor:

The application is for a writ of prohibition to prevent said court and the judge thereof "from hearing, entertaining, passing upon, proceeding with, trying, and deciding" any and all matters and issues in a certain action pending in said court wherein the people of the state of California is plaintiff and the said Yolo Water & Power Company is defendant. The petition herein shows that said company constitutes a public utility, engaged in the sale, rental, and distribution of water for irrigation; that in pursuance of said purpose it is diverting and distributing the waters of Clear Lake flowing down Cache creek for the irrigation of certain farming neighborhoods in the counties of Yolo, Colusa, and Solano, amounting to more than 200,000 acres; that said lands are owned by several hundred different proprietors and are planted and devoted to various agricultural products; that artificial irrigation is needed for the proper growth and maturity of these different crops; that there is no other source from which sufficient water can be obtained to irrigate these lands; that for the purpose of conserving, storing, and distributing said waters said petitioner has constructed a large concrete dam across Cache creek, a natural outlet of said Clear Lake, at a point just where the waters of Clear Lake are discharged into said Cache creek, and has incurred other expenses, in the aggregate of over $2,000,000, for the improvement and development of its irrigation system, the acquisition of property, and other purposes connected with the scheme for which the company was incorporated and is being operated.

It further appears that on the 3d day of July, 1919, the district attorney of Lake county filed a complaint in the superior court of said county in the name of the people of the state of California against petitioner, in which it alleged that the defendant therein has committed and is about to commit a public nuisance in taking said waters from said Clear Lake, and the plaintiff prayed for the issuance of a preliminary and, also, for a final injunction "restraining and enjoining said defendants from building any dam across the arm or slough of Clear Lake at the point where the pumps of said defendant are now located, or any other point in said arm or slough, and from dredging or deepening or widening said slough or arm of said lake, or from lowering Grigsby riffle at the end of said arm or slough, and from drawing off the waters of said lake any faster than the same would naturally flow therefrom." Notice was given petitioner for the hearing of a motion for the issuance of said preliminary injunction on the 18th day or July, and it is alleged that said court and the judge thereof will proceed to hear, entertain, and determine said motion, and that, if said injunction be granted, the petitioner will be unable to carry on its business and will be unable to supply water for the irrigation of the lands within its system, resulting

in the destruction of crops and entailing a loss thereby to the owners of over a million dollars.

It further appears that during the year 1918 the government of the United States, acting through its food commission, urged, advised, and requested many persons producing crops of rice to increase the acreage of land devoted to such production in order to supply the needs of the government of the United States and its allies in the war with Germany and other central powers; that in pursuance of said advice more than 10,000 acres of land subject to irrigation from petitioner's system were planted in rice with the understanding that said food commission would take all necessary steps to secure water for the irrigation of said lands, and to this end, at the instance of said food commission, the railroad commission of the state of California directed and permitted petitioner to install a pumping plant and system which would enable it to pump water from Clear Lake to its canals, ditches, aqueducts, and other utilities for the purpose of supplying sufficient water for the irrigation of said 10,000 acres of rice to such an extent that the level of said lake would be and was reduced to more than 1.9 feet below the low-water mark thereof; that as a result of this reduction it became necessary to refill said lake to the ordinary low-water mark before any water would, without pumping, be available for distribution and sale to said persons during the irrigation season of 1919. It further appears that this would have been supplied by the ordinary rainfall if the seasons had been normal, but that in consequence of the unusual lack of rain in the years 1917, 1918, and 1919, it was necessary for petitioner to use pumps to supply the water for the irrigation of said lands and thereby lower the surface of the lake about 12 inches below the low-water mark of said lake. It further appears that, at the time the owners of the land devoted to rice culture were preparing their lands for planting rice, it was believed that there would be sufficient water to supply petitioner's system during the year 1919 without the necessity of resorting to pumping from said lake, but after said persons had made preparation to plant they were advised and informed that there would not be sufficient water to irrigate the rice without pumping, and thereupon said persons consulted and conferred with the railroad commission and with petitioner, and said railroad commission issued a letter permitting and directing said petitioner to pump water from said Clear Lake during the year 1919 for irrigation of said land, should such pumping become necessary in order to irrigate and mature crops on the lands supplied with water from the system of petitioner, and they also conferred with the board of supervisors of Lake county, and the members thereof, and were informed and led to believe that there would be no objection to, nor interference with, pumping water necessary to mature and irrigate their crop during the year 1919.

The foregoing recital of the allegations of petition herein, though not complete, is deemed sufficient to point the application of the legal principles upon which the parties hereto rely. It may be stated that the questions for our determination arise from said petition and a general demurrer thereto.

An opinion was filed by this court and an order entered overruling the demurrer to the petition and directing that an alternative writ issue returnable before this court on the 15th day of September, 1919. In the meantime respondents filed a petition for a rehearing, which was denied. In the opinion filed denying the petition for a rehearing, we said:

"The order made in overruling the demurrer is obviously not a final judgment in the case, and respondents will have an opportunity, upon the return of the alternative writ, not only to traverse any and all allegations of the petition, but also to present whatever views they may desire upon the sufficiency of the petition itself. We assure respondents that the whole matter will be re-examined in the light of all the reasons and authorities that may be presented by counsel on both sides."

The case now stands submitted for final consideration and decision, and we avail ourselves of the opportunity to re-examine the entire controversy. Before proceeding to a discussion of the merits of the case, it is deemed proper to dispose of some matters that seem to be collateral to the real issues involved.

1. In the argument of counsel for petitioner much space is occupied in an analysis of the allegations of the complaint filed in the superior court of Lake county, the object apparently being to show that it does not contain sufficient facts as the basis for equitable relief.

[1] The question of the sufficiency of the complaint to state a cause of action cannot be tested on an application for a writ of prohibition. Its sufficiency as a pleading is to be determined by the court in which it is filed.

[2] 2. The amount of damages that would accrue to petitioners and to the landowners it is serving with water, should a preliminary injunction be issued, is a proper matter for the consideration of the lower court in exercising its discretion in granting or refusing to grant the temporary injunction, and, doubtless, will be given its full and proper weight and force in reaching a decision; but the size of the interest involved is not a factor in determining the power of the superior court to hear and decide.

3. It is alleged in the petition that the railroad commission authorized the petitioner to do the very acts of which plaintiff is now complaining, and it is argued that a public

nuisance cannot exist in acts that are warranted by law, and therefore petitioner should have the writ asked for.

If it be true in fact that the railroad commission authorized the acts complained of, and if it be the law that such authorization prevents the acts from becoming a nuisance, then petitioner has a good defense to be presented in the superior court.

As to whether the railroad commission could lawfully authorize the acts to be done, and whether such authorization would be a defense, we neither express nor intimate any opinion. All we decide is that these are matters for the consideration of the superior court, uninfluenced by any expression in this opinion.

[3] The existence of facts constituting a good defense on the merits to an application for a writ of injunction does not oust such court of the power to hear and decide the case. With these matters disposed of, we now address ourselves to the merits of the case.

I. The real gravamen of the petitioner's complaint is, not that the superior court of Lake county has not equity jurisdiction to hear and decide an injunction suit against a public utility, but that the dictrict attorney has no power conferred upon him by law to institute the action. This is apparent from the opening sentence of his written argument, wherein he says:

"Petitioner earnestly insists that section 751, Code of Civil Procedure, and section 4156 of the Political Code giving the district attorney of a county power to commence an action in the name of the state of California to abate a public nuisance, were repealed as far as public utilities are concerned by section 23, art. 12, of the Constitution as amended in 1911 and 1914 and the Public Utility Act of 1911 and 1915."

[4, 5] The power of the district attorney to commence an action, and the power of the court to dispose of it after it has been begun, are entirely distinct matters, and to mingle them in the discussion but leads to confusion of thought. A law taking away from a party the power to start a suit is not a law diminishing the powers conferred upon the court by the Constitution and cannot possibly have that effect. If the district attorney, or any one else, brings an action that the law does not permit him to bring, the court in which it is brought has jurisdiction still to dispose of it, and any one aggrieved has his proper remedy in the court in which it is pending by motion to dismiss. This has always been recognized as the proper procedure instead of applying for a writ of prohibition.

Thus, in People v. Stratton, 25 Cal. 242, the Attorney General of the state brought a suit to have declared void certain patents granted by the Governor of the state to the defendants. The defendants, believing that the Attorney General was not authorized to institute such action, made a motion to dismiss the same upon that ground. The motion was granted by the district court and an appeal taken therefrom to the Supreme Court. This seems throughout to be recognized as the proper practice in a case where it is claimed the law did not authorize the plaintiff to bring the action.

In Bishop v. Superior Court, 87 Cal. 233, 25 Pac. 437, the court said:

"Upon this proposition, the case of State v. Valliant [100 Mo. 59], 13 S. W. 398, seems to be much in point. We quote the statement as to what the case was, and as to what the court said on the subject, from petitioner's reply brief: 'A certain railroad company sought to condemn part of the track of another, by proceedings taken in the circuit court of St. Louis. The defendant company applied for a writ of prohibition, on the ground that the statutes and ordinances of St. Louis did not authorize the exercise of jurisdiction in eminent domain there invoked in favor of the company invoking it.' Upon the application for prohibition, the court held 'that the circuit court of St. Louis had jurisdiction of proceedings to appropriate property to public use, in the exercise of the right of eminent domain, in a proper case, is unquestioned and unquestionable; but the substance of the petitioner's contention here, as well as the ground on which they, as defendants, resisted the proceedings in the circuit court, is that the statutes and ordinances do not authorize the exercise of such jurisdiction in behalf of the Southern Railroad Company. We are of the opinion that the question thus raised is not a proper one for our decision upon this application.'"

[6] II. "Has the superior court of the state jurisdiction to hear and determine a suit brought in the name of the people of the state of California against a public utility to enjoin it from committing a public nuisance, said suit being instituted by the district attorney of the county at the request of the board of supervisors thereof?"

"The jurisdiction of the superior courts is conferred by the Constitution, and cannot be taken away by any act of the Legislature." City of Tulare v. Hevrne, 126 Cal. 226, 58 Pac. 530. The jurisdiction of any court "is the power to hear and determine, and does not depend upon the regularity of its exercise, or upon the rightfulness of the decision made by the court." Lange v. Superior Court, 11 Cal. App. 1, 103 Pac. 908. The Constitution of California, in section 5 of article 6, provides: "The superior court shall have original jurisdiction in all cases in equity."

The suit pending in the superior court of Lake county against the petitioner for an injunction is a suit in equity, and that court has jurisdiction to hear and determine it, unless it has been divested of such jurisdiction by some provision of the state Constitution.

Petitioner claims that the power of the superior court to hear and determine this particular suit against a public utility has

been taken away from it by virtue of certain provisions found in section 23 of article 12 of the state Constitution, and of section 75 of the Public Utility Act (St. 1915, p. 115).

Section 23 of article 12 of the Constitution states what are public utilities, and is broad enough to embrace petitioner, and as to such declares them to be "subject to such control and regulation by the railroad commission as may be provided by the Legislature," and it further provides:

"The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, * * * as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution.

"From and after the passage by the Legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, * * * in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission."

We discover nothing in this constitutional provision that limits in any way the equity powers of the court as conferred by section 5 of article 6 of the Constitution.

The phrase "all powers respecting such public utilities vested in boards of supervisors * * * or other governing bodies * * * shall cease so far as such powers conflict with the powers so conferred upon the railroad commission" does not purport to, nor does it, lessen the jurisdiction of the court to hear and determine this injunction suit. Courts are not "governing bodies" of counties within the sense in which that term is used in the Constitution, nor are they classed as 'bodies." The section of the Constitution declares that—

"The right of the Legislature to confer additional powers upon the railroad commission is plenary and unlimited by any provision of the Constitution."

In pursuance of the powers given to it by section 23 of article 12, the Legislature passed a Public Utility Act, and section 75 of this act provides that if a public utility is doing or about to do anything contrary to law, or any rule or requirement of the commission, it shall direct the attorney of the commission to commence an action in the proper court, in the name of the people of the state, for the purpose of having such violation or threatened violation stopped or prevented either by mandamus or injunction.

It is claimed that this section gives the commission the right and power to bring suits for injunction against public utilities, and that such power so vested in it is inconsistent with the power of a county to institute such suit. With this conclusion we are unable to agree. The purpose and intent in enacting section 75 is obvious.

The Public Utility Act invests the board of railroad commissioners with large powers in the control of public utilities, and gives it power to fine and punish for contempt. But the commission is not a court and has not complete court machinery. It was seen that cases might arise where punishments for contempt and fine would not accomplish the objects sought, that writs of mandamus and injunction might be needed, and such writs the commission had no power to issue. It might become necessary for it to avail itself of the equity powers of the courts. Without express authority granted by the Legislature to so do, the question of its right to bring suit might be raised in any litigation arising. Anticipating such contingency, express power was conferred upon the commission to avail itself of court processes and writs, so that its power in this regard might not be questioned. This grant of a right to the commission to bring injunction suits is not at all inconsistent with the continuance of said right in others who may feel aggrieved by the acts of a public utility.

Powers conferred by the Constitution upon the railroad commission to supervise and regulate public utilities and to bring suits to enforce its orders and compel public utilities to obey the law is not inconsistent with the power conferred upon superior courts to entertain injunction suits instituted by others than the commission against public utilities. To so hold will not create any conflict between the courts and the commission, because in all such suits the courts will be bound and guided and controlled in all respects in entertaining and deciding or dismissing them as much by section 23 of the Constitution and the Public Utility Act as by any other provision of the law.

These views are further strengthened by the language of section 74 of the Public Utility Act, wherein it is said:

"This act shall not have the effect to release or waive any right of action by the state, the commission, or any other person or corporation for any right, penalty or forfeiture which may have arisen or may hereafter arise or accrue under any law of this state."

This section would seem to put a fitting ending to all discussion.

The demurrer to the petition for a writ is sustained, and the writ denied.

43 Cal. App. 204

ROBBEN v. BENSON et al. (OSCAR C. SCHULZE, Inc., Intervener). (Civ. 2013.)

(District Court of Appeal, Third District, California. Sept. 8, 1919.)

1. APPEAL AND ERROR ⟸1195(4)—LAW OF CASE; DIFFERENT FACTS.

The law of a case determined by an appeal does not apply to a new trial of the case in which substantially different facts are presented.

2. APPEAL AND ERROR ⟸1214—LAW OF CASE; SUFFICIENCY OF ABSTRACT OF TITLE.

In action involving sufficiency of abstract furnished purchaser to show good title in vendor, opinion on former appeal, declaring that action should have been brought to quiet vendor's title as against grantee named in certain deed as recorded and to establish record that the conveyance was in fact made to vendor's predecessor instead of such grantee, did not preclude vendor from showing on subsequent trial, by evidence not before court on former appeal, that the recorded deed to person so named as grantee was not important.

3. APPEAL AND ERROR ⟸209(1)—FINDING ACCEPTED AS TRUE.

Where sufficiency of evidence to sustain finding of trial court is not questioned in any way, the finding will be taken as true on appeal.

4. APPEAL AND ERROR ⟸1099(1) — SUBSEQUENT APPEAL; LAW OF CASE.

Determination on former appeal that certain names are not within rule of idem sonans is conclusive on subsequent appeal.

5. NAMES ⟸18—IDEM SONANS; PRIMA FACIE CASE.

Names which have the same pronunciation prima facie designate the same person, but the prima facie case so shown is liable to be much shaken by the very slightest proof of facts which produce a doubt of identity.

6. NAMES ⟸18—IDEM SONANS; PAROL EVIDENCE.

Where the case permits parol testimony, such testimony may show two names to be within the rule of idem sonans, though there be considerable difference in spelling.

7. NAMES ⟸16(1)—IDEM SONANS.

Generally, the addition of a letter "s" to one of two names considered takes them without the rule of idem sonans.

8. VENDOR AND PURCHASER ⟸132 — SUFFICIENCY OF TITLE; FAILURE OF THIRD PERSON TO MAKE CLAIM.

In judging whether a title is affected by an instrument of record purporting to show an interest outstanding in another, it is permissible to show that no claim has ever been asserted by such other person.

9. NAMES ⟸16(3)—VENDOR AND PURCHASER ⟸132 — SIMILARITY BETWEEN OWNER OF RECORD AND CLAIMANT.

Where deed as recorded named "B. W. Robbins" as grantee, but no person of such name was shown to have dealt with or claimed land during 38-year period following the conveyance, or had brought action to quiet title against "B. W. Robben" and his successors, who exercised ownership over and claimed the property during such period, and where the original deed naming "B. W. Robben" as grantee was indorsed by county recorder under Pol. Code, §§ 4137, 4138, as the deed which was so recorded, purchaser was not justified in refusing to carry out contract with B. W. Robben's successor because of insufficiency of title; it being apparent under the circumstances that "B. W. Robbins" and "B. W. Robben" represented same person, even though the two names did not strictly fall within rule of idem sonans.

10. QUIETING TITLE ⟸30(1)—INTERVENTION; JUDGMENT LIEN CLAIMANT.

In action to quiet title, a third party who claimed a judgment lien against the property was properly permitted to intervene under Code Civ. Proc. § 738.

11. QUIETING TITLE ⟸16—RIGHT TO SUE; JUDGMENT LIEN CLAIMANT.

Judgment lien claimant may sue to remove a cloud on the title to the property.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by Wm. B. Robben against Mrs. I. M. Benson and others, in which Oscar C. Schulze, Incorporated, intervened. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 173 Pac. 766.

Paul W. Schenck and Richard Kittrell, both of Los Angeles, for appellants.

W. U. Goodman, of Fairfield, for plaintiff and respondent.

F. F. Marshall, of Dixon, for intervener and respondent.

W. A. ANDERSON, Judge pro tem. This is in form an action to quiet title brought by the vendor against the vendees upon an alleged forfeiture by the vendees under a contract for the sale of real property, and the main point urged by appellants for a reversal of the judgment is that the law of the case has been violated. It is also urged that intervention should have been denied.

The complaint contains two counts. The first count is in the usual form employed in an action to quiet title. The second count alleges that on December 6, 1911, the plaintiff, William B. Robben, made an agreement with the defendants, Mrs. I. M. Benson, Alt. G. Smith, and E. W. Benson, whereby plaintiff agreed to sell to the defendants the northwest quarter of section 30, township 7 north, range 2 east, M. D. B. & M., for $21,600, payable in installments. The contract is set out in the complaint.

The plaintiff agreed to furnish an abstract. The contract stated:

"Second parties are to be given 15 days in which to examine said abstract and report upon

the same; in the event title to said premises shall be found to be defective, the said first party is to be given a reasonable time in which to perfect the same."

The contract did not in terms provide that time should be the essence thereof; it declared the vendees' rights would be forfeited for failure to comply with its terms. It gave the vendees immediate possession. It is further alleged in the second count of the complaint that on December 6, 1914, there was due on the contract $4,176, and that this sum has not been paid, and that under the terms of the contract the rights of the vendees have become forfeited.

Defendants' first answer denies all the material averments of the first count of the complaint. It is admitted defendants claimed an interest in the property. In their answer to the second count of the complaint the defendants deny that on December 6, 1911, any sum became due under the contract. They admit that they paid nothing on that date, but they deny that any sum was due. The defendants filed a cross-complaint in which they set up the contract, and allege they had entered into the possession of the land; that they had fully performed all of the conditions of the contract; that up to December 1, 1914, the plaintiff had failed to furnish a complete or any abstract of title to the land, although the same was demanded on that date; that on or about December 18, 1914, the plaintiff furnished an abstract which was defective and which was objected to on the grounds that it showed the record title to the property was vested in one B. W. Robbins, and that the United States patent to the lands failed to specify any township or range, and that there was a like omission in a certain deed from William T. Smith to W. D. Vail; that after the objections were made to the abstract plaintiff refused to make correction of the deed from Smith to Vail or to obtain a conveyance from B. W. Robbins or to quiet his title; that, after the first examination of the abstract by defendants and their noting of their objections thereto and their return of the abstract to the plaintiff for correction of the title, the plaintiff again returned it to the defendants, and from a re-examination of said abstract by defendants it was ascertained that the abstract had been falsified so that it was made to appear that no conveyance to B. W. Robbins had ever been recorded, that the abstract failed to show record title to the land; that complaint was made, but that plaintiff refused to furnish any other or additional abstract. The cross-complaint alleged the amounts paid on the purchase price of the land and the amounts expended on the property during defendants' possession. It alleged possession of the property had been surrendered, and prayed for a recovery of the moneys paid and expended.

The answer to the cross-complaint denied that there was any failure to furnish a complete abstract of the title, or that the title was defective, or that there was any refusal to procure a decree quieting title, and alleged that it clearly appeared from the abstract that Robbins had no interest in the land. Plaintiff denied that the abstract was falsified, or that the defendants refused to accept it, or that plaintiff had refused to do anything further with respect to the title.

At the trial it was conceded that the defect in the patenting of the lands had been remedied, and the defendants asserted that the defect upon which they relied was the record of the deed from Vail to Robbins and what had transpired in regard thereto.

The case has been twice tried. On each trial plaintiff prevailed. The first judgment was reversed. 173 Pac. 766. The judgment entered on the second trial, like that entered on the first trial, provided that, if the defendants did not pay the amounts due under the contract within a time specified, their rights in the property would be forfeited.

The point relied on for a reversal is that the former opinion is the law of the case. In this contention appellants overlook the difference between the record of the case as first presented and as now presented. The bill of exceptions used on the first appeal did not contain all of the evidence offered on the first trial; it did not contain the abstracts offered in evidence; it contained a recital in regard to the abstracts which narrowed the court's consideration of the case to a particular point.

[1] The law of a case determined by an appeal does not apply to a new trial of the case in which substantially different facts are presented. Ellis v. Witmer, 148 Cal. 531, 83 Pac. 800; Stockton, etc., Wks. v. Glens, etc., I. Co., 121 Cal. 174, 53 Pac. 565; Duckworth v. Watsonville Water, etc., Co., 170 Cal. 433, 150 Pac. 58. The difference in the facts here is not so much a difference between the evidence received on the first and that received on the second trial, as it is a difference between the evidence offered at the first trial and the record of the same presented to the court on the first appeal.

The former opinion of the District Court of Appeal recites that in order to show complete title it became necessary for the plaintiff to show a conveyance from one W. D. Vail to B. W. Robben; that the abstract showed a conveyance made on November 8, 1876, from W. D. Vail to B. W. Robbins; that this instrument was recorded on November 10, 1876; that after the abstract was returned to the plaintiff the attorney for the plaintiff, together with the abstractor, went to the office of the county recorder of Solano county, and on December 14, 1914, the recorder changed the record so that the word "Robbins" was made to read "Robben"; that thereupon the abstract was changed so that

it appeared a deed had been made by the said Vail to the said Robben and that such deed had been recorded; that the defendants had examined the record showing the change and had objected to the title; and that plaintiff had refused to do anything further in the way of furnishing an abstract.

The evidence on the second trial shows that the record of the first recording of the deed was changed as stated, lines being drawn through the name "Robbins," and the word "Robben" being written above; the initials of the recorder and his deputy were written in the margin of the record. The original deed was produced when the change was made. The testimony shows the parties making the change thought the course pursued was proper. The character of the change is evident from the record, a photographic copy of which is set out in the recorder's transcript. As hereinafter shown, the original deed was later re-recorded.

It is conceded in the briefs that the record on the former appeal contained the statement next quoted, with respect to the abstract or abstracts furnished to defendants by the plaintiff:

"The entire abstract was filed in evidence, marked 'Plaintiff's Exhibit B,' and as filed showed perfect record title in the plaintiff. One of the essential muniments of title appearing in said abstract was a deed purporting to have been executed by W. D. Vail to B. W. Robben, dated November 8, 1876, and recorded November 10, 1876, in Book 63 of Deeds, page 117. The said deed as appearing in said abstract did not show anything with reference to any change or correction of the record of the same in Book 63 of Deeds, page 117, since the date of its said recordation."

On the last trial the court made a finding as to the record title of plaintiff, which is to the effect that the record of the deed to B. W. Robbins was not a part of the chain of title to plaintiff's lands. This finding is based upon evidence which was not before the District Court of Appeal, except to the extent shown by the quotation last set forth.

In the former opinion it was also stated that—

After complaint was made as to the change in the record of the deed to B. W. Robbins, "the plaintiff refused to have anything more to do with the abstract, but it does appear that on or about the 15th of January, 1915, a conveyance from Vail to Robben was taken to the recorder's office and recorded. However, the existence of this conveyance and of the fact of its being placed of record was not called to the attention of the defendants, nor does it appear that any supplemental abstract was furnished by the plaintiff to the defendants showing the devolution of title from Vail to Robben. The matter appears to have remained in statu quo until about April 5, 1915, when the plaintiff began this action to quiet title to the premises involved."

This statement was in accordance with the record of the case as presented to the court. On the second trial the exact facts were shown with respect to furnishing supplementary abstracts, and on this appeal these facts and these abstracts are brought up, and the record is not curtailed by the brief recital set forth in the record of the former appeal. (The entire record relating to the evidence on the former appeal contained 25 pages, and on this appeal it numbers 312 pages.)

In regard to the showing as to title, the former opinion points out that on the trial of the case, and for the purpose of showing title to the property, the plaintiff introduced in evidence the original deed from W. D. Vail to B. W. Robben, dated November 8, 1876, and recorded November 10, 1876, and re-recorded January 15, 1915. The court, in the former opinion, declares:

"There does not appear to be any testimony showing that the existence of this deed was called to the attention of appellants until its introduction in evidence."

The testimony of F. F. Marshall, who was acting as the attorney for plaintiff, was offered on the second trial. It showed the furnishing to defendants of a supplementary abstract showing the re-recording of this deed.

This court, in its former opinion, recognized the rule that defendants were entitled to a title fairly deducible of record as well as good title in fact; it held that the county recorder was not authorized to make the change in the record. The court further declared:

"The re-recording of the deed from Vail to Robben on January 15, 1915, and exhibit thereof to the defendants, would have laid a foundation for maintaining an action wherein, all proper parties defendant having been joined, judgment might have been entered by the trial court, finding plaintiff's title valid, quieting any claims of B. W. Robbins to said premises, establishing of record that the conveyance purporting to be made to Robbins was in fact made to Robben, and decreeing performance by the appellants within a reasonable time or suffer the alternative of a forfeiture."

The court then pointed out that the plaintiff had not elected to pursue the course suggested, but had, in effect, elected to treat the contract as ended by bringing suit to quiet title. The court ruled that defendants, having surrendered possession, were entitled to a return of the money they had paid out; that the defendants' motion for a nonsuit should have been granted; that the trial court should have proceeded to determine the amount the defendants were entitled to recover.

It distinctly appeared on the second trial of the case that this original deed bore indorsements of the county recorder made in conformity with sections 4137 and 4138 (formerly sections 4241 and 4242) of the Political

Code, showing that it was the deed which had been recorded on November 10, 1876, in Book 63 of Deeds, p. 117. The indorsements of the county recorder, made upon this original deed, specified the time of recordation and the place thereof, and these indorsements are shown in the supplementary abstracts covering the second recording of the instrument. On the second trial of the case it was shown that this abstract was furnished to defendants, and it also appeared that the evidence before the trial court on the first trial of the case showed the same thing. Defendants on receiving the abstract showing the foregoing facts never called for the production of the original deed. They made general objection that title had not been shown. The original deed was introduced as an exhibit on the trial of the case, and the grantee is therein named W. B. Robben.

It is true that in the first opinion of this court it was, in effect, declared that there should have been not only re-recording of the deed from Vail to Robben and the exhibit thereof to the defendants, but that there should also have been a suit to quiet title against the claims of Robbins. While authorities were not cited in support of the position that such an action was necessary, there are authorities to the effect that, where a mistake has occurred in the name of the grantee in a deed which is essential to a title, and which appears both in the deed and in the record thereof, an action of the kind suggested by this court is essential. Walters v. Mitchell, 6 Cal. App. 410, 92 Pac. 315. The case last cited suggests that a suit in rem will reach such an outstanding claim. But where the plaintiff, as here, has found the original deed, and it is obvious to him that the deed contains no mistake, but that the mistake is in the first recording of it, he could not in good faith swear there was an outstanding claim. But the necessity for maintaining such an action as that referred to disappears, in view of the finding of the trial court, based on evidence offered on the second trial of the case. Finding 8, made by the trial court on the second trial of the case, is as follows:

"That the complete chain of title of record in said property vested in plaintiff is as follows:

"U. S. Patent to William T. Smith;

"Deed from William T. Smith and Mary Smith, his wife, to W. D. Vail;

"Deed from W. D. Vail to Bank of Dixon;

"Deed from Bank of Dixon to W. B. Robben;

"The court finds that B. W. Robbins never had any title to said land, record or otherwise.

"The court finds that, at one time subsequent to conveying said land to Bank of Dixon, W. D. Vail made and executed a deed conveying said land to B. W. Robben; said deed was incorrectly recorded by the county recorder copying said name Robben as Robbins; said deed from Vail to Robben was subsequently correctly recorded in the office of the county recorder of Solano county and the re-recording of said deed set forth in said abstract which was furnished to defendants on or about the 4th day of March, 1915; that plaintiff through mesne conveyances, all of which appear of record and are set forth in said abstract, obtained whatever title the said B. W. Robben might have had to said land."

The foregoing finding evidently proceeds on the theory that Vail deeded to the bank before the recording of the so-called deed to Robbins, that the bank continued to hold title, and later, and during the time defendants were objecting to the record of the title, proceeded to convey the title to the plaintiff herein. The original abstract showed the deed to the bank, and a supplementary abstract showed the deed from the bank to the plaintiff herein. The evidence showed these abstracts were furnished to defendants. It further appears that neither of these deeds constituted any part of the evidence as supplied to the District Court of Appeal on the first hearing. The present appeal is upon a reporter's transcript, which contains all the abstracts furnished defendants.

[2, 3] Appellants refer neither to testimony nor to the absence of testimony for the purpose of showing that the foregoing finding is not supported by the evidence. Their sole point is that what the District Court of Appeal said in its opinion on the former trial in regard to the importance of the record of the so-called deed to Robbins and the remedy to be pursued to clear the record of a possible claim under that deed was binding on the trial court. Certainly the former opinion did not preclude respondent from showing by evidence, which was not before the District Court of Appeal, that the so-called deed to Robbins was not important. As stated, the sufficiency of the evidence to sustain the finding of the trial court, hereinbefore quoted, is not questioned in any way; and, this being so, the finding is to be taken as true on appeal. Brovelli v. Bianchi, 136 Cal. 612, 69 Pac. 416; Kyle v. Craig, 125 Cal. 116, 57 Pac. 791; Tait v. McInnes, 3 Cal. App. 156, 84 Pac. 674. These cases establish that it is the duty of the appellant to point out the evidence or the lack of evidence showing a finding assailed is unsupported, and that the court on appeal will look only to the objections argued. This finding referred to evidently depends upon evidence consisting of pages of the abstracts which were no part of the record on the first appeal, and this being true, and the finding being unassailed, it is determinative of the case.

[4, 5] In view of the evidence offered at the second trial, we would be compelled to hold that if finding 8 of the trial court could be disregarded, and plaintiff were compelled to rely upon the record of the deed to Robbins, his title would be good and fairly deducible of record. It is true that the former opinion of the court conclusively determines

that "B. W. Robbins" and "B. W. Robben" are not within the rule of idem sonans. Names which have the same pronunciation do prima facie designate the same persons. "But this prima facie case so shown is liable to be much shaken by the very slightest proof of facts which produce a doubt of identity. A well-known writer seems to state the rule on this point very acceptably and clearly: 'The probative force of the inference of identity from similarity of names is greatly diminished in force, even to the vanishing point, by introducing into the consideration of the matter facts inconsistent with the truth of the administrative assumption that similar names identify a single individual.' 2 Chamberlayne, Mod. Law of Ev. 1191." Keyes v. Munroe, 266 Mo. 114, 180 S. W. 863.

[6] The following is a further explanation of the rule:

"In the case of Johnson v. State, 65 Fla. 492, 62 South. 655, Mr. Justice Taylor, who delivered the opinion of the court, said: 'Where two names are presented to the consideration of the court, the inference that they designate the same individual is strong in proportion as the difference between the two is slight; and, conversely, the inference of identity is weak as the points of difference between the two names are numerous and marked." Rhodes v. State, 74 Fla. 230, 76 South. 776.

Where the case permits parol evidence, such testimony may show two names to be within the rule although there is a considerable difference in spelling. People v. Fick, 89 Cal. 149, 26 Pac. 759. The part which parol evidence may play in establishing identity of pronunciation and hence identity of persons is further explained in the case next quoted from. In Commonwealth v. Warren, 143 Mass. 568, 10 N. E. 178, it was said:

"The province of the court and jury in cases like the present is governed by the following rule: 'If two names, spelled differently, necessarily sound alike, the court may, as matter of law, pronounce them to be idem sonans; but, if they do not necessarily sound alike, the question whether they are idem sonans is a question of fact for the jury.' "

In Munkers v. State, 87 Ala. 96, 6 South. 358, Clopton, J., said:

"Though this is strictly a question of pronunciation, when raised by demurrer, it may be treated as a question of law; but, in such case, the judgment of the court should express the conclusion of law from facts or rules of which judicial notice may be taken. When there is no generally received English pronunciation of the names as one and the same, and the difference in sound is not so slight as to be scarcely perceptible, the doctrine of idem sonans cannot be applied without the aid of extrinsic evidence, unless, when sound and power are given to the letters, as required by the principles of pronunciation, the names may have the same enunciation or sound." Veal v. State, 116 Ga. 589, 42 S. E. 705.

The court proceeded to specify names that, as matter of law, had been held within the rule, as follows: "Blankenship" and "Blackership," "Owens D. Havely" and "Owen D. Haverly," "Hudson" and "Hutson," "Jeffers" and "Jeffries." It held that "Witt" and "Wid" were the same, as matter of law. The names "Pomp Burton" and "Pomp Burden" are within the rule. Burton v. State, 10 Ala. App. 214, 65 South. 91. Also, "Robert" and "Roberts." Willis v. United States, 6 Ind. T. 424, 98 S. W. 147.

[7] Generally, however, the addition of a letter "s" to one of the two names considered takes them without the rule. 29 Cyc. 276. The footnotes at page 274 show cases in which the use of the letter is not controlling. Among the cases is cited Seaver v. Fitzgerald, 23 Cal. 85, in which the names "Seaver" and "Seavers" were declared to be substantially the same. The case is cited in Brum v. Ivins, 154 Cal. 17, 96 Pac. 876, 129 Am. St. Rep. 137. If, in the days when neither deeds nor the records thereof were typewritten, a deed had been made to D. C. Seaver and recorded as a deed to D. C. Seavers and the transaction had stood unassailed for 40 years, D. C. Seaver and his successors dealing with the property, and D. C. Seavers and his successors not appearing at all in the record of title for a period of 40 years, we think that, although it could be held that such names are slightly without the rule of idem sonans, the record facts in regard to the title, coupled with the great similarity in names, would leave no substantial uncertainty as to the identity of the persons designated by the different names. The facts in regard to the title as shown by the records would be quite as conclusive as an aid in determining the question of identity as would be the clearest kind of parol testimony introduced in those cases where the court is in doubt as to whether two names which are very similar, though somewhat differently spelled, have substantially the same pronunciation and designate the same person.

[8, 9] An examination of the abstract of title shows that the deed in question was made November 8, 1876. The consideration recited was $17,000. The property was evidently of considerable value. The records show that after November 8, 1876, no person by the name of B. W. Robbins ever dealt with the lands, that B. W. Robben did deal with the lands, that no suit to quiet title against him was filed, that the estate of his successor in interest, Dorotha Robben, was duly administered upon in Solano county, and that the property in question was appraised and accounted for as a part of the estate of Dorotha Robben, and was distributed to the heirs of Dorotha Robben, who, in turn, granted to the present plaintiff, W. B. Robben. The identity in sound between Robben

and Robbin appears from the abstract. Crop mortgages made by one of the Robben heirs are signed "F. W. Robben," the body of the instruments and certificates of acknowledgment showing "F. W. Robbin." No claim is asserted of record by B. W. Robbins at any time, nor is any claim asserted of record by any one purporting to be his successor. During the long period of 38 years, no one by the name of W. B. Robbins, and no one appearing to claim through W. B. Robbins, has exercised any act of ownership over the property. The silence of the record in this respect speaks as loudly as any words. In judging whether a title is affected by an instrument of record purporting to show an interest outstanding in another, it is permissible to show that no claim has ever been asserted by such other person. This was held in a case in which it was contended that an ancient bond for a deed showed a cloud on title. Reed v. Sefton, 11 Cal. App. 88, 103 Pac. 1095. In this case such evidence bears directly on the point considered. The initials of the two names are the same; the first syllable of the two names is the same, and all that holds them apart is the letter "s," a letter not always preventing the application of the rule of idem sonans as matter of law. The two names appear in connection with the same title. Considering the transactions with regard to the title in question, as shown by the record and covering a period of 38 years, and considering the great resemblance between the two names, B. W. Robbins and B. W. Robben, there would be no substantial reason for saying the two names represented different persons, even though the two names did not fall strictly within the rule of idem sonans. The entire record would leave no reasonable doubt in regard to the title, and a finding on any other theory would not be sustained.

[10, 11] The trial court permitted Oscar C. Schulze, Inc., a corporation, to intervene. The company filed a complaint in intervention against the various defendants, setting up a claim to the interest of defendants in the property based upon judgment liens alleged to have been obtained in various actions heretofore prosecuted. The appellants cite the case of Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101, as determining the intervention was improper. The case is not in point. A person claiming a judgment lien on real property comes within section 738, Code of Civil Procedure. Such a person may sue to remove a cloud on the title to the property. 32 Cyc. 1334.

It follows therefore that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

(43 Cal. App. 182)

NORTH PAC. S. S. CO. v. TERMINAL INV. CO. (Civ. 2954, 2961.)

(District Court of Appeal, First District, Division 1, California. Sept. 5, 1919. Hearing Denied by Supreme Court Nov. 3, 1919.)

1. LANDLORD AND TENANT ⊂=130(1) — IMPLIED COVENANTS OF LEASE; QUIET ENJOYMENT AND POSSESSION.

Under Civ. Code, § 1927, there is an implied covenant on the part of a lessor that lessee shall have quiet enjoyment and possession of the premises during the continuance of the term.

2. LANDLORD AND TENANT ⊂=172(2)—EVICTION; ESSENTIALS.

It is not necessary that there shall be an actual ouster to constitute an eviction for any act of the lessor which results in depriving the lessee of the beneficial enjoyment of the premises will constitute an eviction.

3. CANCELLATION OF INSTRUMENTS ⊂=53 — CONSTRUCTION OF FINDINGS.

In a suit by tenant to have the lease declared rescinded on the ground that it had been deprived of a material part of the consideration through the fault of the lessor, findings, when read together, *held* to show that the tenant was not deprived of a substantial as distinguished from an insignificant or inconsequential portion of the premises.

4. LANDLORD AND TENANT ⊂=130(2), 172(1)—EVICTION; BREACH OF COVENANT FOR QUIET ENJOYMENT.

As no acts of molestation, even if committed by the landlord himself or by a servant at his command, amount to a breach of a covenant to quiet enjoyment unless they are more than a mere trespass, a tenant who was allowed to cut a door through a retaining wall cannot claim an eviction because the lessor allowed another tenant to obstruct the door for a short period each day during several successive days.

5. CANCELLATION OF INSTRUMENTS ⊂=53 — CONTRADICTORY FINDINGS.

Where tenant sued to have his lease canceled and court found that he had not suffered any material damage, also found that the lessor did not fail or refuse to maintain access through a door, etc., except when it was obstructed by a sign placed in front of it on a number of succeeding days by another tenant, *held* that the findings were not conflicting.

6. LANDLORD AND TENANT ⊂=34(2)—LEASE; GROUNDS FOR RESCISSION.

Though a tenant was deprived of access through a door by the act of another tenant who obstructed it with a sign, and the lessor for a short time consented to the obstruction, *held* in view of the length of the term and the slightness of the injury, etc., such obstruction was no ground for rescission of the lease.

7. CANCELLATION OF INSTRUMENTS ⊂=46 — RESCISSION OF LEASE; EVIDENCE.

Where a tenant sought to have a lease rescinded, claiming a constructive eviction, etc.,

held that where the court found no eviction had occurred it was proper to allow evidence of the circumstances under which the trespass, which furnished the basis for the claim, was abated.

Appeals from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the North Pacific Steamship Company against Terminal Investment Company. From a judgment for defendant and from order denying its motion to vacate judgment, plaintiff appeals. Affirmed.

Aitken, Glensor & Clewe, of San Francisco, for appellant.

J. P. Langhorne, of San Francisco, for respondent.

WASTE, P. J. This action was brought by plaintiff, the tenant, to have a lease declared rescinded, because it claimed to be deprived of a material part of the consideration, which had failed, so it is alleged, through the fault of the lessor. Judgment was entered for the defendant. There are two appeals, one (No. 2954) from the order denying plaintiff's motion to vacate the judgment, and the other (No. 2961) an appeal from the judgment. By stipulation, the appeals are considered together.

Defendant's assignor leased to plaintiff the premises, No. 50 Market street, San Francisco, to be used as a ticket office, for the term of 8 years and 8 months, commencing July 1, 1913, and ending February 28, 1922. At the time the negotiations for the lease were begun, a dividing wall of the building between the leased premises and a café and cigar stand, occupying No. 48 Market street, immediately adjoining, extended to a column at the street line. Before taking the lease, plaintiff insisted that the entrance be changed by cutting out two feet of this dividing wall next to the column from floor to ceiling, so that there would be two entrances, or vestibules, at No. 50 Market street—one opening directly on Market street, as before, and a new one opening into and across the adjoining premises, occupied by the cigar stand. The lessor acceded to these requirements, and the change was made. The purpose of plaintiff in obtaining the second entrance was to gain the advantage of having its premises, displays, and advertising matter more readily seen by passers-by.

Plaintiff alleged, as ground for rescission, that defendant caused and permitted the tenant of the adjoining premises, No. 48 Market street, to obstruct this passageway, or "open space," by hanging and displaying therein a café lunch sign, two feet wide, and about six feet in height, during certain hours of the day. It claimed that by reason of such obstruction the consideration for its obligation under the lease failed in a material respect.

It was testified to by witnesses on behalf of plaintiff that on account of the position of the open passageway formed by the alteration the door and a window of the premises being thereby placed in better view of and more easily seen by people walking out Market street from the ferry, this passageway and the view of the place thus gained through the open space were much more important in plaintiff's estimation than the regular entrance on Market street and the Market street windows. It was because of its advertising value that plaintiff insisted on having the vestibule made.

On January 28, 1918, plaintiff, with the consent of defendant, sublet the premises to be used as a photographic gallery, with the understanding that if the business was not a success, the subtenants might move out. When the subtenants inspected the premises before renting, there was no obstruction of the passageway. When it appeared on the first day of their tenancy, the photographic people complained to plaintiff because of its being there. Plaintiff requested defendant to remove the sign. Defendant did not do so, and after a few days the subtenant, complaining that the sign, when in position, rendered their premises dark, and deprived them of their advertising space, demanded of plaintiff the return of the rent that had been paid by them, and on its being refunded they moved out.

The trial court found that the continued existence of said open space, and said right of way, and unobstructed view by passers-by, through and across said space, and of said portion of the corridor was and were a material part of the consideration for the obligation of plaintiff under said lease, and constituted a material inducement to plaintiff to enter into the same; that plaintiff would not have entered into the lease had it not included the right of such unobstructed view through and across said open space. It further found that the obstruction in the open space complained of by plaintiff, and which consisted of a sign, advertising the lunch in the café at No. 48 Market street, was placed by the subtenant of defendant within the interior boundaries of the vestibule and entrance from Market street to the café; that the sign which was first placed in that position on the 25th day of January, 1918, was only maintained over and across the open space from about 11 o'clock to 2 p. m. of each day; that the sign was placed across the open space without the knowledge or consent of defendant, which had no knowledge of the fact until the 5th day of February, 1918, when plaintiff first complained to defendant about the matter; that defendant at first declined to take any action in the matter, but upon further investigation on the 15th day of February, 1918, caused the café people to remove the sign from the

passageway, and thereafter it was kept entirely free from any obstruction whatever, and that plaintiff was fully notified that the obstruction had been removed from the open space, and that same was unobstructed. Two days before receiving this notification, however, plaintiff had delivered its notice of rescission.

The court further found that the obstruction of the open passageway for a period not exceeding 21 days did not work a failure of any material or substantial part of the consideration to plaintiff for its lease, and that plaintiff had sustained no substantial or material injury or damage by reason of the obstruction, or by reason of any of the acts complained of. Judgment in favor of the defendant followed.

In explanation of its action in first declining to take steps to have the offending café sign removed from the passageway, after complaint made by plaintiff, the defendant, before plaintiff served its notice of rescission, took the ground that the opening in the partition wall was made after plaintiff took possession. After notice of rescission was served, and after investigating and finding that the opening existed at the time the lease to plaintiff was made, it took steps to cause its tenant at No. 48 Market street to remove the sign complained of. It so notified plaintiff, and refused to rescind the lease or accept surrender or possession of the premises.

In support of the finding that no material or substantial part of the consideration to plaintiff failed, because of the obstruction of the open space by the café sign, respondent first points out that the lease was for a period of 8 years and 8 months, and the obstruction continued but a portion of the day for about 21 days, being promptly removed after defendant had opportunity to look into the matter. Respondent in the next place relies upon the evidence introduced at the hearing, consisting of a number of photographs and diagrams, the testimony of a number of witnesses, and the view of the premises had by the court during the trial. While there was evidence on the part of plaintiff that but for the construction of the passageway leading into the vestibule at No. 48 Market street, plaintiff would not have leased the premises, and that the existence of such passageway was of material benefit in the way of giving better light to the store, and affording a more open view of the place by pedestrians approaching from the east along Market street, there was a strong counter showing that the passageway in the east wall, two feet wide, afforded but little light, sight, and passageway into the place; that obstruction of this open space would only interfere with the view of persons coming from the east along Market street, into a very small window, and the door of the store, until such time as they had passed the column on the edge of the sidewalk before referred to; that the space was too small for an entrance and was rarely used as such; that in addition to the small window and the door there are three other windows, one quite large, giving ample light and sight into the premises, and that the original vestibule to the store is five feet wide, ample for the purposes for which it was and is intended, and has always been used for the main entrance. Furthermore, before the place was occupied by the tenants, who moved out on account of the alleged injury caused by the display of the café sign, the premises had been empty for some time, and it was while the store was vacant that the café people first put up the lunch sign on a board hung on hooks in the passageway. On the evidence, therefore, the lower court was justified in finding as it did that no material injury was done to plaintiff.

Appellant's chief contention is that the amply supported findings of the lower court to the effect that the existence of the open passage was a material inducement in the matter of the lease of the premises, and the other finding that by reason of the obstruction of the same passage in the manner complained of, plaintiff suffered no material detriment, are diametrically opposed, and so fatally inconsistent as to require a reversal of the judgment.

[1] There can be no quarrel with appellant's statement of the law applying generally to the right of rescission in cases of contracts induced through fraud, mistake, and false representations. Those principles are not applicable to the case in hand. We cannot find that either fraud, mistake, or false representations entered into the inducements which led plaintiff to enter into the contract. The covenant on the part of the lessor, which, if not expressed in the lease, was implied, was that plaintiff should have the quiet enjoyment and possession of the premises during the continuance of the term. Civ. Code, § 1927; McDowell v. Hyman, 117 Cal. 67, 70, 48 Pac. 984. The act complained of, therefore, arises out of the interference by defendant with the enjoyment by plaintiff of the open space or passage under circumstances amounting, so appellant contends, to a forcible eviction from the premises.

[2, 3] While the trial court has not found in so many words that there was no eviction from a substantial portion of the demised premises, it did find "that plaintiff has not suffered, or sustained, any material or substantial damage in any amount of money, or thing whatever, by reason of all, or any, of the acts complained of by plaintiff, and found by the court to have been done, or suffered to be done by defendant." This finding must be read with the other finding

that defendant did not "fail or refuse to maintain said open space, and to allow plaintiff to have said right of way, and said unobstructed view through and across said open space, and said portion of said corridor, or allow said open space to be closed or obstructed to a height of more than six feet, or to any height or at all or at any time, during the business, or other hours of each day," except "that such café sign was so placed by Mollenhauer & Co., on or about the 25th day of January, 1918, and was only placed and kept over and across said open space from about 11 o'clock a. m. until about 2 p. m. of each day," until "on said 15th day of February, 1918, said Mollenhauer & Co. did remove its café sign from said" open space, "and did leave the same entirely free from any obstruction whatever." When so read together, we are of the opinion that the effect of the findings must be that plaintiff was not deprived of a substantial as distinguished from an insignificant or inconsequential portion of the demised premises, or, in other words, deprived of the beneficial enjoyment of a substantial portion thereof. If it was not, the rule that "it is not necessary that there should be an actual ouster to constitute an eviction, but that any act of the lessor which results in depriving his lessees of the beneficial enjoyment of the premises constitutes an eviction" (Agar v. Winslow, 123 Cal. 587, 593, 56 Pac. 422, 423 [69 Am. St. Rep. 84]; Skaggs v. Emerson, 50 Cal. 3), does not apply (Kelley v. Long, 18 Cal. App. 159, 163, 122 Pac. 832).

[4] If the interference with plaintiff's possession was no more serious than the findings indicate (and the sufficiency of the evidence to justify the findings is well established in our minds), the act of defendant's tenant can amount to no more than a mere trespass. And it is the settled rule that no acts of "molestation, even if committed by the landlord himself, or by a servant at his command, amount to a breach of the covenant, unless they are more than a trespass." Taylor's Landlord and Tenant (9th Ed.) § 309. The defendant at all times during its long lease enjoyed possession and occupancy of these premises, including the use of the open space in the dividing wall, except for the trifling period during which it was interfered with by the act of defendant's tenant in displaying the café sign during lunch hours.

"It most certainly cannot be justly said that this act amounted to an eviction of the defendant from a substantial portion of the demised premises, and should therefore operate as a suspension or extinguishment of the rent. Taylor's Landlord and Tenant, § 309; Ogilvie v. Bull, 5 Hill (N. Y.) 54. A mere passing trespass cannot operate to so oust a tenant of his possession as to amount to an eviction or a dispossession." Kelley v. Long, supra.

[5] The two findings of the lower court, therefore, are not inconsistent and contradictory. While the quiet enjoyment and use of the passageway may have been an inducement to plaintiff to enter into the lease, the act of defendant, as found by the court, was a mere trespass, which did not constitute such a breach of the implied warranty of the lease as to work a failure of consideration, or amount to an ouster or eviction from any substantial portion of the premises, causing plaintiff material injury or loss. McCormick v. Potter, 147 Ill. App. 487, 491; Voss v. Sylvester, 203 Mass. 233, 240, 89 N. E. 241; French v. Pettingill, 128 Mo. App. 156, 161, 106 S. W. 575; Wilkes-Barre Realty Co. v. Levy (Sup.) 114 N. Y. Supp. 713.

[6] Plaintiff first complained to defendant about the offending sign on February 5th. Defendant on the next day declined to act, on the ground that the opening in the wall had been made after the lease entered into by plaintiff, and for the benefit of the tenant occupying No. 48 Market street. On further investigation it caused the sign to be removed on February 15th, and on the 16th so notified the plaintiff, who had served its notice of rescission on the 14th. Appellant contends, therefore, that any act of the defendant, after notice of rescission given, was ineffectual to revive a lease theretofore rescinded by one of the parties. It contends that as it had determined to rescind the contract, and had given notice to defendant that the lease was ended by reason of its failure to comply with its terms, the termination of the lease was complete, and defendant could not by any act on its part alone renew the lease by taking away the sign and thus removing the cause of the alleged eviction. Undoubtedly such principle of law is applicable in cases in which the ouster or eviction is established. An examination of those cases, however, will disclose that under the facts of each the lessee or tenant had good cause for rescission. Such was the holding in McCall v. N. Y. Life Ins. Co., 201 Mass. 223, 87 N. E. 582, 584, 21 L. R. A. (N. S.) 38, cited by appellant. There the lease was for the entire fourth floor of a building for a term of five years. The landlord agreed to keep the elevators in the building in repair and running. During the first year of the tenancy the elevators caused trouble. The evidence showed that they stopped at all hours of the business day, and remained so for from 15 minutes to one-half of the day, sometimes at the top and sometimes between floors, holding the passengers imprisoned and unable to get out. The tenant abandoned the premises and moved out. The landlord sued for rent, claiming under the written lease. The tenant defended on the ground that he had been evicted. The court found that the faulty elevator service rendered the building practically unfit for the defendant's business. In approving judg-

ment for the defendant, on appeal, the court said: "Findings would have shown an eviction at the election of the lessee, and it might rightfully abandon the premises and decline to pay further rent (citing cases). Since the tenant was evicted by the landlord, he is not obliged to return, even if the cause of the eviction be removed; and no right to rent exists except upon a voluntary return of the tenant."

This case well illustrates the distinction between the cases relied on by appellant, and the cases already cited by us, which hold that an eviction must be established before the right to a rescission of the lease springs into being.

[7] The trial court, in this case, having found against the plea of the plaintiff that an eviction had occurred, was right in permitting the defendant to show the circumstances under which the trespass was abated.

The order by which the lower court denied plaintiff's motion for an order vacating and setting aside the judgment therein, and entering another and different judgment (No. 2954) is affirmed.

The judgment appealed from (No. 2961) is affirmed.

We concur: RICHARDS, J.; BARDIN, Judge pro tem.

43 Cal. App. 346

SMITH v. GOLDEN STATE SYNDICATE et al. (LAUX, Intervener). (Civ. 3028.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1919.)

1. TAXATION ⟸820—PURCHASER OF VOID TAX DEED TO BE REIMBURSED.

Pol. Code, § 3898, subd. 5, providing that whenever it shall be determined that a conveyance by state is void, no decree shall be given declaring a forfeiture of the property until the former owner or other party shall have repaid to the purchaser full amount of taxes, etc., merely affects the remedy of a purchaser of a tax title, and was intended to apply to all cases after its passage in which the invalidity of a tax title is judicially determined, although the tax sale was made prior to its passage.

2. TAXATION ⟸833—REMEDIES OF PURCHASER; REFUNDMENT OF TAXES.

Since Pol. Code, § 3898, provides positively that no decree shall be made against the purchaser of void tax title until taxes, penalties, etc., have been paid to him, it cannot be maintained that prayer in an intervening complaint, asking that title be quieted and alleging that intervener was owner in fee simple, was not one for a refundment of the amount paid for taxes.

3. APPEAL AND ERROR ⟸907(3)—PRESUMPTIONS ON APPEAL ON JUDGMENT ROLL.

In support of a judgment, it will be presumed on appeal from judgment roll alone that evidence supporting the findings was properly admitted.

4. TRIAL ⟸396(5)—FINDING ON EVIDENCE ADMITTED WITHOUT OBJECTION.

If evidence not otherwise admissible is admitted without objection, a finding based thereon is proper.

5. APPEAL AND ERROR ⟸907(3)—PRESUMPTIONS ON APPEAL ON JUDGMENT ROLL.

On appeal on the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence sustaining the findings were waived.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by J. H. Smith against the Golden State Syndicate and others, in which E. C. Laux intervened. From an adverse judgment, plaintiff appeals. Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Ward Chapman and L. M. Chapman, both of Los Angeles, for respondents.

LANGDON, P. J. This is an action to quiet title to certain real property in the city of Los Angeles. E. C. Laux, the respondent, filed a complaint in intervention claiming to be the owner of a portion of the land described in plaintiff's complaint. The action was tried and judgment given upon the complaint in intervention of E. C. Laux and the answer thereto of J. H. Smith. The complaint in intervention was in form a suit to quiet title, and alleged that the intervener was the owner in fee of the real property therein described. The answer was a denial of the title of the intervener. The court found that the intervener had no right or title to the said property, except that he had purchased a tax deed therefor from the city of Los Angeles, and further found that said tax deed was null and void. Judgment was entered against the intervener and in favor of the appellant, but it was provided therein that said judgment should not take effect until payment by the appellant to said intervener of $561.35, the amount of taxes paid by the intervener upon the property. From the portion of the judgment requiring such payment an appeal is taken.

[1] Section 3898, subd. 5, of the Political Code provides:

"Whenever, in any action at law, it shall be determined by a court that the sale and conveyance provided for in this and the preceding section are void for any reason and that the purchaser from the state may not be finally awarded the property so purchased, no decree of the court shall be given declaring a forfeiture of the property until the former owner, or other party in interest, shall have repaid to the purchaser the full amount of taxes, penalties and costs paid out and expended by him, to be deter-

mined by the court, in pursuit of the state's title to the property so sold."

Appellant contends that this subdivision of section 3898 is inapplicable here, because it was added by amendment in 1913 (St. 1913, p. 560) and the tax deed under which the intervener claims is dated March 8, 1912. We are of the opinion that this statute merely affects the remedy of the purchaser of a tax title, and that it was intended to apply to all cases after its passage in which the invalidity of a tax title was judicially determined. This seems also to have been the view taken of this section by the court in the case of Real v. County of Kern, 179 Pac. 726, where it is said that, notwithstanding the fact that a purported conveyance was made prior to the enactment of this section, the rights of the purchaser of the tax title were to be measured by the statute as it existed when the court adjudged that he was not entitled to an award of the property.

[2-5] The other point made by the appellant is that the tax title was not pleaded and that the prayer of the complaint in intervention was not for a refund of the amount paid for taxes. We think there is no merit in this contention. Section 3898, Political Code, provides positively that no decree shall be made until this relief is granted to the purchaser of a tax title. The intervener alleged that he was the owner in fee simple of the property. In support of that claim, presumably from the findings, he offered evidence of his tax deed. Appellant contends that the evidence, supporting the finding that the amount paid by the intervener does not exceed the total amount of taxes due on said property at the date of the sale, was improperly admitted because no issue was made upon this question by the pleadings. The appeal comes to us upon the judgment roll alone. We do not know what evidence was introduced, nor what objections were made thereto. In support of the judgment we will presume that evidence supporting the findings was properly admitted. If evidence, not otherwise admissible, is admitted without objection, a finding based thereon is proper. As was said in the case of McDougald v. Hulet, 132 Cal. at page 163, 64 Pac. at page 281:

"Conceding that the pleadings were not sufficient to justify the admission of evidence of the promissory note, it does not appear that any objection was made to such evidence. We must presume that the evidence was received without objection, and that it sustains the findings. It cannot be contended that a finding is not within the issues, if no objection was made to the evidence in support of the finding at the trial"—citing Horton v. Dominguez, 68 Cal. 642, 10 Pac. 186; Moore v. Campbell, 72 Cal. 253, 13 Pac. 689.

On appeal on the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence sustaining the findings were waived. Poledori v. Newman, 116 Cal. 375, 48 Pac. 325.

From the entire record before us, it appears that this judgment is in all respects an equitable judgment, and the same is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

(43 Cal. App. 801)

LAUX v. LOS ANGELES STOVE CO. et al.

(Civ. 3029.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1919.)

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by E. C. Laux against the Los Angeles Stove Company, H. H. Smith, and others. From an adverse judgment, the last-named defendant appeals. Affirmed.

J. Everett Brown, of Los Angeles, for appellant.

Ward Chapman and L. M. Chapman, both of Los Angeles, for respondent.

LANGDON, P. J. This is an action to quiet title in the plaintiff to certain real property in Los Angeles. The complaint alleges that the plaintiff is the owner in fee simple of such property. The court found that the plaintiff was not the owner of the property; that his only claim to said property was by virtue of a certain tax deed executed by the city of Los Angeles. The court also found certain facts upon which it concluded that said tax deed was null and void, and that the defendant Smith was entitled to the possession of the property as against said plaintiff. Judgment was entered declaring that the plaintiff has no right and title to the property as against any of the defendants, but providing that said judgment shall not take effect until payment be made by the defendants or either of them to the plaintiff of the sum of $561.35, the amount of taxes paid by the plaintiff upon the property. From the portion of the judgment requiring this payment the defendant J. H. Smith has appealed.

The question of law involved in a decision of this appeal is the precise question considered by this court in the opinion this day filed in the case of J. H. Smith v. Golden State Syndicate et al., No. 3028, 185 Pac. 209, which involves the same subject-matter and the rights of the same parties as herein involved. For the reasons stated in that opinion, the portion of the judgment appealed from is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

43 Cal. App. 399

PEOPLE v. FOX. (Cr. 659.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1919.)

1. CRIMINAL LAW ⟸790—INSTRUCTIONS AS TO LAW.

In view of Pen. Code, § 1127, it is the duty of the court in charging the jury in a criminal case to state to them all matters of law necessary for their information.

2. EMBEZZLEMENT ⟸48(4)—INSTRUCTIONS.

In a prosecution for embezzlement, court did not err in instructing to convict if jury believed defendant did "fraudulently appropriate the moneys of W. after said moneys had been intrusted to him and that said moneys were appropriated to a use or purpose other than that for which such property was intrusted to him," although defendant's claim was that the money was diverted from the original purpose with the consent and approval of the complaining witness, the theory of the state being that such diversion was induced by deceit and fraud, so that accused could obtain possession of the money.

3. CRIMINAL LAW ⟸369(5)—EVIDENCE OF OTHER CRIMES.

Where accused was charged in one count with embezzlement and in a second count with larceny of the same property, the crimes being intermixed and connected so that they formed an indivisible criminal transaction, any testimony tending to establish the essentials of either offense was properly admitted.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

George A. Fox was convicted of embezzlement, and from judgment sentencing him to prison and an order denying his motion for a new trial he appeals. Affirmed.

John L. Richardson, of Los Angeles, Charles E. Williams, and T. E. Parke, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

SHAW, J. By the first count of an information filed against defendant he was charged with the embezzlement of $5,106.25; and by a second count therein he was charged with larceny of a like sum.

The trial resulted in his conviction of embezzlement, as charged in the first count, and his acquittal of the charge contained in the second count.

Judgment sentencing him to prison followed, from which and an order denying his motion for a new trial he has appealed.

[1, 2] Appellant complains of an instruction given to the jury as follows:

"If you find from the evidence beyond a reasonable doubt that the defendant did, on or about the date charged in the information, fraudulently appropriate the moneys of Mrs. Anna G. Walters after said moneys had been intrusted to him and that said moneys were appropriated to a use or purpose other than that for which such property was intrusted to him, you should find the defendant guilty of embezzlement as charged in the information."

While conceding this instruction correct as an abstract proposition of law, he insists that it was not applicable to the case for the reason that defendant admitted the receipt of the money, which, according to his own testimony, was, with the consent and approval of the complaining witness, diverted from the purpose for which it was originally intrusted to him. The evidence of the prosecution, however, was to the effect that defendant by fraud and deceit induced the complaining witness to convey her property to him in order that he as her agent might to better advantage sell and dispose of the same, the proceeds of which sale he was to pay over and deliver to her, and that upon obtaining title to the property, consisting of a valuable orange grove, he exchanged it for an apartment house, the title to which was taken in his name, in addition to which he received $13,000 in cash, and thereafter sold the apartment house for the sum of $5,106.25, all of which latter sum he appropriated to his own use and refused to pay the same to his principal. It is true that defendant admitted the receipt of the money and, as to the charge of embezzlement, based his defense upon the ground, as shown by his own testimony, in contradiction of that of Mrs. Walters, that she consented to his use thereof for a purpose other than that originally agreed upon, and likewise true that, at his request, the court, as applicable to such testimony, instructed the jury as follows:

"If you believe from the evidence that Anna G. Walters voluntarily and of her own free will spent the $5,106.25 described in the information, either on the defendant, or on herself, or on both of them, or if you believe that she voluntarily did so and that in either event she did not expect or intend to receive said moneys back again, or if she gave the money to him as a loan, or if you entertain a reasonable doubt in respect to the foregoing propositions, then I instruct you it is your duty to acquit the defendant."

It was the duty of the court "in charging the jury * * * to state to them all matters of law necessary for their information." Section 1127, Pen. Code. The instruction complained of was a correct statement of the law and clearly applicable to the theory of the prosecution as shown by the testimony of the complaining witness.

[3] It is also claimed that the court erred in its rulings upon the admission of testimony not pertinent to the charge upon which defendant was convicted. Conceding that some of the testimony complained of was improperly admitted in the prosecution of the

charge of embezzlement, it was nevertheless competent as tending to prove the charge of larceny for which defendant was prosecuted, and to which a large part of the testimony claimed to have been erroneously admitted was directed. As shown by the record, the means whereby defendant obtained the money was a fraudulent scheme well calculated to deceive a weak-minded woman, and rob her of the property. Any testimony tending to establish the essentials of either offense was proper. As said by Mr. Underhill in his work on Criminal Evidence (section 88):

"If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme."

As clearly appears from the voluminous transcript, covering upwards of 1,300 pages, the successful conduct of the fraudulent transaction in which defendant was engaged covered a period of several months, during which time he committed acts constituting other offenses than those charged. Such acts, however, were connected with and committed as part of and in furtherance of the larceny and embezzlement, on which charges he was tried.

To our minds, an examination of the entire record leaves no doubt as to defendant's guilt and, had the rulings complained of been otherwise, the jury must have necessarily reached a like verdict; hence in no event can it be said there was a miscarriage of justice.

The judgment and order are affirmed.

We concur: CONREY, P. J.; JAMES, J.

43 Cal. App. 366

TERRY et al. v. SOUTHWESTERN BLDG. CO. et al. (Civ. 3032.)

(District Court of Appeal, First District, Division 2, California. Sept. 26, 1919.)

1. MECHANICS' LIENS ⊂=313—BOND NOT RELIEVING OWNERS FROM LIABILITY OF PROPERTY.

Bond executed by building contractor and surety company, running to the owners, not conditioned for payment in full of the claims of all laborers or materialmen, and not made to inure to the benefit of any and all persons who might perform labor or furnish materials, as provided by Code Civ. Proc. § 1183, *held* not such a bond as relieved the owners from liability of their property for liens under the statute.

2. TRIAL ⊂=404(2)—FINDING OF FACT INCLUDED WITHIN CONCLUSIONS OF LAW.

In an action in the nature of a suit in interpleader by owners of a building against the contractor, its surety, and lien claimants, statement of the trial court, in adopting the referee's findings, that the claimants were entitled to enforce liens on plaintiffs' property for payment of the amounts due them as previously set forth, *held* to amount to a finding of fact that the sums were due, although included within the conclusions of law.

3. TRIAL ⊂=404(1)—FINDINGS AND CONCLUSIONS CONSTRUED TO UPHOLD JUDGMENT.

The entire findings of fact and conclusions of law are to be construed to uphold the judgment, when from the facts found other facts may be inferred which will support it.

4. APPEAL AND ERROR ⊂=1071(6)—HARMLESS ERROR; FAILURE TO MAKE FINDING.

A judgment will not be reversed for want of a finding, unless it appears there was evidence or lack of evidence which required the court to make a finding in favor of the appellant.

5. TRIAL ⊂=391—FINDING NOT NECESSARY ON POINT ADMITTED BY PLEADINGS.

In an action by owners of a building in the nature of a suit in interpleader, joining as defendants the contractor, its surety, and lien claimants, where the complaint did not state the amounts due the various claimants, nor whether their claims were valid, and the claimants in their cross-complaint alleged that the labor and material went into the building, and that there were due and unpaid the sums claimed by them, which cross-complaint plaintiffs did not deny, but stipulated that their complaint should stand as answer, no finding was necessary that the sums claimed by the lien claimants were due.

6. CONTRACTS ⊂=147(2) — INTENTION FROM LANGUAGE OF CONTRACT.

Under Civ. Code, § 1638, the parties' intention must be ascertained from the language of their contract, if such language is too explicit to permit interpretation.

7. MECHANICS' LIENS ⊂=315—NO RIGHT OF ACTION ON BOND FOR BENEFIT OF LIEN CLAIMANTS.

In view of the terms of the bond given the owners of a building by the contractor therefor, considered as a contract of surety, no right of action accrued upon it for the benefit of lien claimants, and the owners could not, either directly or by bringing action against the contractor, its surety, and lien claimants in the nature of a suit in interpleader, work an assignment of the contract, since, under Civ. Code, § 2836, the surety could not be held beyond the expressed terms of the contract.

8. INDEMNITY ⊂=15(3)—NO RECOVERY WITHOUT PAYMENT.

By Civ. Code, § 2778, subd. 2, on an indemnity against claims, or demands, or damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.

9. INTERPLEADER ⟸33—PLAINTIFF AS DISINTERESTED STAKEHOLDER.

Under Code Civ. Proc. § 386, plaintiff in an interpleader suit cannot have a judgment in his favor, nor urge the claims of certain impleaded defendants against others, but must at all times maintain the position of a disinterested stakeholder, which alone gives him right to maintain the suit.

10. MECHANICS' LIENS ⟸317—LIABILITY OF SURETY; PLEADINGS TREATING INTERPLEADER SUIT AS CONSOLIDATED LIEN CASE.

In an action in the nature of interpleader by the owners of a building against the contractor, its surety, and lien claimants, the fact that under subsequent pleadings the owners, the lien claimants, and the court treated the action as a consolidated lien case did not change the status of the contractor's surety as not liable to the lien claimants under the terms of its engagement.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by E. H. Terry and others against the Southwestern Building Company and others. From a judgment foreclosing mechanics' liens, plaintiffs appeal. Affirmed.

William T. Blakely, of Los Angeles, for appellants.

Allen & Weyl, of Los Angeles, for respondents.

BRITTAIN, J. The appellants, owners of real property in Los Angeles, on which a building had been constructed, commenced this action in the nature of a suit in interpleader, joining as defendants the building contractor, its surety and numerous lien claimants. The surety was dismissed from the action by the trial court, certain lien claimants were given judgment against the contractor, and the amounts of their several judgments were decreed to be liens on the plaintiffs' property, which was ordered to be sold to satisfy them. The plaintiffs' appeal is on two grounds: First, that the court erred in dismissing the action as to the surety; and, second, that the judgment is not supported by the findings in three particulars which will be defined later in this opinion.

The action is of such an unusual character that it is necessary to an understanding of the appellants' contentions to state the essential facts upon which the suit was brought, as well as briefly to indicate the salient features of the litigation.

[1] The Southwestern Building Company contracted to erect on the plaintiffs' property a building to cost $6,000. The last $1,500 payment was to be made 35 days after the completion. On the day the contract was executed, the contractor, Southwestern Building Company, as principal, and National Surety Company, as surety, executed a bond running to the plaintiffs, for $3,000. It referred to the contract and contained numerous conditions relating to the work and limiting the liability of the surety. It was not "conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work," and it was not by its terms "made to inure to the benefit of any and all persons" who might perform labor upon or furnish materials to be used in the work described in the contract, as provided by section 1183, Code of Civil Procedure. On the other hand, it contained the express condition:

"That no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee herein named, and that the obligation of the company is and shall be construed strictly as one of suretyship only."

This was not such a bond as relieved the owner from liability of his property for liens under the statute. Before the final payment, the owners began this action. They alleged they had the fund of $1,500 retained under the contract, which was set forth with a copy of the bond. They alleged the defendants other than the surety company claimed interests in the fund and claimed liens, that the plaintiffs were ignorant concerning the defendants' respective rights, and that the defendants threatened a multiplicity of suits. They prayed the defendants be restrained from taking any proceedings on account of their demands and liens, that they be required to interplead, that the $1,500 be adjudged to be the sum to be paid by the plaintiffs, that upon payment of that sum they and their property be relieved of all further obligations, and that judgment be entered in favor of the plaintiffs "and in favor of said defendants who establish their claims of lien against said premises, against the defendant National Surety Company, for any amount which they may be entitled to in excess of said fund of $1,500," and for general relief.

The demurrer of the National Surety Company was overruled. The lien claimants, or at least some of them, answered and cross-complained upon their respective liens. There was no formal order of interpleader. The case was sent to a referee to take evidence, which is not before this court. The report of the referee, which was adopted as the findings of fact, while perfectly clear in its meaning, was not drawn with the technical nicety of language which might have been used. For instance, the report stated "that the following claimants furnished repairs or materials, or both, on the property of the plaintiffs, and that said repairs and materials were actually used in the construction of said building, and that the charge for said materials was a reasonable charge

thereon, and said mechanics' liens were recorded within the time required by law"—following which was a list referring to the respective claims by exhibit letters, giving the respective dates of filing the liens to which the reference was made, and tabulating the respective amounts for which claims were approved.

[2-5] The appellants contend that these findings do not support the judgment because they do not contain the direct statement that the amounts of the claims listed were owing or unpaid. It appears from the record that no exceptions were filed to the findings of the referee, and the court adopted them as its own, adding thereto what were designated as conclusions of law, in which, among other things, it is stated:

"That said lien claimants are entitled to enforce liens upon the real property described in plaintiffs' complaint for the payment of the several amounts found due them respectively as hereinbefore set forth."

This statement amounts to a finding of fact that the sums were due, although included with the conclusions of law, and in such a case the judgment should not be reversed. Lange v. Waters, 156 Cal. 142, 103 Pac. 889, 19 Ann. Cas. 1207.

The entire findings and conclusions of law are to be construed to uphold the judgment, when, from the facts found, other facts may be inferred which will support the judgment. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Pacific States Corp. v. Arnold, 23 Cal. App. 672, 139 Pac. 239. A judgment will not be reversed for want of a finding unless it appears there was evidence or lack of evidence which required the court to make a finding in favor of the appellant. Bliss v. Sneath, 119 Cal. 529, 51 Pac. 848. The evidence is not before this court.

The appellants make no argument upon this point, and do not suggest in their brief that the lien claims were not justly due and unpaid. On the other hand, in their complaint the plaintiffs alleged that they did not know the actual amounts due the various claimants, nor whether or not their claims of lien were valid. The lien claimants respectively in their cross-complaints alleged that the labor and material furnished went into the plaintiffs' building, and that there were due, owing, and unpaid, after deducting all just credits and offsets, the sums claimed by them. The plaintiffs did not deny these allegations, but stipulated that their complaint should stand as their answer to the cross-complaints respectively. The substantial facts were thus admitted by the pleadings, and no finding was necessary. Higgins v. San Diego Sav. Bank, 129 Cal. 184, 61 Pac. 943.

The same rule applies to the appellants' contention in regard to the phrase used by the referee that certain claimants furnished "repairs or materials, or both," and the further phrase that "the charge for said materials was a reasonable charge thereon." The allegations of the cross-complaints in these particulars were not only direct and positive, but technically correct, and they were not denied by the plaintiffs. No ground for reversal is shown so far as the decree establishes the liens.

[6-8] The third contention of the appellants is based on the same grounds as their attack on the dismissal of the surety company. The appellants rely on Fuller v. Alturas School District, 28 Cal. App. 609, 153 Pac. 543. That case was decided on the authority of the decision in Callan v. Empire Surety Co., 20 Cal. App. 483, 129 Pac. 978, 981. In each of those cases the surety guaranteed both directly and by reference to the building contract that the contractor should well and truly perform the building contract. In the present case the condition was:

"That if the principal [i. e., the contractor] indemnifies the obligee [i. e., the owners] against loss or damage directly arising by reason of the failure of the principal to faithfully perform the above mentioned contract, then this instrument shall be null and void; otherwise, to remain in full force and effect: Provided, however, that this instrument is executed by the company as surety upon the following express conditions which shall be precedent to the right of recovery hereunder. * * * 7. None of the conditions or provisions contained in this instrument shall be deemed waived by the company unless the written consent to such waiver be duly executed by its president or vice president, and its seal be thereto affixed, duly attested; * * * nor shall this instrument or any rights thereunder be assignable unless with like consent duly executed and attested as aforesaid. * * * 11. That no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee herein named, and that the obligation of the company is and shall be construed strictly as one of suretyship only."

This language is too explicit to permit interpretation. Civ. Code, § 1638; Pierce v. Merrill, 128 Cal. 472, 61 Pac. 64, 79 Am. St. Rep. 56. Considered as a contract of surety, no right of action accrued upon it for the benefit of lien claimants, and the plaintiffs could not either directly or by the bringing of this suit work an assignment of the contract. The surety could not be held beyond the express terms of the contract. Civ. Code, § 2836. In Fuller v. Alturas School District, supra, and Callan v. Empire Surety Co., supra, the guaranty was of the faithful performance of the contract. In this case it was that the contractor should indemnify the owners against loss or damage arising directly from his breach. Even though under the rule in the Fuller and Callan Cases, this be construed as a direct indemnity, nei-

ther at the time this action was commenced nor when judgment was rendered could the plaintiffs have maintained any action on the bond, for it is a statutory rule that "upon an indemnity against claims, or demands, or damages, or costs, expressly or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof." Civ. Code, § 2778, subd. 2; Fernandez v. Tormey, 121 Cal. 518–519, 53 Pac. 1119.

[9] While the action was not strictly one of interpleader, it was in the nature of such a suit. The plaintiffs alleged they held a fund claimed by the defendants. The National Surety Company did not claim, and could not have claimed, any part of the $1,500 fund. The plaintiffs asked that a judgment be rendered against the surety company in favor of other defendants upon a contract unconnected with the fund, and which the plaintiffs could not assign. The plaintiff in an interpleader suit cannot have a judgment in his favor nor urge the claims of certain impleaded defendants against others. He must at all times maintain the position of a disinterested stakeholder, which alone gives him the right to maintain such a suit. Code Civ. Proc. § 386; Orient Insurance Co. v. Reed, 81 Cal. 146, 22 Pac. 484; Pfister v. Wade, 56 Cal. 46; Wells-Fargo & Co. v. Miner (C. C.) 25 Fed. 533.

[10] The fact that under their subsequent pleadings, the plaintiffs, the lien claimants and the court treated the action as a consolidated lien case did not change the status of the surety company. Sufficient facts were stated by the plaintiffs to permit them to maintain an interpleader suit against the lien claimants in regard to the $1,500 fund, but no facts were stated which in this action could have warranted a judgment against the surety company, which was properly dismissed from the suit.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

43 Cal. App. 373

HUNT v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 3090.)

(District Court of Appeal, First District, Division 1, California. Sept. 29, 1919.)

1. MASTER AND SERVANT ⊂⊃398 — WORKMEN'S COMPENSATION ACT; LIMITATIONS.

The mere fact that an employer permitted an injured employé to return to his old position at full pay, and to continue therein for several months, would not give rise to a claim that a portion of the pay which he thus received was in the nature of compensation for his previous injury so as to extend the time within which an application for compensation should be filed under Workmen's Compensation Act, § 11; there being no evidence that the work performed after the injury was either unsatisfactory, or that the compensation therefor was more than services were worth.

2. MASTER AND SERVANT ⊂⊃398 — WORKMEN'S COMPENSATION ACT; LIMITATIONS.

Where an injured servant went to his employer's physician several times, and was sent to the physician by the employer's claim agent for an examination as to the nature and extent of his injuries, no treatment or medicine being received either time, no such medical service was rendered as would extend the time for filing application for compensation under Workmen's Compensation Act, § 11.

3. MASTER AND SERVANT ⊂⊃398 — WORKMEN'S COMPENSATION ACT; LIMITATIONS.

An injured servant cannot excuse his failure to make application for compensation within the time required by Workmen's Compensation Act, § 11, on the ground that he was lulled into a sense of security by representations made on behalf of his employer by several car dispatchers, who told him that his claim had been sent in and that he should receive compensation, where there was no showing that such persons had any authority to make such statement, or that their positions were such as to justify the servant in relying thereon.

Proceedings by Arthur Hunt under the Workmen's Compensation Act to obtain compensation for personal injuries, opposed by the United Railroads, the employer. The Industrial Accident Commission denied application and a petition for a rehearing, and the applicant applies for a writ of review. Application denied.

Clarence A. Henning, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

RICHARDS, J. The petitioner, who was an employé of the United Railroads, received an injury to his spine on or about June 8, 1918, while in the course of said employment, by being thrown from a street car upon which he was at the time acting as conductor. Twenty-eight days after the date of his injury he returned to work at his former employment, and received full pay therein for the next several months, when he was discharged by his employer. During the period that he was away from his work by reason of his injuries, he received independent medical treatment, and after he returned to work and on or about August 15, 1918, he went to the company's physician for an examination, and went again three or four times for the same purpose, but received no treatment or medicine on any of those occasions; the company's physician informing him that the nature of his injuries was such

that only time would effect a cure. After his discharge, on or about March 15, 1919, he made a claim for compensation to the claims attorney of his former employer, and was then sent for examination as to his physical condition to its physician; but no medical or surgical treatment was then given. Thereafter, and on March 18, 1919, his application for relief was filed before the Industrial Accident Commission. A hearing was had thereon, after which, upon the applicant's own testimony showing the foregoing facts, the commission denied his application upon the ground that it had been made too late and was barred under the provisions of the Workmen's Compensation Act (St. 1917, p. 831). After a petition for rehearing before the commission had also been denied, the application for a writ of review was presented by said petitioner to this court.

[1] Upon the hearing of said application the petitioner urged, as a reason for his contention that the Industrial Accident Commission was in error in holding that his claim was barred by limitation, that the evidence showed the payment or giving of compensation for his injuries on the part of his employer which, under section 11 of the Workmen's Compensation Act, would have extended the time within which his application should be filed. This claim as to the receipt of compensation on the part of the applicant was two-fold, his first contention being that when he returned to work for his employer he was still suffering from his injuries, and was not able on that account to fully perform the duties of his position, but that notwithstanding that fact he received full pay for the time that he continued to be in its employ. The applicant, however, failed to show the existence of any agreement or understanding as between himself and his employer to the effect that the full pay which he received through said period, or any portion thereof, was to be in the nature of compensation for his injuries; nor did he show nor attempt to show that the work which he performed during that period was either unsatisfactory to his employer, or that the compensation which he received therefor was more than his services during that time were actually worth. In the absence of such showing, it cannot be held that the mere fact that the employer permitted the employé to return to his old position at full pay and to continue therein for several months could give rise to a claim that a portion of the pay which he thus received was in the nature of compensation for his previous injuries.

[2] The second contention of the applicant under this head is that he received compensation in the way of medical treatment from his employer which would suffice to prolong the time within which his application might be filed under section 11 of the Workmen's Compensation Act; but the evidence which he gave upon that subject is, in our opinion, insufficient to support such a claim. While it is true that some seven months before the date of the filing of his application with the commission he went to his employer's physician, and that he went again several times thereafter at dates not given by him, he testifies that he received no treatment and no medicine at any of these visits; while as to the visit of March 15, 1919, it is clear that he was sent to the physician on that occasion for an examination as to the nature and extent of his injuries in order that the claims agent of his employer might be able to determine the merits of his claim, and that upon that occasion no treatment was given or medicine supplied. There was therefore no service rendered which could be construed to amount to compensation under the provisions of the Workmen's Compensation Act which would prolong the prescribed time for the filing of his claim.

[3] The final contention of the petitioner is that he was lulled into a sense of security by representations made on behalf of his employer to the effect that his claim was being given proper attention during the period that he had returned to his employment and before his discharge; but his evidence is insufficient to support this claim, since it appears that the only persons in the employ of the company with whom he discussed the matter of his right or claim to compensation were two car dispatchers at its barn, who appear to have told him that his claim had been sent in and that he should receive compensation. There is no showing that these persons had any authority from the employer to make such a statement, or that their positions were such in relation to it as to justify the applicant herein in relying upon any assurances of that kind.

Upon the record before us it is clear that the claim of the petitioner was filed too late before the Industrial Accident Commission, and that the ruling of said commission that said claim was barred under the provisions of section 11 of the Workmen's Compensation Act was therefore correct, and it cannot be disturbed upon this application.

It follows that the application must be denied, and it is so ordered.

We concur: KERRIGAN, J.; BEASLEY, Judge pro tem.

43 Cal. App. 402

BELL v. GERMAN-AMERICAN TRUST & SAVINGS BANK. (Civ. 2934.)

(District Court of Appeal, Second District, Division 2, California. Sept. 30, 1919.)

1. EVIDENCE ⟹332(1)—JUDGMENT ROLL.

In an action against a bank a beneficial owner of a note for proceeds collected on a note and paid by the bank to the payee named therein, a judgment roll in another case by plaintiff against the payee was admissible in evidence to show that plaintiff was the owner of the note.

2. BANKS AND BANKING ⟹169—COLLECTIONS; RIGHTS OF BENEFICIAL OWNER.

Where plaintiff left a note with a bank for collection and told the bank that he was the beneficial owner thereof and entitled to the proceeds, the bank acted at its peril in paying the proceeds to the payee named in the note without notice to plaintiff, and was liable to plaintiff, unless it could show that plaintiff was not entitled to the money.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Chester A. Bell against the German-American Trust & Savings Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Emmet H. Wilson, of Los Angeles, for respondent.

SLOANE, J. This appeal is by the defendant from a money judgment against it for $2,655.76 and costs. The facts, briefly stated, as filed by the court, as shown by the evidence and as substantially conceded by appellant in its opening brief, are as follows:

The plaintiff, by his attorney, left with the defendant bank for collection a promissory note executed by one F. W. Carlisle and payable to Mary A. Bell. The collection clerk of the bank, who received the note, was informed at the time that, while the note was by its terms payable to Mary A. Bell, who is a sister of plaintiff, it was actually the property of the plaintiff and respondent, Chester A. Bell; and that when the money on the note was collected the same was to be deposited to the account of said Chester A. Bell. On receiving the note, the representative of the bank stated that it would be necessary to have the payee named in the note sign some paper of authorization, and the bank, by its agent, thereupon undertook to write to said Mary A. Bell. There was considerable correspondence and delay before the bank heard from her; and, when she did communicate with the bank, she demanded that the money on the note, when collected, be sent to her in New York. Without notifying the respondent or his attorney that Mary A. Bell claimed the beneficial interest in the proceeds of the note, and repudiated respondent's claim of ownership, the bank collected the amount covered by the judgment and paid it to Mary A. Bell.

[1, 2] The liability of the bank in this action depends upon two conditions: First, the beneficial ownership of the note in question by the plaintiff; and, second, notice to the bank at the time it accepted the note for collection from plaintiff's attorney, or at least before it parted with the money collected, that the plaintiff claimed such ownership.

That the plaintiff owned the note, and that it was made payable to his sister, Mary A. Bell, as his trustee only, was established by testimony of plaintiff and his attorney on the trial, as well as by the judgment roll (admitted in evidence) in the case of Bell v. Bell—an action brought by the plaintiff here against his sister and the defendant bank to determine the ownership of the note and of the moneys collected thereon. The judgment in that action decreed that the respondent here owned the note, that Mary A. Bell was merely named as a trustee, and that the defendant bank surrender the note to plaintiff. It appears that at the time the suit was commenced the bank had already collected this money and paid it over to Mary A. Bell. The record, therefore, was not competent evidence to show that the bank, at the time it received the note, made the collections and paid over the proceeds, had notice that the plaintiff, Chester A. Bell, claimed the beneficial interest in the note and collections; but it was competent evidence, and a determination of the fact that the plaintiff was the owner of the note, and that is all the record seems to have been received in evidence for.

That the bank at all times had actual notice, as found by the trial court in this case, of plaintiff's possession and claim of ownership, and that he was depositing the note for collection on his own account and for his own benefit, we think is clear from the direct testimony, as well as from evidence contained in some of the bank's correspondence relating to the matter. Receiving the note under these conditions from the plaintiff, the bank, in accounting for the collections to the nominal payee, without notice to plaintiff, acted at its peril. It may have concluded and believed that Mary A. Bell, the person named as payee, was entitled to the proceeds of the note, but there is no justification in the evidence for the contention that the plaintiff, or his agent, misled the bank, either by act or omission, or failed to disclose that the note was being deposited in plaintiff's behalf. The failure of the bank to account to plaintiff for the collections made could only

be justified by a showing that plaintiff was not entitled to the money.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

43 Cal. App. 376

ROSENBERG et al. v. BUMP. (Civ. 1675.)

(District Court of Appeal, Third District, California. Sept. 30, 1919. Hearing Denied by Supreme Court Nov. 29, 1919.)

1. PUBLIC LANDS ⊂⊃54(10)—RIGHT TO LOCATE UPON SCHOOL-LAND WARRANTS; REPEAL OF STATUTES.

St. 1857, p. 356, relating to procedure for the location of land warrants, did not repeal St. 1852, p. 41, relating to land warrants for purchase of lands granted to the state by act of Congress; but the latter statute was expressly repealed by St. 1858, p. 248, which provided that school-land warrants "now in circulation" should be received for school lands to be located as now provided by law, so that the right to locate land upon school-land warrants sold under the repealed act continued.

2. PUBLIC LANDS ⊂⊃54(10)—LEGAL AND EQUITABLE RIGHTS OF PURCHASERS OF WARRANTS NOT AFFECTED BY REPEALING STATUTE CONTAINING PROVISO.

St. 1867–68, p. 507, constituting the surveyor general the state's agent to locate the "unsold portion" of the school land grant, section 11, and providing that warrants issued in pursuance of St. 1852, p. 41, should be taken in payment of any part of said grant if paid directly to and canceled by the state land office register, section 54, and for duplicate warrants in case of loss or destruction of originals, section 59, and repealing some 27 statutes relating to disposal of public lands, with provision that the act shall not affect any legal or equitable claims, gives the surveyor general no rights as to "sold portion" represented by such warrants.

3. PUBLIC LANDS ⊂⊃54(10)—SCHOOL LANDS; VESTED RIGHT TO AMOUNT OF LANDS DESCRIBED IN WARRANTS PURCHASED.

The purchasers of school-land warrants under St. 1852, p. 41, and St. 1853, p. 230, acquired under such purchase a vested and indefeasible right to locate warrants upon lands within the government 500,000-acre grant, such right being vested to the amount of lands specified in the warrants which St. 1867–68, p. 507, repealing former statutes, does not interfere with in view of its proviso as to existing legal and equitable claims on such lands.

4. STATUTES ⊂⊃228 — PURPOSE OF SAVING CLAUSE OF REPEALING STATUTE.

The specific purpose of a saving clause in statutes is to preserve existing rights by restricting the repealing acts or continuing repealed acts in force as to existing powers, inchoate rights, penalties incurred, and pending proceedings dependent upon the repealed statute.

5. CONSTITUTIONAL LAW ⊂⊃123—IMPAIRMENT OF CONTRACT OF STATE WITH PURCHASER OF LAND WARRANTS.

The sale of warrants by the state under St. 1852, p. 41, constituted a contract between the state and the purchasers for sale of amount of land specified therein, which land was embraced within the 500,000-acre grant by Congress, notwithstanding that at the time of the sale such lands had not been listed to the state, and the Legislature could not take such right from the purchaser by Acts 1867–68, p. 507, without impairing the obligation of a contract which power is expressly denied to the state by Const. U. S. art. 1, § 10, although the Legislature may amend the procedure or change the remedy without repealing the right, so that the owner of warrants purchased under St. 1852, p. 41, could locate lands in 1893, since the state held the legal title in trust for the owner of the warrants.

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by Joseph Rosenberg and others, as executors of the will of M. Brandenstein, deceased, against Charles A. Bump. Judgment for defendant, and plaintiffs appeal on the judgment roll. Judgment reversed, with directions to enter judgment for plaintiffs.

M. W. McIntosh, of San Francisco (Isaac Frohman, of San Francisco, of counsel), for appellants.

Leon Samuels, of San Francisco, for respondent.

HART, J. The action was brought in the superior court of Monterey county, under sections 3414 and 3415 of the Political Code, to determine the title of certain lands in said county. Defendant had judgment, from which plaintiffs appeal on the judgment roll.

Plaintiffs claim title to the south half of a certain section 13 and the fractional north half of a certain section 19, while the claim of defendant is to said south half of section 13 and the fractional northwest quarter and the west half of the northeast quarter of said section 19.

The claim of plaintiffs is based upon the following facts: By a certain act of Congress, 500,000 acres of land were granted to the state of California and, pursuant to an act of the Legislature, approved May 3, 1852 (Stats. 1852, p. 41), land warrants were signed and issued by the Governor of the state, countersigned by the comptroller, deposited in the office of the state treasurer, and thereafter sold. Between the 2d day of July, 1852, and the 1st day of October, 1853, four of said land warrants were issued and sold to different purchasers, each for the amount of 160 acres, and paid for at the rate of $2 per acre. On the 20th day of October, 1893, one Henry Jackson, who had by mesne assignments become the owner of said four land warrants,

located the same on the lands claimed by plaintiffs, and on the 24th of August, 1900, said locations were approved and allowed by the commissioner of the general land office. Said Jackson, on the 8th day of February, 1901, by deed, conveyed said lands to one M. Brandenstein, who died testate on the 25th of March, 1906. His will was duly admitted to probate, and plaintiffs were appointed as executors thereof and qualified as such.

On the 7th day of November, 1911, defendant filed with the surveyor general of the state his application to purchase all of the lands claimed by plaintiffs, except the east half of the northeast quarter of said section 19.

There is no denial by the answer of or any dispute in any form as to these facts, which are alleged in the complaint, quoting from the reply brief as follows:

"That on October 20, 1893, the day on which the locations were made, the lands involved were vacant and unappropriated lands of the United States and subject to sale and location at the United States Land Office at San Francisco; that they had been surveyed by the United States; that the plats of the survey had been approved and certified by the United States Surveyor General for the state of California and filed more than thirty days prior to October 20, 1893, in said land office; that Jackson, who was then the owner of the land warrants, located them on said lands conformably to the said survey; that he made the locations by filing with the register of said land office his written applications for said lands, specifically describing the same in the applications; that the applications were each accompanied by the affidavits of Jackson and at least one witness that there was no valid adverse claim existing upon any of said lands; that he surrendered the warrants to the register of the United States Land Office, who forwarded them to the General Land Office of the United States; that the locations were made with the consent of the register and receiver of the United States Land Office at San Francisco, and entered by them on the records of said office; that on August 24, 1900, the locations were approved and allowed by the Commissioner of the General Land Office; that on January 23, 1901, the lands were certified and listed to the state by the United States as a part of the 500,000-acre grant to the state; that said certificates and listing of said lands was made under and in pursuance of said locations and not otherwise."

The answer, so far as its denials go, does no more than to challenge the allegations of the complaint that Jackson had conveyed the lands to Brandenstein, and that the latter, or the executors of his will, had any legal or equitable title to the lands or were the owners of any portion thereof. Affirmatively, the answer then declares that the act of 1852, under the terms of which the warrants in question were issued and sold to Jackson or his grantors, was repealed by the act of 1868, and that therefore (so the answer concludes), at the time the locations were made by Jackson under said warrants, "there was no law of said state whatever providing for the making of said locations," and that the locations were consequently null and void and conveyed no title or right or estate whatever to said Henry Jackson.

The court found that Brandenstein and his executors, ever since the date of the deed from Henry Jackson to the former, had been in the possession of said lands; that it is not true that M. Brandenstein and his executors have ever at any time been the owners of said lands or any part thereof; that on the 28th of March, 1868 (St. 1867–68, p. 507), the Legislature of the state of California repealed the act of May 3, 1852; and "that at the time the said locations made by said Jackson were made, there was no law of said state whatever providing for the making of said locations, and said locations were, at the time the same were made, ever since have been, and now are, null and void, and conveyed no right or title or estate whatever to said Henry Jackson; and that said Henry Jackson did not at the time said locations were made acquire, hold, or have, nor did he ever acquire, hold, have, or own any right, title, interest, or estate whatsoever either legal or equitable in or to said listed lands or any part of said listed lands." It is then found that on the 7th of February, 1911, when defendant filed his application to purchase said lands, "all of said lands were vacant public lands belonging to the state of California, and subject to sale under the laws of the state," and the findings detail the steps taken by defendant in making his filing.

The judgment, which followed the findings, decreed that the surveyor general approve each of the applications of defendant and, upon further compliance by defendant with the laws relating to the sale of lands, that there be issued to defendant such further evidence of title as is provided by law.

[1] The whole controversy presented by this appeal hinges, it will be observed, on the solution of the question whether the appellants or the grantors of their testator lost their rights by virtue of the asserted repeal of the statute of 1852 by the later legislation respecting the disposal of the lands embraced within the 500,000-acre grant by Congress. The real point of divergence between the parties is upon the question whether the locations of the Jackson warrants were legally made.

The statute of 1852 was entitled "An act to provide for the disposal of the 500,000 acres of land granted to the state by act of Congress" (Stats. 1852, p. 41), and the first section thereof contained the following provision:

"Section 1. The Governor of this state is hereby authorized to issue land warrants for

not less than 160 and not more than 320 acres in one warrant, to the amount of 500,000 acres, which warrants when so signed and issued by the Governor, shall be countersigned by the Comptroller, and by him be deposited in the office of the treasurer of state for sale, charging the same to account of the treasurer."

Section 2 provided for the sale of warrants by the treasurer at the rate of two dollars per acre. Sections 3 and 14 of said act read as follows:

"Sec. 3. The parties purchasing such warrants and their assigns are hereby authorized in behalf of this state to locate the same upon any vacant and unappropriated lands belonging to the United States within the state of California subject to such location, but no such location shall be made unless it be made in conformity to the law of Congress, which law provides that not less than 320 acres shall be granted in a body."

"Sec. 14. So soon as the lands which may be located under and by virtue of the provisions of this act, shall have been surveyed by the United States and such locations are made to conform thereto, the Governor of this state shall cause patents to be issued in such manner and form as the Legislature may hereafter direct."

A review and an analysis of the subsequent legislation with respect to the disposal of the 500,000-acre grant are correctly presented in the opening brief of the appellants as follows:

"On April 30, 1857, the Legislature passed an act in reference to the location of warrants issued under the act of 1852, and the issuance of patents for the lands located thereunder entitled, 'An act authorizing the location and patenting of school lands' (Stats. 1857, p. 356), section 1 of which provides:

" 'Sec. 1. In all cases in which the lands of the United States have been duly surveyed by the general government, and the plat thereof shall have been on file thirty days, in the land office of the proper district, it shall be lawful for the owner or owners of school land warrants, issued under the provisions of the act of this state, passed May 3, 1852, in relation to the disposal of the 500,000 acres granted by the act of Congress of 4th September, 1841, to locate the same according to the legal subdivisions of the public lands, by filing a written application by such owner or owners, specifically describing the particular tract so located, with the register of the United States Land Office for the proper district, accompanied by an affidavit of the party or parties applicant, and of one or more witnesses, that there is no valid claim existing upon the land so desired, adverse to the claim of the person making such application for location.'

"On the 10th of April, 1858, the Legislature passed an act creating a 'state land board for the state of California,' and designating its chief officer as 'the register of the state land office,' and constituting the surveyor general ex officio register until otherwise provided. Stats. 1858, p. 127. This act prescribes with much particularity the duties of the register, and among them is that of keeping the record of all lands selected by the agents of the state of California as a portion of the 500,000-acre grant, showing the number of acres, the description of the land, the name of the original purchaser, the selecting or locating agent, the price per acre, and the numbers of school warrants under which the same are located.

"On the 23d of April, 1858, the Legislature passed an act providing for the location and sale of the unsold portion of the 500,000 acres, and the 72 sections additional granted by the United States for the use of a seminary of learning. Stats. 1858, p. 248. By this act the Governor is authorized to appoint and commission in each of the United States land districts of the state, a locating agent, whose duty it is to locate unsold school lands and the seminary lands referred to, in the manner provided by law. The agents are required to proceed and obtain the consent of such settlers who may chance to avail themselves of the benefits of the act, and the request of others who are not settlers, and who may wish to purchase lands under its provisions, such consent or request to be accompanied by the affidavit of the parties and of two disinterested persons that there is no valid claim existing on the land adverse to theirs, and when such consent or request is obtained, under such forms as the Governor may prescribe, to apply to the register and receiver of their respective land offices to permit the location to be made in the name of the state, as a part of the grant above designated, and if permitted, to make the location in conformity with the laws and regulations of the United States.

"The twelfth section repeals the act of May 3, 1852, but declares that school land warrants then in circulation shall be received for school lands and be located as then provided by law.

"On the 16th of April, 1859, the Legislature passed an act for the issuance of patents for lands located under school land warrants, and for lands purchased under the act of April 23, 1858 (Stats. 1859, p. 338). This act provides that in all cases where school land warrants have been issued under the act of May 3, 1852, and the same have been, or may be, located upon any of the public lands within this state subject to such location, and in accordance with the provisions of that act, or with the provisions of the act of April 30, 1857, or where parties have purchased under the act of April 23, 1858, and obtained a certificate of purchase from the registrar of the state land office, the holder of such warrant, or certificate of purchase, shall be entitled to receive a patent from the state for the lands thus located or purchased. The procedure for obtaining a patent is outlined in the act, and section 7 thereof repeals all acts, and parts of acts, conflicting with the provisions.

"Thereafter the Legislature passed an act providing for the issuance of duplicate school land warrants in lieu of those lost, and on April 2, 1866, an act was adopted providing for the issuance by the register of the state land office of his certificate of the proper location of such warrant. Stats. 1866, p. 854.

"These acts were followed by the act of March 28, 1868, repealing all of the foregoing acts, providing a new and different procedure

for obtaining patents to the unlocated portions of the 500,000 acres set apart as school land; providing further (section 54) that warrants issued in pursuance of the act to provide for the disposal of the 500,000 acres of land granted to the state by act of Congress shall be taken in payment of any part of said grant, provided that said warrant shall be paid directly to the register of the state land office, and shall be by him canceled before a certificate of purchase shall issue for the said lands; and also providing in section 71 of said act that all the various acts heretofore referred to shall be repealed, but that the provisions of said act 'shall not in any manner affect any legal or equitable claims, now existing on any of the lands, hereinbefore described, in favor of any claimant under the state, nor affect any suit or proceeding which is now pending respecting the same, arising out of any claims now made; but the courts of the state may proceed and adjudicate upon said rights, and patents or other evidences of title may issue for the same to the parties entitled thereto, under any existing laws of this state, the provisions of this act to the contrary notwithstanding.' Stats. 1867–68, p. 507.

"The act of March 28, 1868, in so far as the same relates to school lands, has since been amended in some particulars, but its main features were subsequently embodied in the Political Code of California, in sections 3494 to 3503, inclusive."

The contention of the appellants is that their rights were in no way impaired by the legislation prescribing the manner of the disposal by the state of the 500,000 acres of land granted to it by congress following the enactment of the statute of 1852, but that their rights were preserved by said subsequent legislation and particularly by the saving clause contained in the statute of 1868, above quoted herein.

The specific argument of counsel for the respondent is that the locations made in 1893 could not have been valid locations, if attempted to be made under the act of 1852, for the reason that that act was repealed by the act of 1857, which provided "an entirely new procedure for the location of such land warrants"; that since, however, the appellants claim that, in making the locations, they followed the plan outlined by the statute of 1857 and not that prescribed by the statute of 1852, the inevitable result is that thus they "abandoned their claim to any protection under the act of 1852, so far as the same affected the procedure for locating lands under warrants issued under said act of 1852, and recognizing the right of the Legislature to repeal said procedure or to enact any other provision in relation to such land warrants"; that the act of March 28, 1868, which expressly repealed all prior acts relating to this subject, "provided a new and different procedure for obtaining patents to the unlocated portion of the 500,000 acres granted to the state," and therefore, to make the locations by Jackson valid, he should have followed the procedure laid down by said act of 1868.

Replying to the above argument, we say, first, that the act of 1857 did not repeal the act of 1852 either expressly or necessarily from the general language thereof. To the contrary, it seems plain to us that the act of 1857 made certain portions of the act of 1852 a part of its own provisions, or, if it strictly cannot be said that this is true, it certainly and unquestionably recognized by express language the validity of the warrants issued under the prior act, the sale of such warrants and the rights acquired by purchasers of the same. It will be noted that the initial section of the act of 1857 provides that, when the lands granted to the state shall have been surveyed by the general government, and the plat thereof shall have been on file for thirty days in the land office of the district, it shall be lawful for the owner or owners of school land warrants, issued under the provisions of the act of this state passed May 3, 1852, to locate the same according to the legal subdivisions of the public lands, "by filing a written application by such owner or owners," etc., with the register of the United States land office "for the proper district," etc. It is as obvious as any proposition can be that, far from intending to repeal the act of 1852 by the act of 1857, the Legislature by the latter act merely intended to regulate the matter of locating warrants issued by the state and acquired by purchasers under the act of 1852, so that such locations would conform to the requirements of the United States statutes relative thereto. In other words, at the time of the passage of the act of 1852, none of the government lands in this state subject to location under the congressional grant of 500,000 acres had been surveyed, but the Legislature assumed, nevertheless, that it could then dispose of the granted land according to the plan established by the act of 1852. Toland v. Mandell, 38 Cal. 30; McNee v. Donahue, 142 U. S. 587, 12 Sup. Ct. 211, 35 L. Ed. 1122. The earlier California cases (see, for instance, Doll v. Meador, 16 Cal. 315) held that the method of selecting and locating the unsurveyed granted lands as prescribed by the statute of 1852 was not inconsistent or in conflict with the act of Congress, but later on a different view was taken of that proposition, the Supreme Court finally declaring and deciding that the granted lands could not be selected or located until they were surveyed by the United States and that if other rights to the lands should be acquired by pre-emption, homestead, etc., before such survey, the pre-emptioner or homesteader would be entitled to the land. It was further held that, in a case where two land warrant selections or locations were

made on the same land, one prior to and the other subsequent to the survey, the later location would prevail. See Terry v. Megerle, 24 Cal. 609, 624, 85 Am. Dec. 84; Grogan v. Knight, 27 Cal. 515; Hastings v. Devlin, 40 Cal. 358; People v. Jackson, 62 Cal. 548. It was because of the situation so arising that the Legislature of 1857 passed the act of that year, the evident purpose thereof being, as stated, among other things, to preserve the legal integrity of the warrants issued and sold under the act of 1852, said act of 1857 providing, as seen, a method for locating said warrants on surveyed lands, as required by the act of Congress. But, as further showing not only an intention but a determination on the part of the state to protect the rights of purchasers of warrants issued under the act of 1852, and whose validity is expressly recognized by the act of 1857 and intervening subsequent acts, we may refer to the fact that, in 1866, to correct the difficulties the state found itself up against prior thereto, created by its legislation relative to the disposal of the granted lands, resulting in legally improper selections, the Legislature memorialized Congress to pass what in effect might be termed a corrective act, the effect of which was to confirm to the state all selections of the granted lands made by the state, in good faith, and sold by the state in good faith, and the Congress thereupon passed an act, on July 23, 1866, confirming, not all the lands which had been selected by the state, but only such lands as had been selected and sold to purchasers, in good faith, under the laws of the state. This act of Congress "had the effect," said the Supreme Court, in Toland v. Mandell, 38 Cal. 30, 43, "to legalize the possession of locators upon unsurveyed lands under the state, until they should have opportunity to present their claims for determination by the officers of the United States, as therein provided. Thereafter, their claims ceased to be within the rule of Grogan v. Knight, 27 Cal. 515, for they were, by the act, admitted to all the rights and privileges of pre-emptors upon unsurveyed lands, under the laws of the United States, which are comprised in the right of present possession, coupled with the right to purchase the title whenever the time at which a purchase can be affected shall have arrived."

The above decision was followed by the case of Roberts v. Columbet, 63 Cal. 22, where the appellant purchased from the state a school land warrant issued under the statute of 1852, and located the same in 1853, prior to the time that the land had been by the United States surveyed and listed to the state. The claim was that the location was invalid, but the Supreme Court held that the purchase by the appellant was in good faith and came within the confirmatory act of Congress, above referred to. The court, inter alia, said:

"Since the passage of the act [of Congress] of July 23, 1866, we think that the position of the appellant has been essentially the same as it would have been if the land upon which he located his warrant had been, before the date of such location, surveyed by the United States."

From the foregoing considerations, it is entirely clear that the Legislature did not intend by the act of 1857 to repeal the act of 1852, in so far as were concerned the rights acquired by purchasers of warrants issued by authority of the last-named act, assuming for the sake of the present discussion that the Legislature possessed the power to abrogate the rights so acquired by a repeal of the statute, or at all. Indeed, it is clearly manifest, from an examination of all the legislation covering the subject of the disposal of the granted lands in question, from the statute of 1852 down to and including the act of 1868, the Legislature on all occasions intended to and did take special pains to preserve and protect every vital right acquired by and invested in purchasers of school-land warrants under the statute of 1852. The act of April 23, 1858 (Stats. 1858, p. 248), did expressly repeal, among others, the statute of 1852, but it contained the provision that—

"All school-land warrants, *now* in circulation, shall be received for school lands, and may be located *as now* provided by law." (Italics ours.)

The meaning of this language, it is clear, is that school-land warrants in circulation at the time of the passage of the act of 1858 may be located as provided by law existing at the time of the passage of said act; or as provided by the law authorizing the issuing and sale of such warrants. And so, in every act passed by the Legislature between the time of the passage of the act of 1858 and the time of the passage of the act of 1868, we find that the rights of the purchasers of these warrants were expressly recognized and preserved. It will therefore not be necessary to examine herein in detail the several acts passed after the act of 1858, except the act of 1868. The important provisions of the several acts referred to are given above and plainly speak for themselves and sustain the construction which, in a general way, we here ascribe to them.

[2] The act of 1868 involved a general revision of the prior laws relating to school lands granted and belonging to the state and also an elaborate scheme for the disposal by the state of such lands. We shall not, nor is it necessary to the decision herein to do so, examine analytically the numerous provisions of that act. It is deemed sufficient to point out that it provides that the surveyor general, who is by the act constituted the agent

for the state for that purpose, shall locate the unsold portion of the 500,000-acre grant (section 11); that warrants issued in pursuance of the act of 1852 "shall be taken in payment of any part of the said grant," subject to the condition that said warrants shall be paid directly to the register of the state land office and shall be canceled by him before a certificate of purchase shall issue for the said lands (section 54); that there shall be issued duplicate warrants in case of the loss or destruction of the originals, the duplicate to be of the same validity and have the same force and effect as the original (section 59). The act, as shown above, contains the clause saving pre-existing rights acquired in the lands.

In Bludworth v. Lake, 33 Cal. 255, decided before the passage of the act of 1868, the Supreme Court said, quoting the syllabus:

"When the state issues her land warrant and receives the sum of money required to be paid therefor, she thereby sells the amount of land specified in the warrant out of the 500,000 acres granted by the act of Congress, and authorizes the holder, as her agent, to locate the same upon any vacant lands belonging to the United States subject to such location. When this location is made, the locator thenceforth becomes the owner of the entire beneficial interest in the particular tract of land selected, and until the issuing of the patent the state holds the legal title in trust for the locator who has become the purchaser."

This language can only mean that, while the particular tract or parcel of land out of the 500,000-acre grant so sold may not be known either to the state or the purchaser, at the time of the sale of the warrant, yet the amount of land specified in the warrant is nevertheless sold to the purchaser by the state, and it remains with the purchaser to locate the warrant and thus acquire his right to a patent for the land so selected.

In view of the above-stated conclusion of the Supreme Court as to the legal effect of the sale of land warrants by the state issued by authority of the statute of 1852 or under any of the subsequent state legislation of which conclusion the legislative branch of the state government is to be presumed to have had knowledge, particularly since the Legislature had been for a number of prior years wrestling with the problem of a proper plan for the disposing of the government lands within its borders subject to location under state laws, it is (as counsel for appellants aptly suggest) inconceivable that the Legislature would attempt, even if it had the rightful power to do so, to deprive holders of school-land warrants of the rights acquired and which they were authorized to exercise under prior statutes. But that the Legislature intended to make no such attempt by the act of 1868, is plainly manifest, in our opinion, from the language of the several provisions of said act to which we have above referred. For instance, the act provides, as we have shown, that the surveyor general, as ex officio register of the state land office shall act as the agent of the state for the location of the "unsold portion"—not the unlocated portion—of the 500,000-acre grant. By this language, the Legislature expressly recognized and incorporated into the act of 1868 the doctrine laid down in Bludworth v. Lake, viz.: That—

"When the state issues her land warrant and receives the sum of money required to be paid therefor, she thereby sells the amount of land specified in the warrant out of the 500,000 acres granted by the act of Congress."

Thus it is clear to our minds that the Legislature did not intend, as counsel for respondent contend is true, by the act of 1868, to vest solely and exclusively in the surveyor general the right to make school-land warrant selections; for if, as the Supreme Court declared to be true, the sale of the warrant constituted a sale by the state of the number of acres of land specified in the warrant, then it was a sale of land so specified for all time and unconditionally; and there was therefore nothing remaining for the purchaser to do but to locate the number of acres his warrant called for. Having bought and paid for the land, there was no reason why his warrant should be presented to the surveyor general as in payment for something he had already paid for. This view is fortified by the consideration that section 59 of the act of 1868, as we have seen, in authorizing the issuance of duplicate land warrants, in cases where the originals had been lost or destroyed, provides:

"Any person making application for a duplicate school-land warrant, in lieu of one alleged to have been lost or destroyed, shall make satisfactory proof, by affidavit of himself or others, to the register of the state land office, that the party applying therefor is the bona fide owner of such warrant, that the same has not been located, and of the facts establishing the loss or destruction of the same, and shall file with the register of the state land office a good and sufficient bond, in form joint and several, with two or more sureties, to be approved by said register, payable to the state of California, in double the value of said school-land warrant, conditioned that the said warrant alleged to have been lost or destroyed shall not be presented for location."

It is further provided that the duplicate warrant shall be of the same validity, force, and effect as the original. The language "shall not be presented for location" implies that the Legislature recognized all the rights acquired by purchasers of land warrants under previous statutes—not only the right to the number of acres of land designated in such warrants, but to locate the warrants in the manner prescribed by the statute by

whose authority they were issued and sold. Again, if the language referred to is not sufficiently clear and explicit in disclosing the intention to preserve to purchasers of such warrants any right acquired under the warrants as indicated above, then it seems to us that that intention is made absolutely clear and unquestionable by the provision requiring the person applying for the duplicate warrant to furnish a bond conditioned that the lost or destroyed warrant shall not be presented for location. "If," as counsel for the appellants well inquire, "the Legislature had intended as claimed, to cut off the right of any one other than the surveyor general to make school-land warrant locations, why did it exact a bond that the warrant represented to be lost or destroyed would not be presented for location? What need was there for this requirement? Manifestly, no such bond would have been required if the Legislature had lawfully terminated the right to use the warrant for any purpose other than as payment on an application to purchase land forming part of the 500,000-acre grant, and we are told by respondent's counsel that it did lawfully terminate all other rights. The state needed no protection against an unauthorized use of a warrant. It could snap its fingers at that and entirely disregard it. Viewed in this way, the exaction of the bond was a useless and vain thing. But we must not assume that the Legislature had an idle or senseless purpose in making this enactment; that it required a bond against doing an act which it said could not be done and which, if done, would have no validity or effect anyway." To our minds, the idea was to provide against the contingency of the loss or destruction of the written evidence—the land warrant—of rights acquired from the state by a purchaser of the warrant, by substituting a duplicate for the lost or destroyed warrant having "the same validity and the same force and effect as the original"; that is to say, a duplicate warrant preserving to the purchaser of the original himself or his assigns to locate such warrant on the number of acres of land sold to him by the state and specified in the warrant. Or, as the same proposition was stated in Stuart v. Haight, 39 Cal. 87, 89:

"The design evidently had in view in the enactment of the statute was to provide for the relief of those who had purchased state land warrants, which, in some way, had become unavailable to them for the purposes for which they had been issued by the state. The intention was to relieve from loss the holder of the warrant, which had been issued by the state, and acquired by the purchaser in the expectation of being able to locate it on the lands which had been granted to her."

Summarizing the situation, then, it is: That the act of 1868 expressly limits the right of the surveyor general to locate lands comprised within the grant by Congress to the unsold portion thereof; that, by the same act, duplicate warrants in lieu of those lost or destroyed, having the same validity, the same force and the same effect or (we may add) scope are authorized to be issued upon sufficient affidavits and the filing of a bond that the originals will not be presented for location; that the effect of selling the warrants was to sell to the purchasers of the warrants the amount of lands specified in the warrants sold. From all these considerations, we hold that it could not have been the intent of the Legislature by the act of 1868 to deprive owners of pre-existing land warrants of the right themselves to locate said warrants as agents of the state.

It is true that the act of 1868 provides that outstanding warrants shall be taken in payment of any part of the grant; but, considering that provision in connection with the other provisions of the said act which we have already considered and construed, we are led to the conclusion that it was intended only to be permissive—that is to say, that it was intended to confer upon owners of outstanding warrants the right, in addition to their pre-existing right to locate the warrants as agents of the state, to present the same as payment on applications to purchase lands embraced within the congressional grant. As we construe the provision, by comparison with other provisions of the act, it means this: That owners of such warrants may, in their discretion, present the same as payment on applications to purchase the lands, in which case the surveyor general shall or must receive the same as such payment. The object of the provision referred to probably was, as counsel for the appellants suggest, not to destroy the right of location in the owners of the warrants, "but to hasten the redemption or cancellation of the outstanding warrants by allowing them to be used as cash," thus, as stated, giving a further or additional right to the owners of the warrants.

But if there may be any question as to the correctness of the foregoing views regarding the matter in hand, a consideration of the saving clause of the act of 1868 will readily dissipate any doubt as to the proposition that, by said saving clause, the Legislature intended to preserve to the purchasers of warrants issued and sold under the act of 1852 all the rights acquired by them by virtue of such warrants. This clause, it will be remembered, follows language in section 71 of the act repealing some 27 statutes relating to the public lands of the state and regulating the disposal thereof, and declares that—

"The provisions of this act shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore

described, in favor of any claimant under the state," etc.

[3] The contention of the respondent is, as to said clause, that it refers only to those rights under school-land warrants which are vested—"that is, rights that arise out of the actual location of the warrants. In other words," further explains respondent, "the saving clause in the repealing words of the act of 1868 referred to accrued rights under located warrants and not to rights arising out of warrants still in circulation." But the first reply to this contention is that purchasers of school-land warrants issued and sold under the statutes of 1852 and 1853 (St. 1853, p. 230) acquired under such purchase vested rights (Bludworth v. Lake, supra); that is, they thus acquired the indefeasible right to locate the warrants upon lands within the 500,000-acre grant. Indeed, the proposition may even be put in stronger form; they acquired a vested right to the amount of land specified in the warrants. The second reply to the construction respondent gives said clause is that, should it be sustained, it would be inconsistent with the provision in the statute that duplicate warrants should have the same validity, force, and effect as inhered in the originals. We have already shown that, while the Legislature prior to the enactment of the statute of 1868, had repealed the general procedure in the statute of 1852 for the disposal of the granted lands, it expressly preserved to purchasers of warrants issued under the latter act all the vital rights acquired by them under such purchases. (See said statutes, above cited and considered.) In adding to the statute of 1868 the saving clause under consideration, the Legislature is to be presumed to have had in mind and considered the act of previous Legislatures in preserving to purchasers of warrants under the statute of 1852 all the rights vested in them by and under the warrants sold by the state; and therefore, reading, in view of that consideration, the language of the clause, "that the provisions of this act shall not in any manner affect any legal or equitable claims, now existing on any of the lands hereinbefore described, in favor of any claimant under the state," the conclusion would seem irresistibly to follow that the intent at the bottom of said clause was to preserve to such purchasers every right acquired by them by reason of the purchase; that is to say, not only the right to the amount of lands specified in the warrants, but the further right given by the statute under which they were issued and sold—themselves to locate such warrants as agents of the state. To give the clause referred to any other construction would be to deny to the purchasers of such warrants a substantial right, and one which, it can well be said, entered vitally into the consideration upon which they purchased the warrants.

[4] The specific purpose of a saving clause in a statute is to preserve pre-existing rights. "It is generally employed," says Mr. Sutherland in his treatise on Statutory Construction (section 225), "to restrict repealing acts; to continue repealed acts in force as to existing powers, inchoate rights, penalties incurred and pending proceedings dependent on the repealed statute." See, also, section 167 of the same work; Black, Interpretation of Laws, p. 270.

[5] The statute of 1852 did not limit the time within which the warrants issued and sold by its authority were to be used in the manner prescribed by said act. The act of 1868 made radical changes in the system for the disposal of state lands acquired by grant from the general government through its Congress, and the Legislature, by the saving clause of the act of 1868, certainly intended to say to purchasers of land warrants that they were to be permitted to utilize their warrants in the manner and according to the plan or procedure established by the law from which they secured their rights to portions of the grant made by Congress to the state. This conclusion is not only reasonable, but eminently just.

Thus we think we have shown that the Legislature, in the place of attempting to repeal by the act of 1868 the previous statutes relating to the public lands of the state so as to destroy the right of purchasers of land warrants issued under the authority of the previous acts to locate, as agents of the state, such warrants, intended by said act to preserve said right to such purchasers, and that thereby it did do so. But it is to be further suggested that, even if such attempt were made by the Legislature, it would be wholly futile. The sale of the warrants by the state constituted a contract between the state and the purchasers of the warrants. This is true, although at the time of the sale the lands granted by Congress had not been listed to the state. The terms of the warrant were that the purchaser was entitled to locate the same in behalf of the state of California. The warrant constituted a contract of sale of the amount of land specified therein and which land was embraced within the grant to the state by Congress of 500,000 acres of land. Bludworth v. Lake, supra.

Whether the purchaser had ever exercised his right under the contract is a matter of no consequence. He might have delayed locating the warrant until the entire congressional grant had been exhausted, and thus have lost his rights under his warrants; but this consideration would render the sale and the purchase none the less a contract of sale of the amount of land specified in the warrant between him and the state. As heretofore herein declared, the right thus given

the purchaser to locate the warrant in behalf of the state, or as the state's agent, constituted a vital element or covenant of the contract of sale. We do not say that the purchaser, after the passage of the act of 1868, was himself compelled to locate the warrant to complete his right to a patent; but we do say that he was vested with the right to do so or to take that course to obtain the actual benefits of his contract. The Legislature was therefore without the power to take that right from the purchaser. To do so would be impairing the obligation of a contract, a power which is expressly denied to the state by the tenth section of article 1 of the federal Constitution. The Legislature may amend the procedure or change the remedy whereby rights are judicially asserted, and such amendment or change may have a retroactive effect, except in those cases where the procedure or the remedy as amended or changed directly affects and impairs the right. See James v. Oakland Traction Co., 10 Cal. App. 785, 792, 103 Pac. 1082, and authorities therein cited. As shown, the act of 1868, as construed by respondent, although it may be regarded, as all the previous statutes might have been, as involving largely a procedural scheme for acquiring ownership of or title to lands comprised within the grant from Congress, would result in divesting purchasers of land warrants under previous legislative acts of the vested right to locate their warrants in behalf of the state.

The cases cited by respondent upon the proposition under consideration are not in point. The case of Campbell v. Wade, 132 U. S. 34, 10 Sup. Ct. 9, 33 L. Ed. 241, so cited, was where, under a Texas statute, the sale of a portion of the vacant lands of that state, lying within certain counties, was authorized, upon a survey of any of the said lands by the person desiring to purchase the same and upon the payment into the state treasury of the purchase money therefor, when it became the duty of the commissioner of the general land office, upon the presentation to it of the receipt for said purchase money, to issue to the purchaser a patent for the land. The proposed purchaser applied to the surveyor of the county to have the lands applied for surveyed, the applicant paying the required fees for the filing of the application; but no survey was ever made, and before the expiration of the time within which the surveyor was authorized to make the survey the Legislature of the state withdrew from sale all of the public lands mentioned in the act under which the applicant applied to purchase the lands. An action by the applicant against the surveyor to compel the latter by mandate to survey the lands which the former sought to purchase was brought, and found its way to the United States Supreme Court, before which it was contended that the petitioner for the mandate, by his application for a survey, had acquired a vested right in the lands he desired to purchase which could not be impaired by their subsequent withdrawal from sale. The court held that the position of petitioner was clearly untenable, saying:

"The state was under no obligation to continue the law in force because of the application of any one to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the state to sell the lands."

The case of Shiver v. U. S., 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231, merely holds that a person who has entered a homestead under the homestead laws upon lands of the United States does not acquire a vested interest in such lands by a mere entry upon the lands and continued occupation and improvement thereof.

The distinction between these two cases and the one at bar is obvious. And the case of Messenger v. Kingsbury, 158 Cal. 611, 112 Pac. 65, also cited by respondent, very clearly points out the distinction.

Some discussion is had in the briefs of the long delay after their purchase in locating the warrants in question, it being intimated that by reason of such delay Jackson was guilty of laches in exercising his rights under the warrants. But we regard this position as of absolutely no consequence. The state was not, and could not have been, prejudiced by the delay. No rights as against the owners of these warrants could accrue to the state by reason of the delay. The warrants, or the amount of land specified therein, had been fully paid for and the state had the money. Moreover, as before suggested, there was no time limit fixed by the statute of 1852 within which the locations were to be made. Besides, it is alleged in the complaint, and not denied, that the lands upon which the locations were made were certified and listed to the state by the United States on the 23d day of January, 1901, as a part of the 500,000-acre grant, and that said listing and certification "was made under and in pursuance of said locations of said Jackson, and not otherwise, and that ever since said last-mentioned date said state has held the legal title to said listed lands in trust for said Henry Jackson." It may further be suggested that it is alleged in the complaint, and not denied, that Jackson's locations in 1893 were made with the consent of the register and receiver of the United States land office at San Francisco, and were finally approved and allowed by the commissioner of the general land office in 1900.

Thus we have given this appeal extended consideration. Indeed, we have perhaps written more than might by some be deemed to have been necessary. But the main ques-

tion, as well as some of the subsidiary points, are important, and the latter, we think, called for considerable attention.

Our conclusion is, as is indicated by the discussion, that the court below committed error in awarding judgment to the defendant; for it is clear to our minds that the facts found by the court show that the appellants are entitled to judgment. The judgment appealed from, as has been shown, rests entirely upon the alleged "finding" that there was no law existing in the year 1893, when the locations in question were made, authorizing such location or locations made in the manner that these were. That "finding" is, obviously, a mere conclusion of law, and, as has been at least inferentially stated, is not supported by the facts found.

Accordingly, the judgment appealed from is reversed, with directions to the court below to enter a judgment for and in favor of the appellants upon the facts as found.

We concur: CHIPMAN, P. J.; BURNETT, J.

43 Cal. App. 359

VALLEJO HIGH SCHOOL DIST. OF SOLANO COUNTY v. WHITE, County Superintendent of Schools. (Civ. 2045.)

(District Court of Appeal, Third District, California. Sept. 25, 1919.)

MUNICIPAL CORPORATIONS ⊂=79 — SCHOOLS AND SCHOOL DISTRICTS ⊂=133—CONFLICT BETWEEN CITY CHARTER AND GENERAL SCHOOL LAW.

Under Const. art. 11, § 8, providing that charters adopted by cities shall be subject to the general laws, a city cannot by charter provision change the rule prescribed by Pol. Code, § 1617, relating to the duties of trustees and boards of education, and declaring that teachers may be elected on or after June 1st for each ensuing year, and each teacher so elected shall be deemed re-elected, unless the governing body of the school district shall, on or before June 10th, give notice in writing that the services of such teacher will be no longer required; hence the principal of a high school, who was notified in accordance with statute, is not re-elected for the ensuing year, because notice was not given two months before end of the fiscal year, as required by the charter of the city which embraced the same territory as the high school district.

Application by the Valley High School District of Solano County for a writ of review to be directed to Dan H. White as County Superintendent of Schools of Solano County. Writ granted.

Breed & Burpee, of Oakland, for petitioner.

Arthur Lindauer, Dist. Atty., of Vallejo, for respondent.

ELLISON, Presiding Judge pro tem. The petition sets forth that the petitioner is a high school corporation; that the respondent is county superintendent of schools of Solano county, Cal.; that the petitioner school district is composed of the city of Vallejo and adjacent territory of an area of approximately the same as the city of Vallejo; that prior to the year 1918 petitioner employed one Carl H. Nielsen, as principal of said high school, and he acted as such until the 30th day of June, 1919, at which time his employment ceased; that after the 1st day of June, and before the 10th day of June, 1919, petitioner, in writing, duly notified said Carl H. Nielsen that his services as principal of said high school would not be required after June 30,

1919, and that this notice was served upon him before the 10th day of June, 1919; that thereafter said Nielsen appealed to respondent as county superintendent of schools, and asked that the action of the board of trustees of petitioner be reversed, and he be reinstated as principal of said high school; that respondent, without notice to petitioner herein, reversed its action, and reinstated said Nielsen as principal of said high school. Petitioner, claiming that respondent had no authority of law to entertain the appeal or make an order reinstating said Nielsen, applies to this court for a writ of review, and asks that said action of said superintendent of schools in reinstating said Nielsen be annulled and set aside. Respondent, by return of the writ, has set forth all his actions and proceedings as superintendent in connection therewith.

The controversy between petitioner and respondent grows out of the fact that the charter of the city of Vallejo contains different provisions on the subject of employment of teachers from that contained in the Political Code, and one of the questions submitted for decision is: Are the parties' rights to be governed by the state law, as found in the Political Code, or by the provisions of the charter of the city of Vallejo? The record shows that the petitioner received no notice that his services would not be needed after the current fiscal year, prior to the 1st day of May, 1919.

Section 1617 of the Political Code, under the heading of the powers and duties of trustees and boards of education in said school districts, provides:

"* * * Except that teachers may be elected on or after June first for the next ensuing school year, and each teacher so elected shall be deemed re-elected from year to year thereafter unless the governing body of the school district shall on or before the 10th day of June give notice in writing to such teacher that his services will not be required for the ensuing school year."

Section 127 of the charter of the city of Vallejo (Stats. of 1911, p. 2027) reads as follows:

"Every person employed as a regular teacher by the school department shall be considered re-elected for the ensuing fiscal year unless at least two months before the beginning of such fiscal year he or she is notified in writing, by authority of the board of education, that it is expected that his or her services will not be required for the ensuing fiscal year."

If the provisions of the Political Code are to control, then it is clear that Mr. Nielsen's term as principal of the high school ceased on the 30th day of June, 1919. If the provisions of the city charter control, by reason of his not having the notice served on him at least two months before June 30th (which concededly was not done), he was deemed employed for another year, beginning July 1, 1919.

Do the provisions of the Political Code control in this particular matter or is it controlled by the provisions of the charter of the city of Vallejo? Counsel for respondent has argued the case on the theory that Nielsen was discharged after he was employed, and the superintendent had the power of reinstating him. The question is really a somewhat different one. It is: Was he employed for the year beginning July 1, 1919? Both the quoted section of the Political Code and the charter of the city of Vallejo are very specific in using the word "re-elect." If the written notice is not given he is re-elected. There was no express employment of Nielsen for another year, beginning July 1, 1919. If employed at all, it was because of the failure to give him proper notice that his services would not be needed for another year. If the state law controls, then the notice which was given to him by the petitioner prevented him from being re-elected for another year. If the provisions of the city charter control, then as notice was not given as provided therein, he was re-elected for another year.

We are of the opinion the state law controls in the matter, and not the city charter.

Turning to the constitutional provision (article 11, § 8) which confers power upon cities to form and have adopted city charters, it is provided:

"It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

The government of schools and the employment and discharge of teachers are not municipal affairs, and, by virtue of the constitutional provision referred to, the state law controls whenever a conflict arises. This has been decided so often by the Supreme and appellate courts of this state that any lengthy discussion seems unnecessary.

Thus, in Kennedy v. Miller, 97 Cal. 434, 32 Pac. 560, it is said:

"The powers and duties of the board of education in a city cannot trench upon the system that the Legislature has provided for the entire state, since the charter is limited in its operation by any general law that may be passed by the Legislature, and, in addition thereto, such powers and duties are, by the terms of the section in which they are authorized to be given, limited by the provisions of the Political Code."

"It is not, and cannot be, claimed that the election and dismissal of teachers in the public schools are 'municipal affairs,' which may, by a freeholders' charter, be regulated in a manner in conflict with that provided by the general law. See Kennedy v. Miller, 97 Cal.

429 [32 Pac. 558]; Mitchell v. Board of Education, 137 Cal. 372 [70 Pac. 180]."

These decisions are conclusive upon the point that in the matter under investigation the rights of the parties must be controlled by the provisions of the Political Code, and not by the charter of the city of Vallejo.

It was suggested in argument that the Code provisions that a teacher should be deemed re-elected unless he were given a 20 days' notice was passed for the benefit of the teacher, and that the charter provisions, declaring that he should be given a two months' notice, was in line with the Code provision, and more favorable to the teacher than the Code, and therefore there was really no conflict between the two. But if the city, by provision in its charter, can lengthen the time for giving notice to two months, it can lengthen it to six months. And if the city by its charter has the power to lengthen the time of the notice to be given to a teacher, it has the power to shorten it to ten days, or five days, or one day.

We hold that Nielsen was not re-employed for the fiscal year, beginning July 1, 1919; that at the time the appeal was taken he was not a teacher in the employ of the high school district, and that the respondent had no authority or power to entertain his appeal or to reinstate him in his office as principal of the high school of the city of Vallejo.

The writ of review is granted, and the orders of the respondent purporting to reinstate him, Carl H. Nielsen, as principal of the Vallejo high school are set aside, and petitioner will recover its costs.

We concur: HART, J.; BURNETT, J.

43 Cal. App. 363

BROWN v. WHITE, County Superintendent of Schools. (Civ. 2046.)

(District Court of Appeal, Third District, California. Sept. 25, 1919.)

SCHOOLS AND SCHOOL DISTRICTS ⟹144(1) — RIGHT TO COMPENSATION.

On petition for mandate to require county superintendent of schools to approve requisition for petitioner's salary as high school principal, *held* that petitioner was the regularly employed principal, and, having performed his duties as such, was entitled to the relief asked; the contention of school superintendent that another person was the duly employed principal being untenable.

Application by Charles S. Brown for writ of mandate to be directed against Dan H. White, as County Superintendent of Schools of Solano County, Cal. Writ granted.

Breed & Burpee, of Oakland, for petitioner.

Arthur Lindauer, District Attorney, of Vallejo, for respondent.

ELLISON, Presiding Judge pro tem. Petitioner represents that the Vallejo high school district is a public high school corporation, composed of the city of Vallejo and of an additional area of approximately the same size as the city of Vallejo; that respondent is the county superintendent of schools of Solano county; that on the 3d day of June, 1919, the Vallejo high school district of Solano county employed petitioner, as principal of said high school and said intermediate schools for the school year commencing July 1, 1919, at an annual salary of $2,400, payable in 12 equal monthly installments of $200 on the first of each and every month of said term; that thereupon said petitioner accepted said employment, and on the 1st day of July, 1919, entered upon the performance of his duties as such principal; that under the terms of said employment said Vallejo high school district of Solano county agreed to pay to your petitioner the sum of $200 on the 1st day of August, 1919; that said petitioner has duly performed all of the duties as such principal during the month of July, 1919, and has duly performed all conditions precedent to the payment of said sum of money; that thereafter said Vallejo high school district issued and delivered to petitioner a requisition in writing upon the high school fund of said high school district, in the regular and usual form, on respondent, as county superintendent of schools of Solano county; that petitioner presented said requisition to respondent in regular business hours, and demanded that he approve said requisition and order the same paid; that said respondent refused, and still refuses, without any cause, to approve said requisition, or to order the same paid, and that the whole of said $200 remains unpaid. Petitioner prays that an alternative writ of mandate issue, directed to respondent, requiring him, immediately after the receipt of said writ, to approve said requisition and order said sum paid to petitioner, or to show cause, etc., and for general relief.

In response to said alternative writ of mandate respondent has filed an answer, in which he states that the Vallejo high school district of Solano county was, on the 3d day of June, 1919, without any right or authority to employ petitioner, Charles S. Brown, as principal of said high school and said intermediate schools for the year commencing July 1, 1919, at the annual salary of $2,400, or any other amount; that said school district was without any right or authority to pay said Brown any salary, as principal of said high school and intermediate school, because one Carl H. Nielsen, a regular teacher of the Vallejo high

school of Solano county, was and is the duly employed and acting principal of said school, by virtue of a contract entered into by and between Carl H. Nielsen and the Vallejo high school on the 1st day of August, 1918, wherein Carl H. Nielsen was employed and accepted said employment as principal of said school, at a yearly salary of $2,400; that said contract has never been terminated, and is now in full force and effect, Carl H. Nielsen having been re-elected principal of the Vallejo high school district for the ensuing fiscal year of 1919, by virtue and under the provisions of section 127 of the charter of the city of Vallejo.

The same question is involved in this case as was under consideration in the case of Vallejo High School District of Solano County v. White, No. 2045, 185 Pac. 302, this day decided. In this case, as in that, it is claimed by respondent that Nielsen was never discharged from his position as principal of said school; that he, being the principal of the school, the board had no authority to employ petitioner Charles S. Brown.

In Vallejo High School District of Solano County v. White, supra, it was held that Nielsen's employment as principal of said high school ended June 30, 1919. This being so, the board had authority to employ some one to take his place. And it appearing that the high school district before July 1, 1919, regularly employed petitioner as principal of said school, and that he entered upon and performed the duties thereof, it follows that he is legally entitled to the relief asked.

It is therefore ordered that the writ of mandate issue to respondent, commanding him, as county superintendent of schools of the county of Solano, to issue and deliver to petitioner a requisition for his salary for the month, beginning July 1, 1919, and ending July 31, 1919, in the sum of $200, and that petitioner herein recover his costs.

We concur: HART, J.; BURNETT, J.

(43 Cal. App. 441)

KRANZTHOR v. AL. G. FAULKNER CO. (Civ. 2371.)

(District Court of Appeal, Second District, Division 1, California. Oct. 4, 1919.)

CHATTEL MORTGAGES ⇐138(1)—PRIORITY OF POSSESSORY LIEN FOR REPAIRS.

A possessory lien of one who repairs personal property at the request of the owner or legal possessor thereof is superior to the lien and right of possession of the owner of a pre-existing chattel mortgage.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by M. Kranzthor against the Al. G. Faulkner Company. From the judgment rendered, plaintiff appeals. Affirmed.

Frederick A Preston, of Los Angeles, for appellant.

Howard E. Reach and Frederick H. Griffith, both of Los Angeles, for respondent.

CONREY, P. J. The facts bring this case directly within the rule stated in Mortgage Securities Company of California v. Pfaffmann, 177 Cal. 109, 169 Pac. 1033, L. R. A. 1918D, 118. It was there held that the possessory lien of one who repairs personal property, at the request of the owner or legal possessor thereof, is superior to the lien and right of possession of the owner of a pre-existing chattel mortgage.

On the authority of that decision the judgment in this action is affirmed.

We concur: SHAW, J.; JAMES, J.

(43 Cal. App. 439)

PEOPLE v. SCOTT. (Cr. 477.)

(District Court of Appeal, Third District, California. Oct. 4, 1919.)

ROBBERY ⇐24(1)—SUFFICIENCY OF EVIDENCE.

Evidence *held* sufficient to justify conviction of robbery by striking, knocking down, and going through the pockets of an aged and intoxicated man whom defendant had volunteered to help home.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

T. K. Scott was convicted of robbery, and from the judgment, and an order denying him new trial, he appeals. Judgment and order affirmed.

Emmett Phillips, Jr., and Donald McKisick, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted, under an information duly filed in the superior court of Sacramento county, of the crime of robbery, and has brought the cause to this court on an appeal from the judgment and the order denying him a new trial.

No brief was filed in behalf of the defendant in support of his appeal, nor was there any appearance for him and in his behalf when the cause was regularly called at the late term of this court for argument; the case having previously been regularly placed on the calendar of the court at said term for hearing and the attorney of record of the defendant duly apprised by the clerk of this

court of that fact. Accordingly, the Attorney General submitted the case for decision on the record.

[1] The people produced evidence at the trial amply sufficient to justify the verdict, such testimony having been accepted by the jury.

The robbery was committed in the early hours of the morning of March 11, 1919, in the city of Sacramento, and one Charles E. Sundahl, an elderly man, was the party robbed. It appears that Sundahl had been at the Southern Pacific passenger depot in the city of Sacramento with some acquaintances who were waiting at the depot for and finally took a belated train for some point. Sundahl and his friends had, during the hours preceding the time when the latter took the train, indulged more or less in intoxicating liquors, and when, after leaving the depot, Sundahl had arrived at the corner of Fourth and K streets, in said city, on his way home, at about the hour of 2 o'clock a. m., he was in some degree under the influence of intoxicants. At Fourth and K streets he applied to a taxi driver to convey him home, but the driver asked 75 cents for the service, and Sundahl refused to pay that sum, and thereupon started in the direction of L street, walking on the west side of Fourth street. The defendant started away with Sundahl, taking the latter by the arm and walking with him towards L Street, and, when they reached the alley between K and L streets, Scott forcibly took Sundahl down the alley a few feet, struck him, knocking him to the ground, and then went through his pockets and abstracted therefrom and took with him several dollars in silver. This latter proceeding was witnessed by a Japanese night watchman, who arrested Scott and delivered him over to the custody of two police officers.

[2] We have examined the charge of the court and the record generally, and from such examination are justified in saying that the law pertinent to the case, as made by the evidence, was correctly stated to the jury and was fair to both sides, and that the court's rulings on the evidence were generally correct. No prejudicial error in that respect was discovered by our examination of the record. Indeed, we think the defendant was accorded a perfectly fair trial according to law, and we may add the suggestion that the fact that the defendant's counsel did not press the appeal may be taken as evidence that they, too, came to the conclusion, after an examination of the record subsequently to the trial, and after it was made up, that the convicted man has no just legal ground for complaint against the manner in which the court below conducted the trial.

The judgment and the order are affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

(43 Cal. App. 487)

WESTERN INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3077.)

(District Court of Appeal, Second District, Division 1, California. Oct. 8, 1919.)

INSURANCE ⟸435 — WORKMEN'S COMPENSATION; LIABILITY OF INSURER.

A policy against liability under the Workmen's Compensation Act, which covered the business of an electrical store, retail, or combined wholesale and retail, including installation and repairs upon electrical equipment within buildings, etc., and covering enumerated classes of employés, including "chauffeurs and helpers," did not cover injuries to or death of a chauffeur of the employers, irrespective of the duty he was performing, as when at the instance of an employer he was gratuitously taking to her home a former female employé of the business.

Certiorari to Review Award of Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act (St. 1917, p. 831) by J. L. Millard and Julie E. Millard, dependent father and mother of Byron J. Millard, the deceased employé, opposed by the Western Indemnity Company, the insurer. Compensation was awarded by the Industrial Accident Commission, and the insurer petitions for certiorari. Award as to petitioner annulled.

Duke Stone, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, and Swanwick & Donnelly, of Los Angeles, for respondents.

JAMES, J. The applicants before the commission were the father and mother of Byron J. Millard, who was accidentally killed while operating an automobile belonging to P. R. Kennedy. Kennedy was conducting at Long Beach, in the county of Los Angeles, an electrical business. The business was, at the time material here, being directly managed by the son of Kennedy. When he met with the accident which caused his death, young Millard was engaged in conveying to her home a friend of the Kennedys from a point in the city of Long Beach. He was performing this service at the direction of the younger Kennedy. Petitioner here was the insurance carrier which had agreed by its contract to respond to any damage which might accrue on account of injuries or death resulting therefrom suffered by any employé of the assured "in and during the course of and arising out of the operation of the trade, business or work described." In the schedule of statements which formed a part of the contract of insurance, the business so covered was described as:

"Electrical Store. Retail or combined wholesale and retail. Electrical Equipment. Installation and repairs within buildings and on build-

ings incidental to such inside work, including the making of service connections for such work, excluding the installation of equipment in power plants."

The contract was made to cover the various enumerated classes of employés, including "chauffeurs and helpers." Rodger Kennedy, the son of the assured, testified that on the day of the accident young Millard was at the electrical store in Long Beach and under his (Kennedy's) direction; that a Miss Blevins had at a prior time worked as bookkeeper in the electrical store and that she had left Kennedy's employ about a month and a half previous and gone to work for an oil company; that, learning that Miss Blevins was ill at her place of employment, young Kennedy instructed the chauffeur, Millard, to go and get her and take her to her home or her mother's home, whichever she desired; that while performing this service Millard was killed. The service which Kennedy required young Millard to perform in transporting Miss Blevins to her home was, so far as appears, as between Kennedy and the lady, purely gratuitous and without any obligation in any wise connected with the business then being transacted at the electrical store or in connection therewith.

Under this state of facts, petitioner argues that its policy of insurance did not cover the case and that it should not be made to respond in the damages assessed against it. In this conclusion we must concur. The contract of insurance does not purport in any of its terms to cover injuries suffered to a chauffeur of the Kennedys irrespective of the duty which such chauffeur might be performing at the time he suffered injuries. The policy quite clearly related to the business being transacted in and about and in connection with the electrical establishment maintained by the Kennedys at Long Beach. Counsel for petitioner well argues that, if the award of the commission in this case is allowed to stand, then the insurance carrier might be held liable for any injury whatsoever occurring to a chauffeur employed by the Kennedys, regardless of the nature of it, so long as such injury was suffered while such chauffeur was operating an automobile under the direction of his employers. This notwithstanding that the policy, as has been before mentioned, purported to furnish insurance covering injuries to employés while engaged in and about the concern of the electrical establishment. That the employer of Millard would be liable, there would seem to be no question; that an insurance carrier whose policy relates to injuries suffered by employés while engaged in a particular and specified business would not be so liable, we think is just as clear.

The findings and award as against this petitioner are annulled.

We concur: CONREY, P. J.; SHAW, J.

43 Cal. App. 484

GERNHARDT et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3078.)

(District Court of Appeal, Second District, Division 1, California. Oct. 8, 1919.)

1. MASTER AND SERVANT ⟸361—WORKMEN'S COMPENSATION; SANITARIUM HOUSEMAID NOT EXCEPTED AS IN "DOMESTIC SERVICE."

Service to the proprietors of a sanitarium, rendered by a maid performing general housework in addition to attending on patients, was not a service falling within the exception from the Workmen's Compensation Act of any employé engaged in "domestic service."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Domestic Service.]

2. MASTER AND SERVANT ⟸405(4) — WORKMEN'S COMPENSATION; EVIDENCE OF SERVANT'S ENGAGEMENT IN OWN BUSINESS.

In proceedings under the Workmen's Compensation Act for injuries to a housemaid employed by the proprietors of a sanitarium, evidence *held* to show that at the time of injury the maid was engaged only in the performance of washing her own soiled linen, and not in her employers' business.

Certiorari to Review Award of Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act (St. 1917, p. 831) by Mrs. Emma Ottesen, opposed by Mrs. Bertha Gernhardt and John F. Gernhardt, the employers. Compensation was awarded, and the employers petition for certiorari. Award annulled.

Chas. P. Huey, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

JAMES, J. Certiorari. Petitioners here were the respondents before the Industrial Accident Commission. The commission upon the application of Mrs. Emma Ottesen, made its order requiring petitioners to make certain payments of money for which they were found liable under the provisions of the Workmen's Compensation and Insurance Act. By this proceeding petitioners seek to have the award annulled on the ground that no legal authority existed under the showing made to support the action of the commission. The respondent Emma Ottesen, who was employed at a sanitarium which petitioners were conducting, slipped upon a wet floor on the premises of petitioners and fell, sustaining a fracture or sprain, or both, of the left forearm. Mrs. Ottesen was employed as a maid, her duties consisting of what is known as general housework, in addition to which she attended upon patients in the sanitarium. The petitioners lived in the same building, and the place answered to a residence for them, as well as a

sanitarium for the conduct of the business in which they were engaged.

[1, 2] Answering first one of the objections of the petitioners, we are of the opinion that the service for which Mrs. Ottesen was engaged was not one falling within an exception of the Workmen's Compensation Act, which exception excludes from the benefits of the act "any employé engaged in household domestic service." The most serious objection urged against the award of the commission refers to the question as to whether at the time Mrs. Ottesen received her injury she was engaged in the performance of any duty having reference to her employment. We think, under the undisputed facts shown, it should be concluded that this respondent was at the time engaged only in the performance of work of her own, which was wholly disassociated from any duty that she owed to her employers. The facts were these: Mrs. Ottesen, having some leisure time allotted to herself, intended to go to her own home for the purpose of washing her own clothes. She intended to take up her abode permanently with petitioners, but had not yet brought her effects to their establishment. She intended to go to her home to do her laundering early in the afternoon. Mrs. Gernhardt, one of the petitioners, suggested to her that she could as well do her laundering at the sanitarium, as there was hot water and materials there available. Mrs. Gernhardt further suggested that on that particular day, as she intended to go downtown, she would be glad to have Mrs. Ottesen at the sanitarium while doing the washing, so that she might answer the doorbell. Mrs. Gernhardt stated to Mrs. Ottesen that she would not go downtown until 4 o'clock, and it also appeared that there was another attendant who would be on duty until that hour. Mrs. Ottesen, however, as she stated in her testimony, concluded that she would return to the sanitarium earlier and so have more uninterrupted time within which to complete her laundry work. She therefore returned at 3 o'clock, one hour in advance of the time she was requested to appear, and was making ready to do her washing. She had not commenced at this when, walking across a kitchen floor which had been scrubbed by another attendant and was still in a wet condition, she slipped and fell, injuring her arm as before stated. Explaining her reason for coming at 3 o'clock instead of 4, she gave the following testimony:

"Q. The truth is that you were working on your own material and on your own soiled linen between 3 and 4? A. I hadn't commenced yet. Q. Had you come at 4 o'clock that floor would have been dry, and the accident would not have happened? A. Yes, but I couldn't possibly have done my washing and waited on the patient, and the doorbell and telephone, as Mrs. Gernhardt requested me to do, if I had not come before 4 o'clock, when Miss Spicker was off duty. Q. If you had waited and gone on duty at 4 o'clock this accident would not have happened, would it? A. You don't cross a bridge until you come to it; I had to be there at 4 o'clock, to go on duty."

So it appears that the time between 3 and 4 o'clock was wholly at the disposal of Mrs. Ottesen; in other words, it was her own time during which she was not expected and had not been requested to perform any service for her employers. We see no difference in the case than were it one where the employé had, during such portions of the day allotted to her for her own purposes, been engaged in performing any act wholly for her own benefit. A different legal situation, we apprehend, would have been presented had 4 o'clock arrived and had Mrs. Ottesen been left in charge of the premises as was designed, even though she might have been occupied for a portion of the time in washing her own clothes. At the time of the accident she was not in the kitchen of her employers upon any business of theirs. Neither does the case fall within those decisions which recognize liability on the part of the employer where the employé is entering the premises of his employers at a seasonable time for the purpose of commencing his labors, or of departing therefrom by the usual way provided. In our opinion the contention made by these petitioners that they incurred no liability by reason of the accident which befell the employé must be sustained.

The findings and award of the respondent Industrial Accident Commission are annulled.

We concur: CONREY, P. J.; SHAW, J.

(43 Cal. App. 462)

In re HITTSON. (Cr. 671.)

(District Court of Appeal, Second District, Division 1, California. Oct. 7, 1919. Hearing Denied by Supreme Court Dec. 4, 1919.)

1. ATTORNEY AND CLIENT ⟸53(2)—SUFFICIENCY OF EVIDENCE OF MISCONDUCT OF ATTORNEY.

In proceedings for disbarment of an attorney, evidence *held* sufficient to show that he had retained money paid him by a client to pay a judgment, that he had made false statements as to his ownership of lots to qualify as surety on a bail bond, and that when instructed to prosecute action for damages in collision with an automobile, he had drawn a complaint for labor performed and services rendered.

2. ATTORNEY AND CLIENT ⟸57—SUFFICIENCY OF EVIDENCE ON APPEAL FROM DISBARMENT.

On appeal from judgment disbarring an attorney, it is only necessary that the appellate court find in the record evidence of a substantial nature supporting the material allegations

on each of the three counts on which the judgment is founded.

3. ATTORNEY AND CLIENT ⊂⊃44(1)—PROFESSIONAL MISCONDUCT JUSTIFYING DISBARMENT.

Where an attorney retained for his own use money paid him by a client to pay a judgment testified falsely as to his ownership of lots in order to qualify as surety on a bail bond, and drew a complaint for labor performed and services rendered when instructed to prosecute action for damages in collision with an automobile, he was guilty of professional misconduct, and was properly disbarred.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

In the matter of proceedings for the disbarment of W. J. Hittson, an attorney at law. From judgment of disbarment, respondent appeals. Affirmed.

See, also, 178 Pac. 149.

Gesner Williams, W. I. Gilbert, John S. Cooper, Alfred F. MacDonald, and S. W. Thompson, all of Los Angeles, for appellant.

W. J. Ford, Frank C. Collier, and Henry G. Bodkin, all of Los Angeles, for respondent.

CONREY, P. J. The judgment from which this appeal is taken is a judgment permanently disbarring the appellant from the right to practice as an attorney and counselor in the courts of this state. The accusation was filed on behalf of the Bar Association of Los Angeles County. The court found that the allegations contained in the first, third, and fifth counts of the accusation are true. The judgment is based upon those findings.

Briefly stated, the first count charged that while appellant and one Cleveland Schultz, also an attorney at law, were employed by one Plevros to represent him in the defense of a certain action, Plevros paid into the hands of said attorneys $142.50 to be applied on the payment of any judgment rendered against Plevros in said action, and for no other purpose; that judgment was rendered against him in the sum of $22.05; that said attorneys, although having in their joint possession the money so delivered to them by Plevros, converted the money to their own use, did not pay the judgment, and refused to return the money or any part thereof to Plevros. It appears from the evidence that Schultz did pay the amount of the judgment without formal entry thereof. The evidence is, however, sufficient to justify the finding on this count as to all other facts alleged. Plevros had paid said attorneys a separate cash fee for the defense of said action, and the evidence was sufficient to prove that they were not entitled to retain the additional sum for their services.

The third count charges that in a criminal action in the justice court of Ballona township, in Los Angeles county, appellant qualified as surety for the defendant on a bail bond in the sum of $250, and in connection therewith testified that he was at that time the actual owner of eight lots in the county of Riverside, that said lots were at that time of the value of $250 each, and were at that time assessed for the sum of $50 each by the assessor of Riverside county. The accusation then alleged that in fact Hittson did not at that time own any lots whatsoever in Riverside county; that in making such affidavit he well knew that he did not own said lots, and that his statement was made for the purpose of defrauding the justice of the peace and of enabling him to qualify on said bond. The justice of the peace in his testimony stated that at the time in question and upon becoming surety on said bond Hittson was sworn as to his qualifications, and testified that he owned eight lots just outside of the city of Riverside in the county of Riverside, that they were assessed at $50 each, and that their real value was $250 each; that Hittson gave no description of said lots, but promised to mail to the justice a detailed description thereof, which, however, he did not do. There is other evidence which, in our judgment, is sufficient to support the court's conclusion that appellant did not own any such lots.

The fifth count of the accusation alleges that appellant was employed by one Sagar to prosecute an action against one Lange for damages arising out of a collision with an automobile; that instead of commencing such action appellant framed a complaint as stating a cause of action for indebtedness for labor performed and services rendered, and in connection therewith filed an affidavit for attachment wherein it was stated that the amount demanded was due to the defendant upon an express or implied contract for the direct payment of money; that appellant knew when he commenced said action and when he filed said affidavit for attachment that said money was not due for services rendered or labor performed. The record shows that the complaint was made and the affidavit for attachment filed as stated in the accusation. The testimony of Sagar is to the effect that in his statement of facts to appellant he told appellant that his claim was for damages to the machine in the collision, and that he did not tell Hittson that he had performed any labor for the defendant, or that he had any claim against the defendant for work and labor.

[1-3] The points urged in support of the appeal are each and all directed to the claim made on behalf of appellant that the evidence is insufficient to support these several accusations. It may be admitted that there is a conflict in the evidence relating to these

several charges against appellant; nevertheless, after reading the record, we are satisfied that there is evidence of a substantial nature supporting the material allegations on each of the three counts on which the judgment is founded. That is sufficient for the purposes of this appeal. In re Morton (Sup.) 177 Pac. 453; In the Matter of Danford, 157 Cal. 425, 108 Pac. 322. The facts found established appellant's guilt of professional misconduct, and showed that he is wanting in that integrity of character and conduct which the law rightfully requires from an attorney at law.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

43 Cal. App. 451

PEOPLE v. GILMAN. (Cr. 485.)

(District Court of Appeal, Third District, California. Oct. 6, 1919. Hearing Denied by Supreme Court Dec. 4, 1919.)

1. ABORTION ⟸11—CORROBORATION OF PROSECUTRIX.

Under Pen. Code, § 1108, the evidence of a prosecuting witness in an abortion case must be corroborated to justify a conviction.

2. CRIMINAL LAW ⟸693 — OBJECTIONS IN TRIAL COURT.

An objection to a question is too late when made after it is answered.

3. CRIMINAL LAW ⟸396(2) — ADMISSIBILITY OF PART OF CONVERSATIONS PREVIOUSLY INTRODUCED.

In a prosecution for abortion, where a witness, in response to a question as to whether anything was said between witness and defendant as to what witness saw and what transpired, answered that witness said that she thought the prosecuting witness "was quite lucky to be living," *held* admissible as part of a conversation previously admitted.

4. CRIMINAL LAW ⟸413(1)—WITNESSES ⟸270(2) — ADMISSIBILITY OF SELF-SERVING DECLARATIONS.

In a prosecution for abortion, an objection on cross-examination to a question asked of prosecutrix, as to whether defendant told her she would help to obtain employment for her elsewhere, was properly sustained as calling for a self-serving declaration and as being immaterial.

5. ABORTION ⟸9—EVIDENCE AS TO PHYSICAL CONDITION OF DEFENDANT AT TIME OF TRIAL.

In a prosecution for abortion, the exclusion of evidence as to defendant's physical condition and medical treatment at the time of trial was proper as having no bearing on the charge against her.

6. CRIMINAL LAW ⟸404(4)—EVIDENCE AS TO ASHES CONTAINING FRAGMENTS OF HUMAN BONES.

In a prosecution for abortion, evidence of certain ashes containing, according to medical testimony, fragments of human bones, was admissible in view of circumstantial evidence that the ashes were the product of a fire made by defendant to destroy the fœtus.

7. CRIMINAL LAW ⟸404(3)—ADMISSIBILITY OF SURGICAL INSTRUMENTS.

In a prosecution for abortion, evidence of surgical instruments found on the premises where the crime was committed was admissible, where it appeared that the instruments were adapted for the commission of the crime and were owned by defendant at the time the offense was committed.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

May Gilman was convicted of abortion, and, from the judgment and a denial of a new trial, she appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant was convicted of abortion, and from the judgment and order denying her motion for a new trial the appeal has been taken. Some claim has been made that the evidence is insufficient to support the verdict, and the appellant indulges in a criticism of the testimony of certain witnesses of the prosecution, claiming that in certain respects it is inconsistent and unsatisfactory. After a careful reading of the record, however, it must be stated that the verdict is supported in ample measure. The prosecutrix seems to have related a straightforward story that carries upon its face convincing evidence of her veracity. She manifested no unwonted hostility to the defendant, but was apparently disposed to relate all the facts of the case within her knowledge just as they transpired.

[1] It is true that her evidence alone, within the purview of the statute (section 1108, Pen. Code), must be corroborated in order to justify legally a conviction. That corroboration is, however, found in full measure in the record before us. We deem it unnecessary and unprofitable to set out in detail the evidence which justifies the conviction. It is sufficient to say that one Mrs. Johnson was present at the place where the offense was committed at the very time of the delivery of the fœtus, and her testimony is strong and convincing as to the criminal conduct of defendant. She also related a conversation which she had with defendant which was indicative and persuasive of defendant's guilt. It may be added that the record contains substantial, significant, and important circumstantial evidence, all tending toward the sup-

port of the verdict of the jury. Indeed, it is rare that a case of this character is established by such a strong array of positive and circumstantial evidence. It would be singular and unexpected if the jury had failed to convict after a careful and conscientious consideration of the showing that was made in this case.

Viewing the whole record in the light of the strong and conclusive evidence of guilt, it could fairly be said that none of the assignments of error could have resulted in a miscarriage of justice, and hence we would be justified in brushing them aside as not warranting specific consideration. We have, however, examined them with some degree of care and are prepared to say that no substantial error was committed by the trial court. The defendant seems to have been granted every right to which she was entitled under the law. The trial judge conducted the proceedings cautiously, impartially, and justly. The instructions thoroughly and correctly presented the law of the case and left nothing unsaid that was necessary for the guidance of the jury in their determination of the guilt or innocence of the defendant. It is true that certain instructions, proposed by her, were refused; but, as far as correct in doctrine and applicable to the facts of the case, they were entirely covered by instructions which were given.

[2] As to the rulings upon the admissibility of evidence, they are so palpably and clearly sound that we are hardly called upon to specifically notice them. However, we may refer to one or two of these assignments of error. Objection was made, for instance, to this question addressed to Mrs. Johnson:

"Q. Was there anything said subsequent to, after what you saw, between you and the nurse, this defendant, Gilman, as to what you saw and what transpired?"

The answer of the witness was:

"I spoke afterwards, that I thought Mrs. England was quite lucky to be living."

[3] In the first place, no objection was made to the question until after it was answered, and hence the objection came too late. Again, under a familiar rule it was admissible as a part of the conversation, in view of the response made by said defendant to said statement. That answer was: "She said her work always spoke for itself." As a part of the same conversation, it may be added, the witness testified:

"I asked her what she might do about it, about the baby, and she says, 'I told Mrs. England that I would take it to the coroner, but that would cause me too much questioning,' and she further said, 'I will build a good fire.'"

It may be added that the only objection to this part of the conversation was upon the ground that it was leading, which, of course, is inconsequential.

[4, 5] Another ruling of which complaint is made was in sustaining an objection to the following question, asked of the prosecutrix on her cross-examination:

"Q. Now, did she, at any time when you were leaving, tell you she (the defendant) would help you to obtain employment elsewhere?"

This manifestly called for a "self-serving" declaration on the part of defendant and was clearly inadmissible. Besides, it was clearly a matter of no importance in the consideration of the merits of the case. It may be suggested that a similar ruling was made by the court in reference to questions propounded to the defendant by her counsel as to her physical condition and medical treatment, that she was receiving, at the time of the trial. It is clear enough that such matters had no bearing whatever upon the charge against the defendant. If there had been any attempt to show or suggestion that her physical condition, at the time of the commission of the alleged offense, was such as to make it impossible or even difficult for her to have committed it, then, of course, a different question might be presented. We may also refer briefly to the action of the court in sustaining an objection to the question asked of a certain witness as to whether Police Officer Hanney had tried to intimidate her by threatening to prosecute her for perjury. The only purpose of the question could be to discredit the testimony of said officer by showing an unfair anxiety to convict the defendant. However, as to this, in fairness to him, before the effort was made to impeach him his attention should have been called to the circumstance in order that he might have an opportunity to acquit himself of any just censure, or, at least, to explain what occurred. Moreover, the consideration is not of sufficient importance to justify a reversal of the cause.

[6, 7] The only ruling during the trial that is worthy of serious consideration relates to the admissibility in evidence of certain ashes containing, according to the testimony of Dr. Nahl, the fragments of human bones and also certain surgical instruments that were found in the washstand in the bedroom where the crime was committed. As to the first, however, there was strong circumstantial evidence that said ashes were the product of a fire made by the defendant to destroy the fœtus, in accordance with her statement made to Mrs. Johnson. At least, the showing was sufficient to justify its consideration by the jury. In reference to the surgical in-

struments, consisting of a catheter and sound, they are admittedly of a nature to be used in the commission of such an offense as was charged against the defendant. It is true that there is no positive evidence that they were used by her in the present instance, the prosecutrix only identifying a certain speculum as having been used by defendant; but there are circumstances, which we need not detail, sufficient to justify the inference that they were so used. The case in that respect is entirely different from People v. Hill, 123 Cal. 571, 56 Pac. 443, and People v. Muhly, 11 Cal. App. 129, 104 Pac. 466, wherein no connection by either defendant with the material object was shown. Herein, not only is there circumstantial evidence that defendant used these instruments, but it was admitted by her without objection that she owned them and had them in her possession at the time the alleged offense was committed. The fact that they were adapted to such use and were owned by her at the time of the commission of the crime, and were so near at hand, afforded at least some evidence that she had made preparation for the commission of this particular offense. In this connection it may be stated that no explanation was made by defendant as to why or for what purpose she had these instruments, and no objection was made to their introduction in evidence upon the ground that they tended to show the commission of another offense than the one charged against her. In the cases cited above it may be further said the evidence of guilt was slight and unsatisfactory, while here it is full and persuasive.

Before concluding, we may state that the case of People v. Josselyn, 39 Cal. 393, involves a very different state of facts from the case before us. Therein there was no corroboration of the testimony of the prosecutrix, and it is only instructive in the present instance in its discussion in the supplemental opinion of the court as to the character of the corroboration that is required to justify a conviction. Herein, as we have before seen, there was ample corroboration, not only by the testimony of a disinterested witness, but also by an array of circumstantial evidence that is quite significant and potential.

We deem it unnecessary to notice further the various contentions of appellant, as, after careful examination of the whole record, we are entirely satisfied that the defendant was justly convicted and that there is no substantial merit in any of the points made for a reversal.

The judgment and order are therefore affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

43 Cal. App. 408

WINKLER v. LOS ANGELES INV. CO. (two cases). (Civ. 3040.)

(District Court of Appeal, First District, Division No. 2. California. Oct 2, 1919.)

1. INFANTS ⟸58(1)—DISAFFIRMANCE OF CONTRACTS OF PURCHASE.

Under Civ. Code, § 35, minors may disaffirm contracts of purchase actually made by them.

2. INFANTS ⟸58(1)—DISAFFIRMANCE OF CONTRACTS MADE BY PARENT.

Where contracts for the purchase of corporate stock were made by the father of certain minors for their benefit, but without their knowledge, such contracts could not be disaffirmed by the minors; they being the contracts of the father rather than of the minors, who had no power to delegate to the father authority to contract, or to retrospectively make the father their agent, in view of Civ. Code, § 33.

3. INFANTS ⟸100 — ON DISAFFIRMANCE OF CONTRACTS EVIDENCE SUFFICIENT TO SHOW EXECUTION OF CONTRACT BY PARENT.

In a suit by a guardian ad litem to recover money paid for the purchase of corporate stock, upon disaffirmance of the contract by the minors for whom the stock was purchased, evidence *held* to sustain a finding that the contracts were not made by the minors, but by their father.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Separate actions by George C. Kemp, guardian ad litem for Kemp J. Winkler and Lois M. Winkler, infants, against the Los Angeles Investment Company. Judgments after a joint trial for defendant in each case, and plaintiffs appeal. Affirmed.

Wm. M. Morse, Jr., and S. M. Johnstone, both of Los Angeles, for appellants.

Flint & Jutten, H. S. MacKay, Jr., Ed. R. Brainerd, Jr., Wm. R. Flint, and J. H. Schenck, all of Los Angeles, for respondent.

NOURSE, J. George C. Kemp, guardian ad litem for Kemp J. Winkler and Lois M. Winkler, both minors, instituted two separate actions in the superior court on behalf of said minors to recover back money paid for the purchase of stock in the defendant corporation. The actions were tried jointly, and by stipulation are brought to this court on one record. It is alleged that both of the minors were under the age of 16 years when the actions were commenced; that at different times between the 8th day of April, 1910, and the 25th day of April, 1913, they purchased shares of stock from the defendant corporation; and that prior to the commencement of the action each of the defendants

disaffirmed the contracts and demanded the return of the money paid. All of the allegations of the complaints were denied by the defendant, and the court found that it was not true that the plaintiffs entered into any agreement whereby defendant sold and plaintiffs bought shares of stock in said corporation, and that it was not true that the plaintiffs paid any sum of money for said stock, or that they disaffirmed any contracts with the defendant. These findings constitute the only assignment of error upon this appeal; appellants arguing that the evidence is not sufficient to support them.

The material facts are that when each of the minors was about 2 years of age their grandfather, George C. Kemp, delivered to their father, J. H. Winkler, shares of stock of the value of $500 for each, with the intention on the part of the grandfather to make a gift of this stock to each minor, to be held by their father and invested and reinvested by him for the purpose of providing means for their education. From time to time, with the consent of said George C. Kemp, J. H. Winkler sold the stock and invested the proceeds of the sales by loaning some and investing the balance in other stocks. From these investments the original gifts increased from $500 to $746.43 in the case of Kemp J. Winkler, and to $1,269.20 in the case of Lois M. Winkler. During the period from 1910 to 1913 the father of the minors, with the consent of the grandfather, disposed of all of the securities held by him for the two minors, and, without the knowledge or consent of the minors, purchased certain shares of stock of the defendant corporation. Certificates of stock were issued in the name of the minors, and thereafter dividends were made by checks drawn in their names. These checks were all indorsed for payment by the minor in whose name they were drawn and by J. H. Winkler, who received the money. Prior to the commencement of the action a notice of rescission was given to the defendant by the attorneys for the minors upon the ground that the sale of the stock to the minors was a fraud upon them because of misrepresentations as to the value of the stock on the part of the agents of defendant corporation. The action was tried upon the theory that the contracts for the purchase of the stock were the contracts of the minors, made while they were under the age of 18 years, and that this notice of rescission was in effect a notice of disaffirmance of these contracts.

There is no conflict of evidence as to the manner in which the purchases of the stock were made. It appears that the grandfather had great faith in the value of the stock, and frequently urged the father to dispose of the securities which he held for the minors and to invest the proceeds thereof in the stock of this corporation. This was done without the knowledge or consent of the minors. The names of the minors were signed to the contracts of purchase and certain promissory notes by the father without their knowledge or consent, and the stock certificates were issued in their names at the father's request and without their knowledge or consent.

[1, 2] Preliminarily it may be said that under section 35 of the Civil Code, if the contracts of purchase had been actually made by the minors, they could disaffirm and be relieved from any further burdens under them. But in this case the minors did not make any contract, either individually or by agent: First, because they had no knowledge of the execution of any contract; and, second, because they could not give a delegation of power to the father to contract for them. Section 33, Civ. Code. The contracts having clearly been made by the father without the knowledge of the minors, they would become the contracts of the minors only through the adoption of the action of the father, and this could be done only upon the theory that the minors thereby retrospectively made the father their agent. This could not be done under our statute, and the contracts must be deemed, therefore, to be contracts of the father rather than of the minors.

Though these are the issues made by the pleadings, counsel argue at length as to the power and liability of the father as trustee for the minors. It would seem to be apparent that such was the relation of the father to the minors, and that, occupying such position, his powers as to the investment and reinvestment of the funds held by him as such trustee depend upon the terms and conditions imposed by the trustor. But the question of such powers and liability is not put in issue in this case.

[3] The trial court properly held that the contracts were not made by the minors.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

(43 Cal. App. 465)

SALOMON v. CAWSTON OSTRICH FARM.
(Civ. 3043.)

(District Court of Appeal, First District, Division 2, California. Oct. 8, 1919. Hearing Denied by Supreme Court Dec. 4, 1919.)

1. GUARANTY ⊂=27—STRICT CONSTRUCTION OF GUARANTY OF LEASE.

The obligations of a guarantor, as a lessee who assigns and guarantees that his assignee will pay rent, are strictly construed.

2. GUARANTY ⊂=50—RELEASE OF GUARANTY OF LEASE BY ALTERATION OF PREMISES.

Where the lessee of a store assigned the lease, guaranteed the payment of rent by the assignee, and, after a second assignee was in default, the lessor took possession and subdivided the store so as to lease it as two, the original lessee was released from its liability as a guarantor by the change made in the subject to which the guaranty applied, and was not liable to the lessor for the difference between the specified rental and that raised from other tenants.

Appeal from Superior Court, Los Angeles County; H. T. Dewhirst, Judge.

Action by W. J. Salomon against the Cawston Ostrich Farm, a corporation. Judgment for plaintiff for less than claimed, and he appeals. Affirmed.

Bond & Babson, of New York City, and Wm. F. Craig, of Lynn, Mass., for plaintiff.

Donald Barker, of Los Angeles, and Arthur R. Smiley, of New York City, for respondent.

BRITTAIN, J. The plaintiff and appellant sued the defendant as a grantor of a lease made and performable in New York. The trial court rendered judgment for the plaintiff for $2,197.48, the unpaid portion of rent for the month of October, 1914, with certain surcharges. The appellant maintains the judgment should have been for $6,045.36, to include the difference between the rentals specified in the lease and that received between November 1, 1914, and April 1, 1915.

The appellant leased to the respondent, a California corporation, for five years, the most northerly store and basement thereunder, on the Fifth avenue side of the Bristol building, at Fifth avenue and Forty-Second street, in New York. The single store was 17 feet wide. The front of the store consisted of the show windows and entrance, with two stone pilasters. The lease was assigned by the California corporation to a New York corporation of a similar name, and by the latter to a Mrs. Cohen. The landlord consented to each assignment. The trial court accepted the views of the appellant, based on decisions of the New York courts, that the original lessee was the guarantor of each assignee successively for the rents reserved in the lease. Manley v. Berman, 60 Misc. Rep. 91, 111 N. Y. Supp. 711; Ranger v. Bacon, 3 Misc. Rep. 95, 22 N. Y. Supp. 551; Wallace v. Dinniny, 11 Misc. Rep. 317, 32 N. Y. Supp. 159; People v. German Bank, 126 App. Div. 231, 110 N. Y. Supp. 291; Zinwell Co. v. Ilkovitz, 83 Misc. Rep. 42, 144 N. Y. Supp. 815. The respondent prosecutes no cross-appeal from the judgment. It is therefore unnecessary to consider any change in the legal status of the parties which may have resulted from a later express guaranty by the respondent of the performance of the conditions of the lease by the first assignee. The lease provided that, in the event the landlord should take possession of the premises by summary proceedings after the default in rent, he should relet the premises or any part thereof, and the lessee should pay the difference between the amount of rent reserved in the lease and that collected as rent of the demised premises.

In October, 1914, Mrs. Cohen having defaulted in the payment of rent the landlord took possession under summary proceedings. Prior to that time, at the instance of Mrs. Cohen, he had unsuccessfully made some attempt to rent the premises as they were. After taking possession, he made no effort to rent the premises as a whole, but removed the entire front, and by the removal of the two pilasters increased the glass area 4 or 5 feet in width. He also divided the store in two by a longitudinal partition 2 inches thick and put two doors in the front instead of one, thus changing the demised store into two new stores, each somewhat less than 8½ feet wide. None of the changes were made because of needed repairs or for the preservation of the premises.

The plaintiff took possession about November 1st. The changes were completed about November 15, 1914. Neither Mrs. Cohen nor the defendant had any knowledge of, or consented to, the changes.

It was found the plaintiff used due diligence in his efforts to obtain a tenant or tenants, and that he did relet the said premises for sums segregated between the two new tenements for various terms between November 1, 1914, and the end of March, 1915. It was further found that the plaintiff thought two smaller stores would be more rentable than one large store. Upon conflicting evidence, the trial court found that certain affirmative allegations of the answer were true. Among these were that by the alterations the premises were so changed that they were not adapted to the use of one tenant; that the premises were more valuable for rental purposes and more readily rentable as one store than as two; and that, if the alterations had not been made, the plaintiff could have obtained in the reletting an amount of rental equivalent to the rental payable under the lease. There was sufficient evidence to sus-

tain these findings. Upon them the trial court concluded that by the summary proceedings and the subsequent acts of the plaintiff the lease was terminated, and that the plaintiff was entitled to recover the net amount of rents, with surcharges unpaid for the month of October, 1914, in which the plaintiff resumed possession. The implication necessarily follows that the plaintiff was not entitled to the difference between the rents collected and those reserved in the lease after the lease was terminated. The only real question presented on this appeal is whether or not, despite the evidence and the findings, the conclusion of law upon this subject was correct.

The appellant contends that, since under the lease he had the right to relet the premises in whole or in part, he had the further right to divide them into two stores. He relies upon the doctrine announced in New York:

"The spirit of the agreement required him to lease again the same subject which he had demised to the first lessee. If he elected to make it more valuable, it was without any authority from the lessee or his surety, the defendant. They cannot complain, as they are not prejudiced by the improvements; and, if they are benefited by them, it is an advantage which the plaintiff has chosen to confer upon them without any agreement or obligation on their part to reimburse him." Hackett v. Richards, 13 N. Y. 138; McCready v. Lindenborn, 172 N. Y. 400, 65 N. E. 208.

[1, 2] The respondent maintains that its obligation as a guarantor could not be extended beyond the terms of the guaranty. Under the New York rule, as announced in the quotation just made, the agreement required the landlord to lease the same subject which he had demised to the first lessee. In the present case the landlord entirely changed the identity of the premises demised to the first lessee and created two new tenements. Under the New York case it was held that the lessee and his guarantor could not complain because they were not prejudiced by the improvements to the original premises. In this case the trial court found that the guarantor was injured by the changes which had been made, because the premises thereby became less rentable, of lower value, and incapable of being rented as a single tenement. The appellant argues that the finding of the trial court is not supported by the evidence, because under the present lettings the rentals are $20,000 per annum or $2,000 a year higher than the highest rentals reserved in the original lease. The lease provided that, if increased rentals were collected, the excess over the reserved rents was to be divided between the lessee and the owner; but the owner reserved the right at any time within six months, by notice, to deprive the lessee of the benefit of this clause. In the present case the landlord sought to recover the deficiency of rentals for the period of six months. The argument, based upon the profits made by the landlord after the expiration of the six months, does not tend to show that he might not have rented the premises originally demised for an amount equivalent to the reserved rentals during the six months. The finding of the trial court upon this subject is conclusive of the appellant's claim in this regard. The utmost the respondent did was to guarantee the deficiency of rentals of the subject of the original lease. In New York, as well as in California, the obligations of the guarantor are strictly construed. Any change made by the person to whom performance is due in the subject to which the guaranty applies, without the knowledge or consent of the guarantor, releases the latter. Page v. Krekey, 137 N. Y. 307–314, 33 N. E. 311, 21 L. R. A. 409, 33 Am. St. Rep. 731; City of New York v. Clark, 84 App. Div. 383, 82 N. Y. Supp. 855; Wilkesbarre Realty Co. v. Powell, 86 Misc. Rep. 321, 149 N. Y. Supp. 209.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

181 Cal. 479

UNION OIL CO. OF CALIFORNIA v. PURISSIMA HILLS OIL CO. (L. A. 5242.)

(Supreme Court of California. Oct. 29, 1919.)

1. LIMITATION OF ACTIONS ⊜180(5)—PLEADING BAR BY DEMURRER.

The bar of the statute of limitations should have been set up by a demurrer calling attention to the proper section of the Code.

2. APPEAL AND ERROR ⊜1170(3)—SUSTAINING DEMURRER TO ANSWER SETTING UP SHAM DEFENSE HARMLESS.

In an action for the price of oil well casings sold, where the defense of breach of warranty was palpably a sham, error in sustaining demurrer to the part of the answer which set up the defense was harmless, and no ground for reversal under Const. art. 6, § 4½.

3. LIMITATION OF ACTIONS ⊜141—WAIVER OF BAR BY ACKNOWLEDGMENT AND PROMISE TO PAY.

Where the buyer of oil well casing, within four years prior to commencement of the seller's action for the price, through its agent and president acknowledged its obligation to pay for the casing, and promised to pay, signing by its president, the case was taken out of the purview of Code Civ. Proc. §§ 312–363.

4. LIMITATION OF ACTIONS ⊜143(1) — AUTHORITY OF PRESIDENT OF CORPORATION TO WAIVE BAR.

In view of Code Civ. Proc. § 1962, subd. 3, oil company which purchased well casing *held* bound by the acts of its president in acknowledging the indebtedness and promising to pay it, to effect waiver of the bar of the statute of limitations within Code Civ. Proc. § 360, the by-laws of the company authorizing the president in his discretion to proceed with the business of developing the land of the company, also authorizing him to procure a drilling rig and necessary appliances, while the promises of the president, signed by him personally, were made on letter heads using the corporate name.

Department 2.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Union Oil Company of California, a corporation, against Purissima Hills Oil Company, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Manning, Thompson & Hoover, of Los Angeles, for appellant.

Glen E. Huntsberger, of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued on two counts: One for balance due for goods, wares, and merchandise sold at an agreed price; the other for the reasonable value of such goods. The judgment was in favor of plaintiff for the full amount demanded. Defendant appeals.

The goods sold and delivered by plaintiff's assignor consisted principally of casing necessary for the use of defendant in the creation of an oil well on its property. The merchandise was delivered between the 31st of January and the 31st of August, 1911. Defendant paid $1,500 on account. The judgment prayed for and given was for a balance of $2,791.25. The complaint was filed July 8, 1916, more than four years after the last delivery of supplies to defendant, but it was alleged by the plaintiff and found by the court that within four years of the institution of the suit defendant acknowledged the indebtedness in writing, and thereby promised and agreed to pay the amount due.

Defendant, by its answer, denied the indebtedness, and alleged that the sum of $1,500 paid was the full and reasonable value of the goods, denying also that any certain price had been agreed upon. The answer also set up the bar of sections 337 and 339 of the Code of Civil Procedure; and by way of counterclaim averred breach of warranty, in that the casing supplied was entirely unfit for the purpose for which plaintiff's assignor had warranted it. The damage caused by such breach of warrant was placed by the pleadings at $5,000, but in this part of the answer defendant prayed for nothing more than that plaintiff take nothing by its suit.

Plaintiff's general demurrer to the part of the answer averring a counterclaim was sustained, admittedly upon the ground that such claim was barred by the statute of limitations.

At the trial defendant offered no proof regarding the reasonable value of the property purchased, the only issue being whether or not the statute of limitations operated in favor of the defendant. This issue was determined in favor of the plaintiff.

[1, 2] Appellant insists that the judgment should be reversed because of error in sustaining plaintiff's general demurrer to defendant's counterclaim and error of the trial court in holding that plaintiff's claim was not barred. Undoubtedly, the bar of the statute of limitations should have been set up by a demurrer calling attention to the proper section of the Code. Bliss v. Sneath, 119 Cal.

526, 51 Pac. 848; California Safe Deposit & Trust Co. v. Sierra, etc., Co., 158 Cal. 690, 698, 112 Pac. 274, Ann. Cas. 1912A, 729; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672. But appellant was not injured by the ruling because at the trial it was demonstrated that the defense of breach of warranty was wholly frivolous and groundless. The casing was delivered; was used in the oil well; and payments were made on the purchase price more than a year after the alleged warranty. In all of the correspondence between defendant's president and the plaintiff or its assignor (to which we shall presently refer) is found not one word of protest regarding the quality of the casing. There was absolutely nothing in defendant's pleading to the effect that defendant had ever demanded damage for any breach of any contract of warranty, or had sought rescission because of violation of any such agreement under section 1786 of the Civil Code. The defense of breach of warranty was so palpably a sham that the error in sustaining the demurrer to that part of the answer was harmless. Section 4½, article 6, Constitution of California.

[3] The court found that payments on account were made by defendant within four years prior to the commencement of the action; that one Howard A. Broughton, president of defendant corporation during all but one year of the period between the purchase of the casing and the filing of plaintiff's complaint, and a director during all of that time, "represented the defendant company in all its negotiations with the Union Well Supply Company", plaintiff's assignor, and that in a series of letters between the seller and the purchaser of the casing "the letters written by the said Howard A. Broughton acknowledged the aforesaid obligation of the said defendant company, and contained a promise to pay said obligation, and were signed by the said Howard A. Broughton, and sent to and received by the said Union Well Supply Company, and were written and received within four (4) years prior to the commencement of this action."

The findings are sustained by the proof, and are sufficient to take the case properly out of the purview of title 2, part 2 of the Code of Civil Procedure.

[4] It was proved without contradiction that payments of $500 each were made, respectively, on April 12, 1912, June 10, 1912, and September 19, 1912. These payments were credited to defendant on the account generally, and were not applied to any particular items. Respondent insists that the account was an open book account, and that the statute of limitations runs from the payment of the last sum of $500, which was made within four years of the filing of its complaint, citing in this behalf subdivision 2, § 337, Code of Civil Procedure, Mercantile Trust Co. v. Doe, 26 Cal. App. 246, 146 Pac. 692, Barron v. Kennedy, 17 Cal. 574, Concannon v. Smith, 134 Cal. 14, 66 Pac. 40, and McCormick-Ormand Co. v. Nofziger Bros. Lumber Company, 10 Cal. App. 241, 101 Pac. 688. It is unnecessary to determine whether the last payment alone would take the matter out of the statute of limitations, because in addition to that very significant partial settlement of the debt the defendant did in writing acknowledge the said obligation, less than four years before the filing of the complaint. It is true that the letters of acknowledgment, written upon the stationery of defendant, were signed by Mr. Broughton personally. Appellant's principal contention is that he had no power to bind the corporation, but the court properly found to the contrary. By the by-laws the president was authorized in his discretion to proceed with the business of developing the land of the company. He was authorized to procure a drilling rig and all necessary appliances. True, he was to have, "subject to the advice of the directors," direction of the affairs of the corporation, yet their minutes fail to show any meeting of the directory between February 26, 1908, and January 1, 1913. He, and he alone, conducted all business with the assignor of plaintiff. He, and he only, replied to letters addressed to the corporation. It is apparent from all of these facts that defendant is bound by his acts as the managing officer of the corporation, which may not now, after so long acquiescence, repudiate his negotiations with plaintiff's assignor. Section 1962, subd. 3, C. C. P.; Nicholson v. Randall Banking Co., 130 Cal. 533, 62 Pac. 930; Chandler v. Hart, 161 Cal. 405, 119 Pac. 516, Ann. Cas. 1913B, 1094; Newton v. Johnston Oregon & Piano Manufacturing Co., 180 Pac. 7.

In his letter to plaintiff of November 30, 1912, Mr. Broughton wrote:

"My understanding is that I promised you some money by the first of the month. I did this with the assurance that I could safely make such a promise but have been grievously disappointed in receiving money that I had a right to depend upon."

On December 9, 1912, he wrote a letter to plaintiff's representative containing, among other things, the following expressions:

"I promised you $500 by December 1st which I find I cannot pay, and I am primarily interested in showing you that I did not make you the promise without justification. I am generally pretty careful about making definite promises, but in this instance I felt I was absolutely safe in doing so. * * * Several days before going down to see you I wrote to my brother, sending him the original letters which I had received from your credit department, and explaining to him the necessity of making you a substantial payment, and asked him to wire me whether he would be able to do so. On the 29th of October he wired me that he would

send $2,000 in ten days, and that I could make definite promises based upon this. I received this wire while in Los Angeles, and consequently felt perfectly safe in making you the promise which I made you. * * * The stockholders have until the end of this month in which to pay the assessment. At the end of that time we intend to reorganize and get out among our stockholders and get a subscription for $10,000 worth of stock. Out of this we will pay you in full and pay Fairbanks-Morse a small balance we owe them, which will be our total indebtedness. We will not commence work again on the well until you are fully paid.

"With the assurance we have of getting oil there, I cannot see any reason why we shall not be able to raise the sum stated, and I shall insist on raising that amount at least."

On March 24, 1913, he wrote:

"I wrote Mr. Berry fully some time ago as to our plan. It is to raise $10,000.00 with which to complete our well, out of which we will pay you our indebtedness before work is resumed.

"I have nearly $6,000.00 subscribed and am working on several lines which ought to bring in the balance before long. I had expected to have it subscribed before this time, but find it slower work than I anticipated.

"I am doing the very best I can and will work it out all right and your bill will be paid, but it takes hard work to enthuse people on the oil situation now."

And on November 1, 1913, after setting forth a plan of getting the stockholders in Honolulu to co-operate with certain investors in financing the company, he closed with the following paragraph:

"I am doing everything that I possibly can, and, as I have stated before, this bill will be paid before we start work."

It is to be remembered that the communications of Mr. Broughton were written upon letterheads upon which, in addition to the corporate name, was printed his own as president; that he frequently used the pronoun "we" in reference to the indebtedness and the promise to pay it; that throughout the letters various references were made which were appropriate to the corporation; and that Mr. Broughton had very plenary powers in reference to binding the corporation in the very matter of this development. Under all the circumstances it would be sacrificing substance to form for us to hold that he could take the indebtedness out of the purview of the statute by subscribing the corporate name and adding "per Howard A. Broughton, President," yet could not do so by the subscription of his own signature alone. We think that under the circumstances the letter head was incorporated by reference in the communications, and that the signature of the president appearing at the foot of each letter constitutes a sufficient promise to take the claim out of the bar of the statute of limitations.

All of the quotations from Mr. Broughton's letters, taken in connection with his undoubted authority to bind the defendant corporation, fully justify the findings of the court and the conclusion of law that an acknowledgment of the debt had been made as required by section 360 of the Code of Civil Procedure, and that such new promise to pay took the indebtedness out of the bar of the statute of limitations.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

181 Cal. 537

In re PAGE'S ESTATE. (L. A. 6232.)

(Supreme Court of California. Nov. 19, 1919.)

1. WILLS ⟸506(2)—LEGACY TO "LAWFUL HEIRS" OF WIDOW TESTATRIX; RIGHTS OF HUSBAND'S HEIRS.

Under will of widow with no issue or parents, leaving one-fourth of residue to deceased husband's "lawful heirs" and the other three-fourths to her "lawful heirs," the three-fourths should be distributed to persons who would have inherited it in absence of will; the husband's heirs being entitled, as widow's heirs under Civ. Code, § 1386, subd. 8, to all of such portion of residue inherited by widow from husband and to one-half of what had been community property, notwithstanding legacy to them of one-fourth of residue, or use of term "lawful heirs" in providing for such legacy; and wife's heirs, under subdivisions 2 and 3 of section 1386, being entitled to her separate property and that acquired after husband's death, and to other half of community property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lawful Heirs.]

2. WILLS ⟸524(2)—TIME OF ASCERTAINMENT OF LAWFUL HEIRS.

Under widow's will, giving legacy to "lawful heirs" of deceased husband, the term "lawful heirs" is to be construed as of the date of the death of testatrix, and to include only those who were his heirs at that time, excluding those who died before death of testatrix.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Philura B. Page. From a decree of final distribution of estate on application of Frank Bryson, administrator, Zeno T. Page and others, heirs of deceased, appeal. Reversed.

Stewart & Stewart, of Los Angeles, for appellants.

George L. Greer, of Los Angeles, for respondents.

WILBUR, J. This is an appeal from a decree of final distribution of the estate of Philura B. Page, a widow, who left no issue,

no father, and no mother. The principal question is as to the proper construction of the following clause of the will of the deceased:

"I give, bequeath and devise to Russel G. Page, my husband, all the rest, residue and remainder of my estate of whatever kind or nature or wherever situated, and in the event that my husband dies before my death, then I give, bequeath and devise one-fourth of the rest, residue and remainder of my estate to his lawful heirs and the balance, after deducting said one-fourth, to be equally divided among *my lawful heirs*." (Italics ours.)

[1] The husband, Russel G. Page, predeceased the testatrix March 17, 1912. A portion of the property owned by the testatrix at the time of her death was the community property of herself and her deceased spouse, and a portion was the separate property of such deceased spouse, and as to other property of the testatrix, while it is claimed to have been the community property of herself and her deceased spouse, there is no finding on the question, and that it may have been her separate property, although we express no opinion on that matter. In the absence of a will and issue, the right to succeed to the property of a widow, derived from her deceased spouse, is regulated by section 1386, subdivision 8, of the Civil Code, and as to her separate property acquired before or after the death of the spouse by subdivision 2 or 3 of section 1386. It is held in Estate of Watts, 175 Pac. 415, that where there is no issue a devise and bequest by a widow "to my heirs" is to be construed as a devise and bequest to those who would take under section 1386, subdivision 8, of the Civil Code, where such persons would succeed to the property in the absence of a will. It will be observed, then, that different heirs of the deceased inherit the different classes of property. Her separate property owned by her during the marriage or acquired by her subsequent to the marriage would be distributed in accordance with section 1386, subdivision 3. The common property of the testatrix and her deceased husband would be divided between the relatives of herself and the relatives of her deceased husband. The separate property of the deceased husband would go to his relatives alone. In view of the above decision, the only difficulty in interpreting the clause of the will in question arises from the fact that a direct devise and bequest is made to the "lawful heirs" of the predeceased spouse, and there was, therefore, apparently in the mind of the testatrix a distinction, to use her own language, between "his lawful heirs" and "my lawful heirs," which might lead to the conclusion that when she referred to "my lawful heirs" she meant to exclude "his lawful heirs." The distribution was ordered on this theory, and therefore only the heirs designated in section 1386, subdivision 3, were permitted to share in the "three-fourths" left to "my lawful heirs." The difficulty of interpretation arises rather from the character of the property left by the testatrix and the peculiar provisions of the law governing its succession than from the language used in the will. If the property had been entirely the separate property of the testatrix, or acquired by her subsequent to her husband's death, there would be no difficulty about the provision of the will. The heirs of the husband would take one-fourth, and the heirs of the wife—that is to say, those persons designated in subdivision 3 of section 1386—would take the remaining three-fourths. As the language of the will is plain and unambiguous, the fact that some of the property to be disposed of thereby was community and some other separate property of her deceased husband, to be distributed under the provisions of section 1386, subdivision 8, is not sufficient to change the interpretation that otherwise should be placed upon the plain and unambiguous terms of the will. In other words, the fact that the undivided one-fourth devised and bequeathed to "his [the husband's] lawful heirs" and the undivided three-fourths of the residue bequeathed and devised to "my [the wife's] lawful heirs" may in whole or in part be distributed to the same persons is not decisive of the question as to who the testatrix intended to designate by the words "my lawful heirs," for she made no attempt to limit or define the term "heirs," leaving that to the law. The separate provision for the lawful heirs of the husband does not deprive them of their rights, if any, as heirs of the wife. The decree is erroneous, in so far as it fails to distribute such portions of the estate as come within the provisions of section 1386, subdivision 8, in accordance with the provisions thereof.

[2] Another difficulty arises in the interpretation of the provisions of the will. The appellants contend that, as to the one-fourth left the heirs of the deceased husband, such heirs must be determined as of the date of *his* death, and, inasmuch as some of such heirs died before the testatrix, that the decree distributing such one-fourth to the persons who would have been the heirs of the deceased, had he died at the same time as did the wife was erroneous. We think, however, that the decision of the trial court in this respect was correct, that the term "his lawful heirs" is to be construed as of the date of the death of the testatrix, and to include only those who were his heirs at that time, excluding those who died before the death of the testatrix.

It follows that one-fourth of the residue should have been distributed to the heirs of the deceased spouse, to be determined as of the date of the death of the testatrix; that the remaining three-fourths should be distributed in accordance with the provisions of

section 1386, subdivision 8, of the Civil Code, except such portions, if any, as were the separate property of the testatrix, or acquired by her after her husband's death, and as to that portion it should be distributed in accordance with section 1386, subdivision 3, of the Civil Code. It is conceded by the respondents that, the bequest to the brother, Bradford G. Bass, having lapsed, the property should be divided among the residuary legatees.

It is ordered that the portion of the decree relating to the distribution of the residue of the estate and that portion of the decree distributing the legacy of Bradford G. Bass to Edward L. Bass, Ellen F. Brown, and Clemie R. Pratt be reversed, and that the property distributed to the heirs of Bradford G. Bass be distributed as part of the residue; that said residue, consisting of the separate and community property of the deceased spouse, be distributed in accordance with subdivision 8, section 1386, of the Civil Code, and the balance, if any, be distributed in accordance with subdivision 3 of section 1386 of the Civil Code; that the trial court take such evidence as may be necessary to determine the rights to such residue.

We concur: LENNON, J.; MELVIN, J.

181 Cal. 519

MOSS v. SMITH et al. (L. A. 5328.)

(Supreme Court of California. Nov. 15, 1919. Rehearing Denied Dec. 15, 1919.)

1. APPEAL AND ERROR ⟸1011(1)—REVIEW OF FINDING ON CONFLICTING EVIDENCE.

That there was evidence which would justify a conclusion contrary to that reached by the trial court requires the application of the rule that where there is a substantial conflict in the evidence the decision of the trial court on the facts is binding on the court on appeal.

2. SALES ⟸441(4)—EVIDENCE SUFFICIENT TO SUPPORT JUDGMENT FOR BREACH OF WARRANTY.

In action by buyer of automobile for breach of warranty that automobile was free from defects in material or workmanship, evidence *held* to justify judgment for plaintiff for $2,000 under Civ. Code, §§ 3300, 3313.

3. SALES ⟸442(4)—DATE FOR MEASURE OF DAMAGES ON BREACH OF WARRANTY.

Where buyer and sellers of automobile contemplated that engine should be used continually, and that defects discovered should be remedied from time to time as discovered, the time of the first discovery of the breach may be taken as the proper date for fixing the measure of damages, where it is ultimately ascertained that attempts to remedy the defects are unavailable.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Leon F. Moss against Clarence F. Smith and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Leo V. Youngworth and Frank P. Doherty, both of Los Angeles, for appellants.

Leon F. Moss, of Los Angeles, for respondent.

WILBUR, J. This action was brought by the plaintiff to recover damages for a breach of a written warranty given by the defendants at the time of the purchase by plaintiff from them of an automobile. Plaintiff recovered a judgment of $2,000. Defendants appeal.

The automobile in question was guaranteed in the following language, to wit:

"To be free from defects in material or workmanship for one year from the 13th day of October, 1914, and will replace such defective part or parts in the car absolutely free of charge when delivered at our place of business."

It is conceded that the engine and clutch of the automobile in question were defective, but the appellants claim that the defects were those of design instead of material or workmanship. Respondent alleged that the automobile was defective in both material and workmanship, in that the clutch would not operate properly in certain specified particulars, and that the engine on said automobile, consisting of six cylinders and pistons and other parts, was so defective "that it would not properly operate and drive said automobile, in that the pistons did not properly fit the cylinders, the cylinders were not properly put together and placed on said engine, and were not properly in line, and in other respects concerning which plaintiff is not informed, but defendants are fully informed. The court found the facts in accordance with the allegations of the complaint, and also found that but for the defects in said automobile the same would have been worth $3,000, but that in the condition in which the same was sold and delivered to respondent same was at the said time of the value of $750, and no more.

[1] The question presented is whether or not the evidence is sufficient to justify the finding of the trial court that the defects were those of workmanship and material, and not of design. The evidence upon the subject covers over 450 pages of the transcript. It would serve no useful purpose to analyze this evidence. Suffice it to say that evidence was introduced showing the representations made by the manufacturers through the appellants to the respondent as to the design of the automobile and its engine. These statements, if believed by the

court, as they no doubt were by the respondent in purchasing the car, fully justified the conclusion that the defective operation of the car was due, not to the imperfect design of the engine, but to faulty workmanship in its construction. The fact that there was evidence which would have justified a contrary conclusion merely requires the application of the rule that where there is a substantial conflict in the evidence, the decision of the trial court upon the facts is binding upon this court.

[2, 3] Appellants contend that there is not sufficient evidence as to the damages to justify the judgment, for the reason that the testimony was as to the difference in value of the automobile at the time it was purchased had it been in the condition warranted and its value in the condition in which it actually was, and that the proper amount of damages is the difference between its actual value at the time of the discovery of the defects and its value had it been as represented. It was alleged and the court found that the defects were discovered within a week after the purchase. It is true that from that time forward for nearly a year respondent and appellants had dealings with reference to the machine, respondent from time to time calling attention to the defective condition of the engine of the automobile and the appellants conceding the defects and endeavoring to remedy them by various changes in the engine and repairs to the clutch. In November, 1915, respondent requested certain repairs to the machine, and at that time the appellants requested that he take the machine to Mr. John Stintin for repair. After the report of Mr. Stintin on November 16, 1915, respondent notified the appellants that they must either take the car off his hands and furnish him a new car, or that he would be compelled to sue them for damages. Thereafter repairs were made by said Stintin at an aggregate cost of $353.84, which was paid December 29, 1915. These repairs proving unsuccessful, respondent brought suit January 25, 1916, and in July, 1916, traded in said automobile on a new machine for the allowance of $750. The entire distance traveled by the automobile was about 5,000 miles. In view of these facts we see no reason why the evidence introduced was insufficient to justify the conclusion of the court as to the amount of damages suffered by the plaintiff. If we assume that the rule adopted by this court in the cases involving the sale of nursery stock (Shearer v. Park Nursery Co., 103 Cal. 415, 37 Pac. 412, 42 Am. St. Rep. 125; Burge v. Albany Nurseries, 176 Cal. 313, 168 Pac. 343) controls, in that the measure of damages is to be ascertained at the time that the breach of the warranty is discovered, there is no reason why, in a case of this sort, where it is contemplated by the parties that the engine guaranteed should be used continually, and that defects discovered from time to time should be remedied as discovered, the time of the first discovery should not be taken as the proper date for fixing the measure of damages, where, as here, it is ultimately ascertained that the attempts to remedy the defects were unavailable. A substantial part of the warranty was that the appellants would "replace such defective part or parts in the car absolutely free of charge." Respondent refrained from bringing suit until it was apparent that it was impossible for the appellants to make good their warranty in that respect, and thereafter sued for damages suffered. The evidence was sufficient to justify the finding of the trial court as to the amount of damages. See sections 3300 and 3313 of the Civil Code.

The judgment is affirmed.

We concur: LENNON, J.; MELVIN, J.

181 Cal. 508

A. R. G. BUS CO. v. BOARD OF PUBLIC UTILITIES OF CITY OF LOS ANGELES. (L. A. 6341.)

(Supreme Court of California. Nov. 14, 1919.)

CERTIORARI ⊂=23—REVIEW OF LEGISLATIVE ACTS.

Certiorari will not lie against the board of public utilities of the city of Los Angeles to review an act purely legislative in character.

In Bank.

Application by A. R. G. Bus Company for certiorari prayed to be directed to the Board of Public Utilities of the City of Los Angeles to review a legislative act. Application denied.

Alfred H. McAdoo, of Los Angeles, for petitioner.

PER CURIAM. The court is of the opinion that the action of the board of public utilities of the city of Los Angeles, which is sought to be reviewed herein, was purely legislative in character. It follows that certiorari will not lie.

Solely on that ground the application is denied.

All concur.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

181 Cal. 530

BLECH v. JEAL et al.

JEAL et al. v. BLECH et al.

(L. A. 5278.)

(Supreme Court of California. Nov. 15, 1919.)

MORTGAGES ⟸280(4)—PURCHASER OF PORTION OF MORTGAGED PREMISES ENTITLED TO HAVE MORTGAGE SATISFIED OUT OF REMAINING PORTION.

Where mortgagors at time of their sale of a portion of lands subject to one mortgage agreed that upon payment by purchaser of $3,000 to apply on the principal of the mortgage they would execute a mortgage on certain lands to secure the repayment to the purchaser of said sum, and thereafter one acquired the previously existing mortgage as trustee for purchaser, and without consideration released therefrom the land conveyed, *held*, that trustee was entitled to have such mortgage satisfied out of the remaining mortgaged lands; $3,000 of the principal of the mortgage remaining due and unpaid, and the promised mortgage never having been executed.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Charles K. Blech against J. W. Jeal and others, in which J. W. Jeal and Jessie Jeal filed cross-complaints against Charles K. Blech and another. From the judgment rendered, the cross-complainants appeal. Affirmed.

Crandall & Edmonds, E. Earl Crandall, and C. L. Welch, all of Los Angeles, for appellants.

F. D. R. Moote, of Los Angeles, for respondents.

LENNON, J. This is an appeal from a judgment upon the judgment roll alone. The question presented for our determination is whether or not the findings support the conclusion of law that respondent Blech is entitled to have a mortgage held by him in trust for respondent Rutledge satisfied out of the lands of appellants.

From the findings it appears that appellants, defendants and cross-complainants below, executed a note wherein they promised to pay to one Earle L. Roberts the sum of $9,500. At the same time appellants executed a mortgage on various parcels of land owned by them to secure this note. By assignment respondent Blech became the owner of the note and mortgage which he holds in trust for respondent Rutledge. Three thousand dollars of the principal sum remains due, owing, and unpaid. A portion of the land covered by the mortgage was conveyed by appellants to respondent Rutledge prior to the time at which she acquired the equitable title to the note and mortgage. Mrs. Rutledge assumed no personal obligation to pay the mortgage indebtedness, which had at the time of the conveyance been reduced to $8,500. Respondent Blech, subsequent to his acquisition of the note and mortgage as trustee for Mrs. Rutledge, without consideration, released from the mortgage the land conveyed to her by appellants.

Appellants contend that the above-mentioned release was in effect a fraud upon them. In this behalf it is argued that, when Mrs. Rutledge accepted the conveyance of the land subject to the mortgage, she undertook, as between herself and appellants, to pay part of the mortgage indebtedness. The existence of this obligation, which appellants assert should be implied from the facts surrounding the conveyance, is further supported by the argument that the debt for which the land was liable must presumably have been considered in determining the price which Mrs. Rutledge was required to pay appellants for the land.

Assuming, although by no means admitting, that such would be the interpretation to be placed upon the transaction in the absence of an express agreement to the contrary, respondents rely upon two agreements executed by appellants and Mrs. Rutledge at the time of the conveyance. Respondents allege that by these agreements Mrs. Rutledge undertook to pay $5,500 of the mortgage indebtedness, and that appellants agreed to pay the remaining $3,000; it being further stipulated that, should appellants fail to pay this portion of the debt as agreed by them, and it should, therefore, become necessary for Mrs. Rutledge to advance the entire sum in order to secure a release, appellants would execute a mortgage on certain land owned by them to secure the repayment to Mrs. Rutledge of the sum so advanced.

Although the court found that appellants had been guilty of a breach of the agreements collateral to the contract for the sale of the land to Mrs. Rutledge, appellants assert that there is no sufficient finding as to the terms of the said agreements to enable the judgment to be supported on the theory that the mutual obligations of appellants and Mrs. Rutledge with respect to the mortgage indebtedness were determined by express agreement at the time of the sale. This contention is not sustained by the record. In the finding numbered XIII the court finds that, at the time of the sale of the property to Mrs. Rutledge, appellants agreed that, upon the payment by Mrs. Rutledge of the sum of $3,000 to apply on the principal of the mortgage indebtedness, they would execute a mortgage on certain land to secure the payment to her of this sum by them, and that at the same time Mrs. Rutledge agreed to credit on the sum so to be secured to her

any payments made by appellants and applied to reduce the mortgage indebtedness. This finding is fairly, if not necessarily, subject to the construction that the parties agreed that appellants should pay $3,000 of the debt, and that Mrs. Rutledge should pay the remainder.

It follows that appellants cannot successfully contend that the obligations of Mrs. Rutledge are to be determined merely by implication from the facts surrounding the conveyance of the land sold to her by them. The appeal is based upon this contention, and is therefore without merit.

The judgment is affirmed.

We concur: MELVIN, J.; WILBUR, J.

181 Cal. 509

GRUMMET v. FRESNO GLAZED CEMENT PIPE CO. et al. (S. F. 8397.)

(Supreme Court of California. Nov. 15, 1919.)

1. TRIAL ⟸165—PRESUMPTIONS OF TRUTH OF EVIDENCE ON MOTION FOR NONSUIT.

A motion for nonsuit assumes as true every fact which the evidence and presumptions fairly deducible therefrom tend to prove, and which was essential to entitle plaintiff to recover.

2. CORPORATIONS ⟸319(7) — PRIMA FACIE CASE IN ACTION FOR SALARY.

In an action by an assistant manager of a corporation for a balance due on salary, it was not necessary for plaintiff, in order to make out a prima facie case, to prove that his employment had been especially authorized by the board of directors, or that the president and manager had acted on the advice of the directors; notwithstanding that the by-laws of defendant corporation gave the president direction of the affairs of the corporation, subject to the advice of the directors.

3. CORPORATIONS ⟸308(11)—SUFFICIENCY OF EVIDENCE IN ACTION FOR SALARY TO BAR NONSUIT.

In an action by the assistant manager of a corporation against the corporation for a balance due on salary, evidence *held* to make a prima facie case for plaintiff, so that it was error to grant a nonsuit.

4. CORPORATIONS ⟸432(2)—POWERS OF OFFICERS; AUTHORITY TO HIRE EMPLOYÉS.

In an assistant manager's action against a corporation for salary, it was not necessary for plaintiff to show that the president was authorized to hire him, where the services were rendered to and accepted by defendant with knowledge and consent of its president in the ordinary course of business; it being presumed that the acts of the president pertaining to the business of the corporation not clearly foreign to his powers were authorized.

In Bank.

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by John Grummet against the Fresno Glazed Cement Pipe Company, a corporation, and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

A. W. Carlson and W. P. Thompson, both of Fresno, for appellant.

Miles Wallace, of Fresno, and J. E. Light, of Berkeley, for respondents.

LAWLOR, J. This is an appeal from a judgment of nonsuit in an action upon contract brought by the plaintiff against the defendant corporation for a balance of $2,340, alleged to be due the plaintiff as salary under a contract of hire; it being alleged that he was employed by the said corporation through H. H. Backer, the president and manager thereof, in the capacity of assistant manager, at a salary of $150 per month.

From the record before us it appears that plaintiff's salary was to begin on September 1, 1914, and continue until he was discharged, or he resigned; that he entered upon his duties as assistant manager of said defendant corporation in the month of August, 1914, and continued until May 10, 1916; that plaintiff was never discharged from said employment; that at one time while acting as secretary pro tem. of the corporation he tendered his resignation, which was not accepted; that, according to the bill of particulars which was stipulated into the record in lieu of the books of account, the plaintiff was credited with salary at the rate of $150 per month from September 1, 1914, to May 10, 1916—a total of $3,050—on account of which there was paid to the plaintiff in varying sums a total of $710, leaving a balance due of $2,340.

At the close of plaintiff's case the defendant corporation made a motion for nonsuit. The motion was granted on the ground that the plaintiff had not made out a prima facie case because he had not shown that the president and manager of the defendant corporation was specially authorized by the board of directors to make the contract of employment sued on herein. On appeal the respondent argues that plaintiff failed to show that the said president and manager had acted upon the advice of the board of directors as provided in section 8 of the by-laws. Section 8 reads as follows:

"The board of directors at the regular meeting shall elect one of their number president. The president, or, in his absence, the director appointed as above provided has these powers:

"Under 3 (b). Shall call the directors together whenever he deems it necessary *and shall, subject to the advice of the directors, have direction of the affairs of the corporation,* and shall discharge such other duties as may be required by the by-laws." (Italics ours.)

On the other hand, the appellant contends:

"That he could, and did, make out a prima facie case without proving either of these things, and that such proofs were not necessary to make out his case in the first instance."

The one question to be decided on this appeal is: Was the motion for a nonsuit properly granted?

[1] The law governing motions for nonsuit is well settled in this state. In Marron v. Marron, 19 Cal. App. 328, 125 Pac. 914, it was said:

"A motion for nonsuit assumes as true every fact which the evidence, and presumptions fairly deducible therefrom, tend to prove, and which was essential to entitle the plaintiff to recover. Estate of Arnold, 147 Cal. 583, 82 Pac. 252. On such motion the evidence must be taken most strongly against the defendant. Contradictory evidence must be disregarded (In re Daly, 15 Cal. App. 329, 114 Pac. 787), and the motion denied if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence (Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Vermont Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143). The rules as to a nonsuit are the same, whether the trial is by the court or by a jury. Freese v. Hibernia S. & L. Soc., 139 Cal. 394, 73 Pac. 172."

[2, 3] It is clear from the above authorities that it was not necessary for the appellant in order to make out a prima facie case to prove that his employment had been specially authorized by the board of directors, or that the president and manager had acted on "the advice of the directors" when he employed the appellant. There was "substantial evidence tending to prove plaintiff's case," for it appears in evidence from the testimony of plaintiff, witnesses George C. Thomas, bookkeeper, Reginald V. Smith, who succeeded Thomas as bookkeeper, J. E. West, secretary, and defendant H. H. Backer, president and manager, that the plaintiff had been engaged by the president and manager of the corporation; that he performed services for the corporation; that the employment continued for nearly two years; that plaintiff's name appeared as assistant manager in the advertising of the defendant corporation; and that the books of the corporation showed that he received a fixed compensation for his services, $710 of which had been paid him, the balance of $2,340 standing credited to his account on the books. Upon this showing the motion for a nonsuit should have been denied. In the determination of such a motion the trial court is not to pass on the full effect of such evidence or consider contradictory evidence, but simply to decide whether the evidence on its face substantially tends to establish the cause of action. We think the plain tendency of the evidence before the trial court was to establish a contract of employment between the appellant and the respondent. The question of special authorization being properly a matter of defense was not a necessary element in making out a prima facie case. Referring to the power of the president of a corporation to make contracts, it was said in Skinner Mfg. Co. v. Douville, 54 Fla. 251, 44 South. 1014:

"It is argued that the president of the corporation was not shown to have the power to make a contract for the sale of the property, and therefore no authority to make a contract for commissions. Any unusual restrictions in the charter powers of the corporations are within its peculiar knowledge rather than in the knowledge of the other party and were therefore defensive matter."

[4] From the evidence before the trial court it is to be presumed that the president and manager of the defendant corporation acted within the scope of his authority when he made the contract of employment with appellant. Subdivision 20, § 1963, Code Civ. Proc.; Reardon v. Richmond Land Co., 21 Cal. App. 358, 131 Pac. 894; Lloyd v. Matthews, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346; Skinner Mfg. Co. v. Douville, supra; Patterson v. Robinson, 116 N. Y. 193, 22 N. E. 372. In Lloyd v. Matthews, supra, it was said:

"A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interests, to execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation"—citing cases.

It was stated in Reardon v. Richmond Land Co., supra:

"The point is made that the plaintiff's evidence failed to show that the president of the defendant was authorized by resolution of its board of directors to contract for the services of plaintiff. There is no merit in this contention. The services sued for were rendered to and accepted by the defendant, with the knowledge and consent of its president, apparently in the ordinary course and conduct of its business. This was sufficient evidence of the authority of the president of the corporation to contract for the services in question."

See, also, Crowley v. Genesee Mining Co., 55 Cal. 276.

It is clear that it did not rest upon the plaintiff to show a special authorization of its board of directors, or that the president acted upon the advice of the board, in order to make out a prima facie case. Newton v. Johnston, etc., Co., 180 Pac. 7.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; MELVIN, J.

181 Cal. 547

McGROREY v. HEGGERTY. (S. F. 7293.)

(Supreme Court of California. Nov. 19, 1919. Rehearing Denied Dec. 18, 1919.)

CORPORATIONS ⊂⊃139—SUFFICIENCY TO SUPPORT FINDINGS AS TO OWNERSHIP OF STOCK.

In an action to recover certificates of stock, which had been delivered by plaintiff to defendant under a receipt which plaintiff took and which specified that the defendant held the certificates for a third party, since deceased, evidence *held* sufficient to sustain the court's finding that the stock was not the property of plaintiff.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Bernard Campbell against Charles J. Heggerty. Judgment for defendant, and plaintiff appeals. Pending appeal, plaintiff died, and Thomas McGrorey, as executor of his estate, was substituted as plaintiff. Judgment affirmed.

Bernard Campbell, Ogden & Ogden, R. Clarence Ogden, and Albert C. Aiken, all of San Francisco, for appellant.

Knight & Heggerty, of San Francisco, for respondent.

OLNEY, J. This is an action brought by one Bernard Campbell to recover certain stock certificates in the possession of the defendant. Judgment went for the defendant, and the plaintiff appealed. Pending the appeal, the plaintiff died, and his executor was substituted.

The possession of the certificates is admitted by the defendant, who, however, while sued in his individual capacity, claims no personal interest of any sort in the property. His claim is that the stock is part of the estate of Patrick Campbell, deceased, of whose will he is the executor, and the sole issue in the case is as to whether the plaintiff or Patrick Campbell, when alive, was the owner of the property. On this issue the trial court found against the plaintiff.

It appears that the certificates had been delivered by the plaintiff to the defendant while Patrick Campbell was alive, and under a receipt which the plaintiff himself took which specified that the defendant held the certificates for Patrick. The presumption arising from this receipt is confirmed by letters from the defendant to the plaintiff, written in Patrick's lifetime, in which the stock is spoken of as belonging to Patrick. The defendant also testified that he always understood the stock to be Patrick's and he held it for him, and that the plaintiff had never made any claim to it until the present action was commenced after Patrick's death.

To overcome this evidence all that appears is the testimony of the plaintiff himself and a certain writing. The character of the plaintiff's testimony and the weight to which it is entitled may be judged from the following excerpt, which is but typical:

"Q. When you had this stock, why didn't you have it transferred in your name? A. Because afterwards you transferred it. Q. I mean before I ever got it at all? A. I never wanted to have anything to do, and I was opposed to ever forming the New Bluepoint Mining Company, and it came out I was always opposed to it, for I considered it was nothing more than a swindle, and I went to Ireland to put monuments on the old folks' graves there, and that was in 1900, and I came back to New York, and I went to Smartsville within 30 days from the time I heard of it in Ireland. I left Smartsville on the 4th day of July, 1900, and I had no breakfast there, and I had to go into a grocery store to get some crackers and milk until we came to Wheatland, and the same man that drove the stage is living there today."

If the plaintiff's testimony itself were not sufficient to convince us that the trial judge was justified in disregarding it in toto, the brief which the plaintiff in propria persona filed with us would leave no doubt. The following is a fair sample:

"And Patrick Campbell never claimed to defendant that he claimed to own any of the stock belonging to the plaintiff. On the contrary, Patrick Campbell's letter of June 19, 1911 (Trans. p. 13), has been carried on before any of the honorable judges had been elected to the bench, and it is a more unjust and illegal system than the police court, as the judges reduce the bail for lawyers' clients affording means of escaping justice. The judge in the police court admitted it was a custom before his time, but was a bad system, and he would stop it. That would be sufficient for me to have them stopped, but the citizens of San Francisco would not and have the recall."

The writing relied on by the plaintiff was a letter to the defendant, purporting to be signed by Patrick Campbell. In it is the statement, occurring rather incidentally, that the plaintiff owns the greater part of the stock. What part is not specified. The trial court may well have had some doubt as to the authenticity of the letter, although there was no direct evidence upon the point, and in any case the letter is not such a document as, uncorroborated, would justify an affirmative finding against the estate of the person for whom the stock was being held that it actually belonged to some one else.

Counsel for the plaintiff's executor make the point that the defendant is not the legally appointed executor of Patrick's will, because of lack of jurisdiction on the part of the court appointing him. But it makes no difference whether the defendant was legally appointed, or appointed at all. If the stock

did not belong to the plaintiff, he could not recover it in any case.

Judgment affirmed.

We concur: SHAW, J.; LAWLOR, J.

181 Cal. 533

SQUIER v. DAVIS STANDARD BREAD CO. et al. (L. A. 5318.)

(Supreme Court of California. Nov. 17, 1919.)

1. MUNICIPAL CORPORATIONS ⟸706(7) — SPEED OF MOTORCYCLE NOT NEGLIGENCE AS MATTER OF LAW.

Running a motorcycle at a rate of 10 miles an hour on a city street does not amount to negligence as a matter of law.

2. MUNICIPAL CORPORATIONS ⟸706(7)—FAILURE TO SOUND HORN OF MOTORCYCLE NOT NEGLIGENCE AS MATTER OF LAW.

Though under State Motor Vehicle Act it was plaintiff's duty to sound the horn on his motorcycle before attempting to pass defendant's wagon going in the same direction on the same street, it cannot be said that failure to sound horn was negligence as a matter of law, where jury might have found that there was no such duty prior to collision, because of absence of intent on plaintiff's part to make an immediate attempt to pass.

3. MUNICIPAL CORPORATIONS ⟸705(2)—PASSING VEHICLE ON WRONG SIDE IN CASE OF PERIL.

It is not negligence to turn to the right of a vehicle being approached from the rear if a situation of peril is presented in which, to avoid a possibility of injury, a reasonably careful man might well consider it the more prudent course.

4. MUNICIPAL CORPORATIONS ⟸706(5)—PERIL JUSTIFIES PASSING VEHICLE ON WRONG SIDE.

Evidence *held* to warrant finding that plaintiff, approaching defendant's vehicle from the rear with a motorcycle, was confronted with a condition of peril which justified his turning to the right of defendant's vehicle.

5. MUNICIPAL CORPORATIONS ⟸705(4)—VIOLATION OF ORDINANCE TO KEEP TO RIGHT OF CENTER OF INTERSECTION.

If driver of vehicle approached intersection with intent to proceed into intersecting street, and started at an angle which would place the center of the street on his right, he violated the ordinance from the moment he began to turn; it not being the mere passing of the center of the intersection on the driver's right which is rendered unlawful.

6. MUNICIPAL CORPORATIONS ⟸706(8) — INSTRUCTION IN ACTION ON COLLISION IN STREET NOT MISLEADING.

In action for injuries due to collision between plaintiff's motorcycle and defendant's delivery wagon at street intersection, instruction with reference to defendant driver keeping to the right of center of intersection when turning into intersecting street *held* not subject to criticism that its grammatical construction was such as to make the words "keeping the center on his right" misleading and confusing.

7. TRIAL ⟸296(4, 5)—INSTRUCTION ON CONTRIBUTORY NEGLIGENCE NOT MISLEADING.

Instruction that if plaintiff's negligence was "the proximate cause" of the injury the verdict should be against him *held* not to have misled jury, where the sentence containing the quoted words was preceded by a sentence requiring jury to determine whether plaintiff's negligence was "a proximate cause," and the jury was elsewhere fully and correctly instructed on the law of contributory negligence.

Department 2.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by F. C. Squier against the Davis Standard Bread Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Hickcox & Crenshaw, of Los Angeles, for appellants.

Clyde C. Shoemaker and George H. Woodruff, both of Los Angeles, for respondent.

LENNON, J. This is an action to recover for personal injuries sustained by plaintiff when the motorcycle upon which he was riding collided with a horse-drawn delivery wagon owned by the defendant corporation and driven by defendant Masters. Plaintiff had judgment, and defendants appeal.

From the plaintiff's evidence it appears that just prior to the accident the two vehicles were proceeding in an easterly direction along Vernon avenue in the city of Los Angeles at a point near to the intersection of that avenue with Ascot avenue. The motorcycle upon which plaintiff was riding was a short distance behind the wagon, and, a few seconds prior to the collision, it was moving at a speed of 14 miles an hour. Plaintiff testified that he intended to stop at the corner to permit a car to pass on Ascot avenue, from which, in view of all of the circumstances, it might fairly be inferred that he had no immediate intention of passing the wagon. It also appears from plaintiff's testimony that the defendant Masters, although aware of plaintiff's approach, without the warning required by ordinance turned his horse's head sharply to the left as though about to turn north into Ascot avenue, keeping the center of intersection of Ascot avenue and Vernon avenue on his right, but that, instead of keeping on in this course, he stopped and backed the vehicle. Plaintiff, seeing the horse start to turn, and fearing that he would not be able to veer sharply enough to the left to avoid striking the

horse, made a sharp turn to the right, and in so doing struck the right hind wheel of the wagon and fell, sustaining the injuries complained of. The evidence indicates that he was not at the time traveling at much over 10 miles an hour. It also appears that at the moment of the collision the head of the horse was a few feet out into Ascot avenue and a few feet to the right of the center line of Vernon avenue, the equipage heading in a northeasterly direction at an angle of about 45 degrees from the line of the direction of Vernon avenue.

[1-4] In the face of this evidence, appellants contend that the court should have held as a matter of law that plaintiff was guilty of negligence by reason of traveling at an excessive rate of speed, by reason of failing to sound his horn, and by reason of attempting to turn to the right of the vehicle with which he collided. The record discloses no justification for the contention that plaintiff was traveling at a rate of speed which amounted to negligence as a matter of law. Under the State Motor Vehicle Act (St. 1915, p. 397), it was, of course, plaintiff's duty to sound his horn before attempting to pass the wagon, but the jury might well have found that there was no such duty prior to the collision by reason of absence of intent to make an immediate attempt to pass. Finally, it is not negligence to turn to the right of a vehicle which is being approached from the rear if a situation of peril is presented in which to avoid a possibility of injury to life or property a reasonably careful man might well consider it the more prudent course to drive to the right. There was sufficient evidence to warrant the jury in finding that plaintiff was confronted by such a situation of peril when he turned to the right of defendants' wagon.

It is next contended that the court erred in giving the following instruction on the traffic ordinance of the city of Los Angeles:

"Section 12 provides that the driver of any vehicle in or upon any street shall, in turning to the left into another street, pass to the right of and beyond the center of the street intersection before turning. Under the provisions of this ordinance, if you find from the evidence that the defendant driving the delivery wagon in question intended to and started to turn from Vernon avenue, proceeding easterly, into Ascot avenue, proceeding northerly, the court instructs you that it was his duty to pass to the right of the point which indicates the center of the intersection of those streets, and if you find from the evidence that the defendant was making this turn with the intention aforesaid, and that he did not pass to or beyond the center of the intersection of these streets, keeping the center on his right, then you will find that he was guilty of negligence, and if you find that such negligence was the proximate cause of the injuries to plaintiff, and that plaintiff was not guilty of negligence proximately causing his own injuries, then the verdict shall be in favor of the plaintiff."

It is urged that the intent of defendant Masters was absolutely immaterial; that the section of the ordinance here in question can be violated only by an actual turning into another street, and that such turning is not accomplished until some portion of the equipage has passed the center of intersection of the two streets.

[5] The court's instruction did not make defendants' violation of the ordinance depend solely upon the intent of defendant Masters. It merely made the intent, and properly so, an essential element in determining whether or not Masters was, as a matter of fact turning into Ascot avenue. If his sudden and sharp change in direction was made with another and lawful purpose, there was, of course, no violation of the statute. If, however, his purpose was to proceed into Ascot avenue, and he started at an angle which would place the center of intersection on his right, it is not open to dispute, we think, that he was violating the ordinance from the moment he commenced to turn. It is not the mere passing of the center of intersection on the driver's right which is rendered unlawful by the ordinance. It is rather the very turning itself from the moment of its beginning. To construe the ordinance otherwise would be to permit the driver of a vehicle to turn suddenly and sharply to the left at an intersection as often as he might please, so long as he changed his mind in time to crowd back into the stream of traffic before any part of his vehicle crossed the center line of the street. Such a construction would be unreasonable, and would utterly destroy the purpose and effect of the statute.

[6] Appellants also contend that the grammatical construction of the instruction is such as to make the words "keeping the center on his right" misleading and confusing. This is a clear instance of hypercriticism.

[7] The court, after charging as to the duty of the driver of an overtaking vehicle to sound an audible signal before passing a vehicle proceeding in the same direction, and after instructing the jury that if plaintiff was under such a duty and failed to sound his horn he was guilty of negligence, continued to the effect that if such negligence was found to be "the proximate cause" of the injury, the verdict should be against the plaintiff. Appellants insist that the use of the article "the" instead of the article "a" before the words "proximate cause" constituted reversible error. The sentence containing the objectionable words is immediately preceded by a sentence requiring the jury to determine whether plaintiff's negligence, if any, was "*a* proximate cause" of the injuries received by him. Moreover, the jury was elsewhere fully and correctly instructed on the law of contributory negligence. Considering the instructions as a whole, we consider the possi-

bility that the jury could have been misled by the error complained of so remote as to be altogether unworthy of serious consideration.

Error is claimed in the refusal of the trial court to give certain instructions offered by appellants. These instructions embody appellants' theory of the law of the case, which we have held to be erroneous.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.

181 Cal. 522

In re NUTT'S ESTATE. (L. A. 6047.)

(Supreme Court of California. Nov. 15, 1919.)

1. WILLS ⟸166(1)—EVIDENCE OF UNDUE INFLUENCE AND FRAUD.

In a contest of a will, evidence *held* sufficient to sustain a finding of undue influence and fraud.

2. WILLS ⟸163(4)—PRESUMPTION OF UNDUE INFLUENCE ARISES FROM CONFIDENTIAL RELATION.

If a confidential relation between a testatrix and the beneficiary appear, coupled with activity of the latter in the preparation of the will, a presumption of undue influence arises, and the burden is on the beneficiary to show that the testament was not procured by undue influence.

3. WILLS ⟸386—REVIEW OF EVIDENCE.

Conclusions reached by the jury and the court in a will contest will not be disturbed on appeal, where based upon conflicting evidence.

4. WILLS ⟸277—CONTEST; DOMINATION AND SUPPRESSION OF FACTS.

A count in a will contest, alleging domination of the mind of testatrix, was not incompatible with a count alleging suppression of facts; domination and suppression sometimes being handmaidens of fraud, working together.

5. WILLS ⟸153—CONTEST; WITHHOLDING OF MEDICAL OPINION AS SUPPRESSION OF FACT.

Withholding by physician from testatrix of opinion that she would die soon was not only the withholding of the belief of the physician, where the progress of the disease as indicated by the symptoms justified only a prognosis of its early termination, but was the suppression of a fact that could be considered in a contest of a will wherein the physician was charged with fraud.

6. TRIAL ⟸219 — DEFINITION OF SIMPLE WORDS IN INSTRUCTIONS.

In a will contest, where one of the grounds of contest was suppression of facts, court did not err in refusing to give in the instructions a definition of the word "fact"; court not being called upon to define simple words.

7. TRIAL ⟸214—INSTRUCTIONS AS TO COMMONPLACE MATTERS UNNECESSARY.

Court did not err in refusing to instruct that a party had a right to enter into a trust agreement with another party, as such an instruction would be merely the statement of a commonplace familiar to all.

8. TRIAL ⟸251(2)—INSTRUCTIONS AS TO MATTERS NOT INVOLVED UNNECESSARY.

In contest of a will, court did not err in refusing to instruct that proponent had a right to enter into a trust agreement with testatrix, the validity of a trust agreement entered into by them not being involved, although proponent put the trust agreement in evidence as answer to the contest.

9. TRIAL ⟸251(2)—INSTRUCTIONS AS TO MATTERS NOT INVOLVED UNNECESSARY.

In a will contest, court properly refused to instruct that the quality of trust funds deposited by a trustee in his own name is not changed merely because he failed to place the designation "trustee" after his name; such instruction referring to a trust agreement the validity of which was not involved in the contest.

10. TRIAL ⟸302 — EXCUSING JURY DURING ARGUMENT OF MOTION FOR NONSUIT.

Whether jurors should be excused during the argument of a motion for a nonsuit rests entirely within the discretion of the trial court.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

In the Matter of the Estate of Carolynn E. Nutt, deceased. From a judgment in favor of contestants of a will, the proponent appeals. Affirmed.

See, also, 181 Pac. 661.

Stephen G. Long, of Long Beach, and Hahn & Hahn, of Los Angeles, for appellant.

M. B. Butler, of Pasadena, for respondent.

MELVIN, J. This is an appeal by the proponent of an alleged will of Carolynn E. Nutt, deceased, from a judgment in favor of Martha and David Nutt, beneficiaries under an earlier will, who, being minors, sued by their guardian ad litem contesting the validity of the purported will of later date.

It appears, without conflict, that proponent of the later will, W. Ray Simpson, is the husband of Dr. A. Winegar Simpson, a physician practicing her profession at Long Beach. Mr. Simpson was connected with the Long Beach Sanitarium as manager. To that institution Mrs. Nutt came as a patient of Dr. Simpson in June, 1917. Later, the physician correctly diagnosed the malady of the patient as pellagra, and told Mrs. Nutt that she was afflicted with that disease.

In the month of August, 1917, Mrs. Nutt sent for Mr. George M. Martin, an attorney at law, and, after consulting with him, caused him to prepare a will, which, on the 17th day of August, 1917, was executed in due

form. By this will the contestants herein, who are niece and nephew, respectively, of the late husband of Mrs. Nutt, were made her sole beneficiaries.

In the month of September, 1917, Mr. Simpson entered into negotiations with Mr. Long, an attorney, and under the former's instructions certain instruments were prepared by which disposition was made of all of Mrs. Nutt's property (amounting in value to about $15,000). One of these was the will afterwards successfully attacked in this suit. This and the other writings were brought by Mr. Long to the sanitarium on the 24th day of September, 1917, and were first taken by Dr. Simpson to Mrs. Nutt's room. Half an hour later Mr. Long and a notary were admitted to the sick room, and there the will was executed with due formality, Dr. Simpson being present all the time. Mrs. Nutt also executed the following instruments: (1) A declaration of trust whereby, in consideration of the transfer to him of all of her property, Mr. Simpson promised to furnish Mrs. Nutt with all necessary medical attendance, food, clothing, etc., during her life, such care to be paid for out of the income and principal of the property, and if more money should be required, out of the private funds of said W. Ray Simpson; (2) an assignment of a note for $5,000 and accompanying mortgage; (3) a grant deed to Mr. Simpson of lots in Oklahoma worth $4,500; (4) an assignment of 2,400 shares of stock of the Yellow Pine Mining Company, worth about $3,700. Mr. Long was hired and paid by Mr. Simpson. Mr. Martin was not summoned, nor was any other lawyer called to give the sick woman independent advice. Mr. Long, in preparing the necessary papers, had not conferred with Mrs. Nutt, but had obtained his information from Mr. Simpson.

On the day following the execution of the will Mr. Simpson prepared a letter, which was taken by Dr. Simpson to Mrs. Nutt for her signature. By this letter the writer demanded custody of the earlier will from the trust company having it for safe-keeping, and the instrument was returned to the hospital. Mrs. Nutt died on the 4th of October, 1917. The purpose of the transactions attacked by contestants was to provide for Mrs. Nutt's care and treatment during her life, even if she should live so long that, without the creation of a trust or arrangement such as was contemplated, all of her financial resources would have been exhausted. Mrs. Nutt had great confidence in her physician.

It also appears that the physician was present at the time of the execution of the will; that she remained in close physical contact with Mrs. Nutt; that she passed to the invalid the pen for signing the will; and that just before the execution of the instrument she said to her patient, "Never mind, Mrs. Nutt, it will be all right," or words to that effect.

At the request of the patient, Dr. Simpson had written to a kinsman of Mrs. Nutt's deceased husband asking for financial aid to pay the expenses of the invalid's treatment, as her income was insufficient to meet those charges. This letter, dated September 9, 1917, is of strong significance, both as an indication of the relations between physician and patient and as expressing the former's belief in the very serious condition of Mrs. Nutt. The following quotations from the letter will serve to illustrate its value to the court and jury in the trial of the case:

"She is in a critical condition as you will understand when I tell you she is suffering from pellagra. She has not been well since her husband's death and has without doubt been suffering from this disease for a number of years. Her suffering is intense and the depression is indeed distressing. She is obliged to have a nurse with her day and night—one nurse cares for her during the day and another sleeps in her room and cares for her at night. She feels very lonely and I have tried to be to her not only a physician but a friend. * * * Her condition is critical and it is a very grave question whether she will recover. Since treating her for this disease she has improved some but we cannot yet say what the outcome will be nor how long she may live. * * * Unless she makes greater improvement soon I fear she will not live long."

[1] All of the foregoing facts appear without conflict, and it is evident that they create prima facie a condition which justifies the verdict of the jury and the judgment of the court. The jury, by special verdict, found that appellant or his wife had exercised the confidence and authority imposed in them by Mrs. Nutt for the purpose of obtaining an unfair advantage over her; that the contested will was the product thereof; that unfair advantage was taken of Mrs. Nutt's distress of mind; and that facts known to proponent or his wife to be true had been suppressed from Mrs. Nutt, such suppression influencing the making of the will.

[2] Respondents rely upon the rule that if a confidential relation between the testatrix and the beneficiary appear, coupled with activity of the latter in the preparation of the will a presumption of undue influence arises, and the burden is on the beneficiary to show that the testament was not procured by undue influence (citing Estate of Baird, 176 Cal. 381, 168 Pac. 561), and the rule that any undue influence exercised by Dr. Simpson would be imputed to appellant (citing Ross v. Conway, 92 Cal. 632–637, 28 Pac. 785).

Appellant seems to concede the first of these rules, but insists that he has met the burden which the law imposes. With this assertion we are unable to agree.

[3] It is appellant's first contention that Mrs. Nutt was of so strong mind that she could not be easily influenced. Upon this matter there was a conflict of evidence which

prevents this court from overturning the conclusions reached by the jury and the court. Certain it is, in view of the undisputed facts, that the sick woman did radically change her mind within the period of a few weeks.

It is next contended that her mind was not weakened by her illness. Yet, when the purported will was executed she was under the constant care of nurses, and the testimony of some of the witnesses tended to show that she uttered no word at the time of the execution of the will, indicating her answers to questions by pantomime.

During the time that Dr. Simpson was discussing the condition of Mrs. Nutt with the latter the patient was told that if she could live until cool weather set in she had a good chance to recover; that she might pass out quickly, or that she might live a long time; and it is argued that this was a sincere expression of opinion justified by the history of the disease. There was some conflict in the testimony of the medical experts relative to pellagra which is a rare disease in this climate, but there was testimony to the effect that when the disease reaches the stage in which the patient suffers from sore mouth and profuse flow of saliva the probabilities of early dissolution are very great, and that this is known generally to physicians. Dr. Simpson herself said that she noticed some soreness of the patient's mouth about the middle of September, and there was testimony regarding the undue amount of saliva at the time of the execution of the will.

It would be useless to review in detail the mass of testimony given in this case. It is sufficient to note that appellant and his wife offered no adequate excuse for their failure to secure for this unadvised widow living in their institution (and suffering from a disease which, according to Dr. Simpson's certificate signed at the time of Mrs. Nutt's death, had existed about six years) that sort of advice to which she was entitled under the existing circumstances. The preparation of the will by a lawyer who obtained all his knowledge from appellant and was neither requested to consult nor given opportunity of adequate conference with the testatrix speaks volumes against the good faith of the Simpsons. Upon the whole record, we find most abundant justification for the judgment.

In the briefs of appellant and in the oral argument our attention was directed to the case of Estate of Wickes, 139 Cal. 195, 72 Pac. 902, and counsel for appellant declared that to be substantially "on all fours" with the case at bar and an authority supporting appellant's contentions. But that case differs in many essential particulars from this one. The superior court had decided against the contestant, and this court sustained the judgment. The testatrix was an aged woman with no relatives. She was suffering from an incurable disease, as was her husband. He was amply provided for, and he, too, was without kindred. Dr. Shannon had cared for the old lady for half a year, charging her almost nothing, and he had been very kind to he "as much so as a son." Under these circumstances she expressed a wish to make a will in his favor, and asked him to have a testament prepared in harmony with her desire. He accordingly consulted with Judge Zenas N. Goldsby, who called at the hospital where Mrs. Wickes was a patient. Dr. Pratt accompanied the lawyer to the old lady's room, but Dr. Shannon, the prospective beneficiary, remained outside during all of the negotiations concerning the will. Before executing the instrument Mrs. Wickes was interrogated with reference to her desires, and although a form of will had been prepared in advance, it was not produced and read to her until the attorney had satisfied himself that it really expressed her testamentary wishes.

From the brief outline of the facts in the Estate of Wickes, given above, it will appear at once that there are several points of difference between that case and the one at bar. That was a contest between strangers to the blood of both of the testatrix and her husband; this is between the kindred of Mrs. Nutt's deceased husband and a stranger. There was no pretense in that case that Dr. Shannon had worked upon the fears of the testatrix to convince her that she might become destitute if she did not transfer her property to him. And in that case the important element of the personal presence of the trusted physician at the moment of the testamentary act was not in existence, as it is in this contest. And the witnesses were entirely different in the two cases, their credibility being a subject for different tribunals. Mr. Justice Lorigan well expressed the rule regarding credibility in the following words, in the opinion in the Estate of Wickes:

"Whether evidence is sufficient to sustain a will must in all cases mainly depend on the credibility of the witnesses by whom the testimony is offered, and how far credibility should be given to their testimony is to be determined by the judge who heard it. That matter is solely committed to him, and his judgment upon it is conclusive upon us."

[4, 5] Appellant takes the ground that the pleadings of the contestants were not sufficient to set forth a ground of contest, and that therefore no testimony should have been admitted over his objection. Respondents had set forth their contest in three counts. In the first was pleaded Dr. Simpson's undue influence over the mind of Mrs. Nutt by the domination of her mind over the weakened invalid, towards whom she owed the greatest fairness by reason of her confidential relation

to her patient. The second pleaded fraud by overreaching Mrs. Nutt by means of suppression; and the third averred fraud and undue influence, accomplished by taking advantage of Mrs. Nutt's distress of mind. It is contended that domination and suppression are utterly incompatible. On the contrary, they are sometimes handmaidens of fraud, working together. But appellant's counsel say that actionable suppression must be of fact or facts, and that Dr. Simpson, if she suppressed anything, only withheld her opinion that Mrs. Nutt would die soon. But the fact concealed was not only the belief of the physician that her patient would not and could not long survive, but the further fact that the progress of the disease as indicated by the symptoms justified only a prognosis of its early fatal termination.

Proponent's motion for nonsuit was properly overruled for reasons which must be apparent from the foregoing discussion of the essential parts of the evidence.

[6] There was no error in the court's refusal to give in the instructions a definition of the word "fact" offered by proponent. The court is not called upon to define simple words employed in instructions.

[7, 8] The court declined to give an instruction to the effect that as matter of law proponent had a right to enter into a trust agreement with Mrs. Nutt. This was proper, because the proposed instruction contained merely the statement of a commonplace familiar to all, and, secondly, because this was a will contest, and not a proceeding or suit to invalidate a trust. True, the trust agreement was in evidence, but of that appellant may not well complain. He had made it a part of his answer to the contest.

[9] Another instruction refused by the court was to the effect that the quality of trust funds deposited by a trustee in his own name is not changed merely because he failed to place the designation "trustee" after his name. This instruction was not pertinent to the issues, and was correctly refused.

[10] The court did not err in refusing to excuse the jury during the argument of the motion for nonsuit. Whether the jurors should be excused or not was a matter entirely within the discretion of the court. In denying the motion the court, with most commendable care, instructed the jurors as follows: "I want to say to the jury that in denying this motion I am not deciding the case at all. It simply amounts to this: That if it was to stop right here I should leave it for the jury to determine on proper instructions after the argument of counsel."

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

181 Cal. 541

KROBITZSCH v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 9123.)

(Supreme Court of California. Nov. 19, 1919.)

1. MASTER AND SERVANT ⊂=405(2)—WORKMEN'S COMPENSATION ACT; EVIDENCE OF TERMINATION OF EMPLOYMENT INSUFFICIENT.

Employer's letter to employé and employer's testimony *held* to warrant a finding by the Industrial Accident Commission that the employment was not terminated prior to employé's injury, but he was given the option of leaving or continuing at his old salary.

2. MASTER AND SERVANT ⊂=417(7)—WORKMEN'S COMPENSATION ACT; REVIEW OF COMMISSION'S FINDINGS.

A finding of the Industrial Accident Commission that employé's injury arose out of and in course of the employment will be upheld by court where evidence is conflicting.

3. MASTER AND SERVANT ⊂=363—WORKMEN'S COMPENSATION ACT; "FARM LABOR" AND "STOCK RAISING."

An employé of one engaged in the propagation of trout for domestic purposes, a business prohibited by Pen. Code, § 632, prior to St. 1911, p. 378, *held* not excluded from the benefits of Workmen's Compensation, Insurance and Safety Act of 1917, by section 8, subd. (a), excluding employés engaged in "farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising"; the term "farm labor" meaning labor engaged in the production of hay, grain, vegetables, and the like by tillage of the soil, and the term "stock raising" meaning the raising of domestic animals.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Farm Laborer.]

In Bank.

Proceedings under the Workmen's Compensation, Insurance and Safety Act of 1917 by Gertrude Starkey and others for compensation for the death of Charles Edward Starkey, opposed by R. W. Krobitzsch. An order awarding death benefit was made by the Industrial Accident Commission, and employer applies for certiorari to review order. Award affirmed.

Henry A. Jacobs and Jacobs & Oliver, all of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LAWLOR, J. Certiorari to review the proceedings of the Industrial Accident Commission in awarding a death benefit in the sum of $2,807 and $100 for funeral expenses to the widow and children of Charles Edward Starkey, deceased, and against the petitioner.

The commission found:

"(1) That Charles Edward Starkey, hereinafter called the employé, was injured on the 8th day of October, 1918, in Santa Cruz county, California, while in the employment of defendant,

R. W. Krobitzsch, hereinafter called the employer, as an employé on the 'Santa Cruz Trout Farm' at Olympia, in said county, and that said injury proximately caused the death of the employé on the said day.

"(2) That said injury arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employé was performing service growing out of and incidental to the same, and happened in the following manner: While engaged in clearing weeds, brush, ferns, and other natural growth from the neighborhood of the flume on said 'Santa Cruz Farm' and carting it away in a small wagon for the purpose of burning same, a part of the load on said wagon slipped off, carrying the employé with it, and causing a pitch-fork to fall on the employé, wounding him and causing his death.

"(3) That at the time of said injury the employé was not engaged in farm labor, stock raising, or any of the occupations or employments excluded by section 8 of the Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 835) from the provisions of said act, and the employé and the employer were subject to the compensation provisions of said act and to the jurisdiction of this commission."

1. Petitioner contends that the award of the commission should be annulled on the ground that "the decision and award are contrary to the evidence relating to the employment of said Charles Edward Starkey, in that his term of employment had ceased seven days prior to the injury," that is to say, that deceased was not the employé of the petitioner at the time of his injury and death. This contention is based on the fact that deceased had become dissatisfied with his pay, which was $80 a month, and had asked that his salary be raised to $100, and that in reply to this request the petitioner, on September 27, 1918, wrote the following letter:

"Mr. Chas. E. Starkey, C/o Santa Cruz Trout Farm, Olympia, Calif.—Dear Sir: In thinking the matter over regarding the advance in salary that you ask for, I find that I will not be able to meet with your views.

"Rather than have any argument over same, and feeling that perhaps you are dissatisfied, I would ask you to find a new position after October 1st, 1918.

"If you will feed the fish for me until I send a man down, I will allow you in return for this work and without any further consideration, to live in the house you now occupy free of rent until you locate yourself.

"Before leaving the place advise me three or four days in advance so that I can send a man down to take care of the fish.

"Thanking you for what you have done for the Santa Cruz Trout Farm, beg to remain,

"Yours very truly."

[1] Petitioner contends that this letter terminated the employment of the deceased. It seems to us that this letter did not have the effect of terminating the employment, but that it gave Starkey the option of leaving or of accepting the employment and continuing therein at the rate of $80 a month. This conclusion is sustained by the testimony of the petitioner himself, wherein he said:

"I expected Mr. Starkey to be up—that is what I really expected. I thought when he received this letter he would come up. I expected him in almost any time. *I thought he would either do one thing or the other* because it had got to a point where one thing or the other had to be done." (Italics ours.)

Upon this state of the evidence the finding of the commission that the deceased was at the time of his death in the employ of the petitioner cannot be disturbed.

2. It is contended that the award should be annulled "on the further ground that said decision and award are contrary to the evidence relating to the issue as to whether the accident arose out of or in the course of the employment of said Charles Edward Starkey by the petitioner." As we have already seen, the commission found on this point that the deceased was killed while engaged in clearing brush and ferns and other natural growth from the neighborhood of the flume and carting it away in a small wagon for the purpose of burning it. The petitioner testified that the sole duties of the deceased were to feed the fish, to clean the ponds where the fish were kept and keep them supplied with fresh water, and prepare the fish for the market as orders came in, and that he had never given instructions to Starkey to clear away any brush or ferns or the like from the vicinity of the flume, and that such was not a part of the work for which he was employed. Petitioner further testified that he made a tour of inspection throughout the entire length of the flume after the fatal accident, and that there was no evidence that any clearing had been done near the flume, but that at one place across the road from the flume he found a patch about 15 by 18 feet which had been cleared of brush, and that there was a pile of fern brakes in this clearing, and that Mrs. Starkey had pointed out this place as the one where her husband was killed. He also testified that he found a quantity of these fern brakes on the floor of the stable where the deceased kept his cow, the claim being made that the deceased was at the time of his death engaged in hauling fern brakes to be used as bedding for his cow, and therefore that the injury did not arise out of and was not received in the course of his employment. Witness McGuire also testified that he went up to the barn and "could see the remains of fern brakes used as bedding for the cow." Witness Miller, the former manager of the trout farm, when asked what advantage, if any, there would be in clearing ferns in October along the flume, answered, "None whatever."

However, Mrs. Gertrude Starkey and Wil-

liam E. O. Starkey, the 14 year old son of deceased, both testified that it was the custom on the trout farm to clear away the brush from the vicinity of the flume every fall; that this was done to minimize the fire risk; that this work of clearing away the fern and brush had been done in the fall of the years 1915, 1916, and 1917; and that the deceased was engaged in that work at the time of his death.

[2] In view of this conflict in the evidence the finding of the commission that the injury to the deceased "arose out of and in the course of such employment, was proximately caused thereby, and occurred while the employé was performing services growing out of and incidental to the same," must be upheld.

3. Petitioner contends, also, that the award "should be annulled upon the ground that said Industrial Accident Commission, in rendering a decision and entering an award against the petitioner, acted without and in excess of its authority, in that the business conducted by the petitioner, E. W. Krobitzsch, to wit, the propagation of trout for domestic purposes, comprises farm labor and stock raising, and that an employé of such business is excluded from the benefits of the 'Workmen's Compensation, Insurance and Safety Act of 1917,' by virtue of subdivision 'a' of section 8 of said act." The said subdivision reads, in part:

"* * * Excluding any employé engaged in household domestic service, farm, dairy, agricultural, viticultural or horticultural labor, in stock or poultry raising. * * *"

[3] We are of the opinion that the petitioner is not entitled to exemption under the provisions of this act. It seems clear beyond question that the Legislature did not intend to use in a general sense the terms employed in describing the excluded classes. If that had been the intention of the Legislature, it would not have used the terms "farm, dairy, agricultural, viticultural or horticultural labor," for "farm labor" would, in the broad sense, include labor engaged in dairying, agriculture, horticulture, stock raising, and poultry raising and anything which can be defined as cultivation of the soil. 19 Cyc. 456; 2 C. J. 988. The very wording of the clause of the act upon which petitioner relies shows that the Legislature was giving a restricted meaning to the term employed and was segregating into certain definite and exclusive classes all kinds of "labor" which in the broad and unrestricted sense would come under the head of farming. "Farm labor" must, we think, be taken in its ordinarily accepted meaning as labor engaged in the production of hay, grain, vegetables, and the like by the tillage of the soil. To give the term a broader meaning would be to restrict the terms "dairy, agricultural, viticultural or horticultural labor," as used in the statute, for by the employment of the words used it is clear that the Legislature did not intend to include dairy farming, fruit farming, grape growing, or, we may add, "fish farming," within the term "farm," or it would not have employed terms of narrowing import.

Likewise, we must interpret the term "stock raising" in the sense in which it is commonly employed, namely, the raising of those domestic animals usually classed as "live stock," and commonly raised on farms or ranches, such as horses, mules, cattle, sheep, goats, hogs, and the like. Petitioner has gone to great length in quoting from dictionaries and encyclopedias to show that the term "stock raising," in its broadest sense, includes the propagation of domestic trout. It is clear that, if the term is to be taken in its generic sense, it will include the propagation and rearing of all domestic animals, which, it may be conceded here, includes domestic trout. But it is equally clear that the Legislature did not use the term in its generic sense so as to include the raising of all domestic animals; otherwise, "poultry raising" would not have been specially mentioned.

The business conducted by the employer herein was one prohibited by law (section 632, Pen. Code) prior to the adoption of the statute of 1911 on the subject of raising trout for domestic purposes (Stats. 1911, p. 378). In the title of that act the business is thus described: "Persons engaged in the business of propagating and rearing such fish." The license issued by the board of fish and game commissioners under this act is entitled: "Licensed Pond for Culture of Domesticated Trout or Other Fish." The certificate recites:

"That a holder thereof is the proprietor of a private pond or ponds called ——— and situate in the county of ———, state of California, upon the real property described as follows: ——— is hereby authorized to keep and propagate therein and dispose of as provided by law, trout or other fish."

It will be observed that in this legislation, which was on the statute books at the time of the enactment of the Workmen's Compensation Act of 1917, neither the word "farm" nor "stock" is used. Instead thereof, the words used are "pond" and "fish." It seems to us that, if the Legislature had intended to exclude labor employed in such an enterprise from the operation of the Workmen's Compensation Act, it would have in terms so specified.

We do not think, therefore, that such labor is to be included in the terms "stock raising" or "farm" labor.

It follows that the award must be affirmed, and it is so ordered.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; WILBUR, J.; LENNON, J.; MELVIN, J.

(181 Cal. 489)

RANKIN v. SUPERIOR COURT OF SAN JOAQUIN COUNTY. (Miscellaneous 202.)

(Supreme Court of California. Nov. 6, 1919.)

MANDAMUS ⊜154(2)—PETITION INSUFFICIENT TO AUTHORIZE WRIT.

An application for a writ of mandate to require the superior court of county to deliver to the Supreme Court for petitioner's use in preparing an application for habeas corpus certified copies of the records of the court in his cause, which merely alleged that petitioner's restraint was illegal, that court had no jurisdiction to try his cause, that the matter purported to be charged in the information did not constitute a public offense, and that petitioner had good cause for discharge on habeas corpus, does not set forth sufficient facts to warrant relief.

In Bank.

Application by Nathan Rankin for a writ of mandate to be directed to the Superior Court of San Joaquin County, State of California. Application denied.

See, also, 183 Pac. 686.

Nathan Rankin, in pro per.

PER CURIAM. One Nathan Rankin, confined in the California state prison at San Quentin under a judgment of the superior court of San Joaquin county, has presented, with an application that the same be filed without payment of costs, a petition for a writ of mandate against said superior court to require said court to deliver to this court for his use in preparing an application for a writ of habeas corpus, certified copies of the records of said court in his cause. In so far as said petition attempts to show any matter which would be material on an application for a writ of habeas corpus or for a writ of mandate it is manifestly insufficient to warrant any relief, inasmuch as it appears to allege no specific facts showing illegality in his imprisonment. The bare allegations that his restraint is illegal, that the court had no jurisdiction in his cause, that the matter purported to be charged in the information does not constitute a public offense, and that petitioner has good cause for a discharge on a writ of habeas corpus or other proceeding do not sufficiently set forth the specific facts warranting relief either under mandamus or on habeas corpus.

No merit appearing in the application sought to be filed, it is ordered that leave to file the same without payment of fees is denied.

ANGELLOTTI, C. J., LAWLOR, J., WILBUR, J., and OLNEY, J., concur.

(43 Cal. App. 315)

TULARE COUNTY POWER CO. v. PACIFIC SURETY CO. (Civ. 1991; Sac. 2850.)

(District Court of Appeal, Third District, California. Sept. 20. 1919. Opinion of Supreme Court In Bank Denying Hearing, Nov. 17, 1919.)

1. INSURANCE ⊜558(1)—INDEMNITY INSURANCE; WAIVER OF NOTICE OF ACCIDENT.

Conditions of a liability policy requiring immediate notice to insurer of an accident are waived, when the insurer actually assumes control of the litigation growing out of an accident.

2. INSURANCE ⊜388(5) — LIABILITY INSURANCE; WAIVER OF CONDITIONS BY ASSUMING CONTROL OF ACTION.

The fact that attorneys for a liability insurance company gave attorneys for insured permission to take part in the case and represent the insured did not prevent assumption of control of the case by the company from constituting a waiver of prior breach of conditions by insured, in the absence of a complaint that the defense was interfered with by insured's attorneys.

3. INSURANCE ⊜670—FINDINGS NOT INCONSISTENT.

In an action by insured under a liability insurance policy, finding that plaintiff "performed all the conditions of said policy" may be considered as surplusage, and not inconsistent with a further finding of waiver on the part of the insurer of performance of conditions.

4. INSURANCE ⊜670—CONSISTENCY OF FINDINGS.

A finding in an action by insured under a liability insurance policy that F., W., D., C., and B. were all acting as legal representatives of both the insured and the insurer, and were co-operating in the defense of an action under the terms of the policy, was not inconsistent with a further finding that F., insured's attorney, in making a motion for new trial, was representing the insurer and not the insured.

5. APPEAL AND ERROR ⊜1071(1)—HARMLESS ERROR IN INCONSISTENT FINDINGS.

In an action on a liability insurance policy, that a finding that F., W., D., C., and B. were all acting as the legal representatives of both the insured and the insurer was inconsistent with a further finding that F. was representing the insurer and not the insured could not harm defendant.

6. APPEAL AND ERROR ⊜1071(3)—HARMLESS ERROR IN FINDINGS OF FACT.

In an action on a liability insurance policy, insurer cannot complain that a finding that

plaintiff had performed all the conditions of the policy was unsupported by the evidence, where the court also found upon ample evidence that insurer had waived any breach of conditions.

7. INSURANCE ⊂⊃435—LIABILITY INSURANCE; NEGLIGENCE OCCURRING PRIOR TO POLICY.

Where accident happened during the period of a liability insurance policy, insurer cannot claim that it was not liable, in that the negligence causing injury was in construction work done prior to the issuance of the policy.

8. INSURANCE ⊂⊃514—LIABILITY INSURANCE; PAYMENT OF LOSS BY CHECK.

Where insured in a liability insurance policy, after an accident sold his business under an agreement reciting that the judgment of an injured person was a lien upon the property, and that the balance due insured under the agreement should not be paid by the purchaser until such judgment and lien were fully satisfied of record, and the purchaser drew a check to insured with which insured, together with a small check of his own, paid the judgment, insured actually sustained loss and paid money in satisfaction of the judgment within the meaning of the insurance policy.

9. INDEMNITY ⊂⊃6—STRICT CONSTRUCTION OF CONTRACT.

A contract of indemnity is to be strictly construed, and measures the rights of the parties thereto.

10. INSURANCE ⊂⊃513, 598—LIABILITY INSURANCE; INTEREST ON JUDGMENT AS EXPENSE OR COST OF DEFENSE.

An insured who pays a judgment for the full amount limited in a liability policy indemnifying against actual loss, or a judgment for a smaller amount than such limited sum, can recover the sum with interest only from the time of such payment, but interest accruing on the judgment pending an appeal therefrom is not an expense or cost of defending the action.

11. INSURANCE ⊂⊃513 — LIABILITY INSURANCE; ATTORNEY'S FEES.

Insured in a liability insurance policy was not entitled to recover from insurer attorney's fees paid by him to his own attorneys, who participated in the defense of an action by injured person by permission of the insurer; insurer having furnished its own attorneys who defended the action.

12. VENUE ⊂⊃7—IN ACTION ON LIABILITY INSURANCE POLICY.

In view of Const. art. 12, § 16, and Civ. Code, § 1626, under an affidavit of an agent of a liability insurance company, that the policy was received by affiant in Tulare county by mail from the head office of the insurer at San Francisco, and affiant as agent of insurer personally delivered the policy to insured in Tulare county, and it was the practice and custom of insurer to pay its losses incurred in Tulare county by sending drafts to affiant, and affiant would thereupon deliver them personally to the beneficiaries, court could properly find that the contract was made in Tulare county and was to be performed therein, and could properly deny a motion for a change of venue to the county in which San Francisco is located.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by the Tulare County Power Company against the Pacific Surety Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Denson, Cooley & Denson and Cooley & Lachmund, all of San Francisco, for appellant.

Middlecoff & Feemster, of Visalia, for respondent.

HART, J. The action was brought by plaintiff to recover upon a liability insurance policy, issued by defendant, dated June 18, 1913. Judgment was entered in favor of plaintiff for $5,460, with interest and costs, from which judgment defendant prosecutes this appeal.

From the allegations of the complaint it appears that plaintiff was a California corporation doing business in the county of Tulare, and "between noon on the 16th day of June, 1913, and noon on the 16th day of June, 1914, was engaged in the business of operating and maintaining an electric light and power plant" in said county, together with extension lines and service connections, etc.; "that on said 18th day of June, 1913, said defendant made its contractor's public liability policy of accident insurance," a copy of which was attached to and made part of the complaint, to portions of which we shall hereinafter refer. It was further alleged and found that, "on the 18th day of June, 1913, said defendant delivered said policy of insurance to this plaintiff, and plaintiff paid the full amount of the premium provided for in said policy of insurance to said defendant." It was found that said premium was paid to defendant on or about the 3d day of January, 1914, "and defendant waived the payment thereof prior to such time, and waived any defense it had to said policy by reason of said premium not being paid prior to the time it was so paid."

On the 10th day of July, 1913, one L. C. Bergen was being furnished for hire by plaintiff with electricity for lighting and power on certain property in Tulare county, and "in order to use said power said L. C. Bergen maintained on said lots a well for irrigating purposes, and an electric motor and pump and pumphouse"; that plaintiff had erected along the south line of said premises a line of poles and a system of wires known as "primary" wires, "charged with a dangerous and life-destroying force and current of electricity, * * * to wit, 6,600 volts"; that the motor was to be operated by 220 volts and the lights by 110 volts; that, to reduce said

6,600 volts to 220 and 110 volts, respectively, transformers and ground wires were "supplied, furnished, installed, and erected at said pumping plant" by plaintiff, the system of wires, switches, etc., being known as "secondary" wires. On said 10th of July, 1913, said Bergen descended into the pit in which said pump was located for the purpose of inspecting said pumping plant; at that time "there was a dangerous, unusual, and excessive current of electricity passing from said 'primary' wires and into the drop cord and electric light which hung in the pit of said pumping plant, * * * rendering said drop wire and electric light highly dangerous to handle, and that this dangerous condition was at said time unknown to said Bergen and unknown to this plaintiff." Bergen came in contact with the drop wire and light and was instantly killed, without any fault on his part.

It was alleged in the complaint and found by the court that "upon the occurrence of said accident, and as soon thereafter as plaintiff was informed that a claim was made against plaintiff on account of said accident, plaintiff did, to wit, on the 16th day of September, 1913, give immediate written notice thereof, with the fullest information obtainable at the time, to the defendant's head office at San Francisco, and at the same time by the said notice gave like notice of the making of said claim on account of said accident." The notice above referred to was in the form of a letter, signed by Drew & Drew, attorneys, Fresno, addressed to the defendant at San Francisco, and read as follows:

"You are hereby notified that on September 3, 1913, Mrs. Sarah E. Bergen, as administratrix of the estate of L. C. Bergen, deceased, has through her attorneys * * * made a claim against the Tulare County Power Company [assured under policies Nos. C. P. 2347 and C. E. 4212], for and on behalf of herself and the minor children of said deceased [naming them] for the death of said L. C. Bergen, claiming that the death of said deceased was caused by coming in contact with a drop cord in the pit of the pumping plant belonging to the deceased. The attorneys have not made claim for any particular amount. We are serving this notice on your company under the provisions of your policy. Mr. Bergen met his death some time in July, but this is the first direct intimation that we have of any claim against the company for his death."

On September 17, 1913, the defendant replied to the above letter as follows:

"You are hereby advised that the above policies have been canceled upon the books of this company by reason of the nonpayment of premiums thereunder, and that the same have been void and of no effect from date of issue."

On December 8, 1913, Sarah E. Bergen, as administratrix of the estate of L. C. Bergen, deceased, commenced an action against plaintiff, in the superior court of the county of Tulare, in which she asked for $50,000 damages on account of the death of her husband. Summons was duly issued, and a copy of the complaint and summons was served on plaintiff, and on December 11, 1913, plaintiff forwarded to defendant, at San Francisco, said summons and complaint. On December 27, 1913, defendant wrote the following letter to Messrs. Holley & Holley, Visalia:

"In rel: L. C. Bergen v. Tulare County Power Co. Our Mr. W. B. Renton has made a thorough investigation of the facts surrounding the nonpayment of premium in this case and this office is in receipt of his report thereon, in view of which this company will, upon receipt of the Tulare County Power Company's check for earned premium in the amount of $572.08 due from 6/16/13 to 9/16/13, be pleased to reinstate this policy without prejudice. We inclose bill for this amount. For this purpose, we will ask you to have assured return to us at once the papers in the case."

On December 29, 1913, Holley & Holley wrote plaintiff as follows:

"I have received a letter from the Pacific Surety Company this morning offering to reinstate the liability policies in that company which were written and effective June 16, 1913, and which were canceled for nonpayment, upon the payment of the earned premium from June 16th to September 16th. As I understand it, this contemplates the assumption of all liability under these policies from the date of their issuance, including the case of L. C. Bergen v. Your Company which has been filed for action, on which case the Pacific Surety Company formerly denied liability. * * * You will understand that if you accept the proposition, you will be relieved of all expense in connection with the defense of this case of Bergen's."

Upon receipt of said last-mentioned letter, plaintiff paid to defendant the amount of premium demanded by it. On March 3, 1914, defendant wrote plaintiff:

"This letter will serve to notify you that policy No. CP–2374, issued to you on June 16, 1913, and subsequently canceled, has been reinstated as of the date of issue, and is in full force and effect."

It was then found that thereupon plaintiff rendered to defendant all assistance in plaintiff's power in the protection of its interest; that defendant, in the name of plaintiff and on its behalf, filed an answer to the Bergen complaint; that a trial of said action was had, and judgment was given therein in favor of the administratrix for the sum of $12,500 and $160 costs. Further facts, appearing from the record, will be adverted to in the discussion of the points raised upon the appeal.

[1] 1. It is first contended by appellant that plaintiff failed to perform the first condition of the policy, namely, "Upon the occurrence of an accident, the assured shall give

immediate written notice thereof with the fullest information obtainable at the time," and that plaintiff failed to give immediate notice of the claim "with full particulars," as required by the policy.

The court found "that the defendant waived any defense which it had herein by reason of the failure and neglect of said plaintiff to give immediate written notice of said accident."

We think this point is disposed of in favor of plaintiff by the case of J. Frank & Co. v. New Amsterdam C. Co., 175 Cal. 293, on page 298, 165 Pac. 927, on page 930, where it is said:

"Of course the conditions of the policy requiring notice to the home office of probable liability are intended primarily to afford opportunity to the insurer promptly to take charge of a defense. Such requirements are reasonable and just, but they are waived when, as in this case, the insurer actually does assume control of the litigation growing out of the accident."

2. It is claimed "that plaintiff violated condition 2 of the policy, in that it took complete control of one of the legal proceedings in the Bergen litigation, namely, the motion for new trial, and did not even notify us of the date of the hearing of the motion."

The following facts were stipulated to by the respective parties at the trial:

"That at the time of hearing of the motion for new trial in the Bergen Case, Denson, Cooley & Denson, E. I. Feemster, and A. E. Cooley were acting as attorneys on behalf of the defendant in said action, and that no notice of the time of said hearing was given by said E. I. Feemster, to Denson, Cooley & Denson, or to A. E. Cooley, and that neither Denson, Cooley & Denson nor A. E. Cooley took part in the argument of said motion for new trial, but said motion for new trial was argued for the defendant in said action solely by said E. I. Feemster; that the reason that E. I. Feemster did not notify Denson, Cooley & Denson or A. E. Cooley of the time set for the hearing of said motion for new trial was that he believed it would be a useless tax upon the time of said A. E. Cooley to go to Visalia from San Francisco for that purpose, and that said E. I. Feemster believed that the trial court would refuse the motion for new trial and pass the matter up to the appellate court for decision."

As seen, the action of Bergen v. Tulare County Power Co. was commenced on December 8, 1913, and the summons and complaint were sent to the surety company on December 11th. Between that date and the 27th of December, defendant was denying any liability on account of the death of Bergen. Before the date when the defendant announced that it would defend the action, the power company had appeared therein and filed a demurrer to the complaint. On January 17, 1914, Denson, Cooley & Denson of San Francisco, by A. E. Cooley, wrote to Feemster & Walker, at Visalia, the attorneys for the power company, suggesting that an amended demurrer to the complaint be filed, and stating, "We shall be glad to co-operate in every manner in the defense of this action." An amended demurrer was filed and overruled and an answer was filed on behalf of the defendant by "Feemster & Walker, Denson, Cooley & Denson, Attorneys for Defendant." Mr. Cooley was present and participated in the trial, and the decision of the Supreme Court (173 Cal. 709, 161 Pac. 269) shows him to have been one of the attorneys for the appellant on the appeal.

In Williams v. Harter, 121 Cal. 47, 52, 53 Pac. 405, the appellant made the point that the trial court arbitrarily denied his motion for a new trial without hearing or considering the grounds urged in support thereof. The Supreme Court refused to consider the point because not properly brought before it, but said, "Besides, the real and only question is, Did the court err in denying the motion?"

The Supreme Court having affirmed the judgment in the Bergen Case, we think, under the authority of the above-cited case, that it becomes immaterial whether Denson, Cooley & Denson were notified of the date set for the hearing of the motion for new trial.

[2] 3. It is next urged that "no waiver of breach of conditions was proved, and none could have been under a complaint alleging due performance by plaintiff of all conditions of the policy." In this connection, the allegations of the complaint, which the court found to be true, were:

"And this plaintiff has duly performed all the conditions of said policy of insurance upon its part to be performed. That defendant herein through its own attorneys and counselors at law controlled all said legal proceedings, and had charge of the trial of said action, and tried the same. And this plaintiff alleges that by reason of the facts herein alleged the defendant waived and excused any further notice of said accident, and waived any and all defenses it might have had herein."

In J. Frank & Co. v. New Amsterdam C. Co., supra, it is stated in a syllabus:

"When an insurance company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to a forfeiture for any previous default which may be asserted is waived."

In Rodgers v. Pacific Coast Casualty Co., 33 Cal. App. 70, 164 Pac. 1115, it was also held that—

"Where an insurance company * * * takes charge of and assumes exclusive control of an action brought against the insured for damages for injuries from * * * an accident, it recognizes a liability, if it fails to defend successfully, to pay the assured the amount of the

judgment not exceeding the amount stipulated in the policy."

Appellant attempts to distinguish those cases from the one at bar, because here the insurance company did not have, while in the cited cases it did have, "full and exclusive control" of the litigation. In the Frank Case the attorney for the insurance company invited the attorney for the insured to participate in the preparation and trial of the case, but he refused to do so. In the present case, Mr. Cooley, in the letter to plaintiff's attorneys, suggesting that an amended demurrer to the complaint be filed, wrote:

"Inasmuch as the plaintiff has sued for very much more than the policy limit of the Pacific Surety Company, we presume the defendant will want to employ its own attorneys to represent it in the trial of the action. This is customary, and permission is always granted by the Pacific Surety Company to the assured to do so."

The attorneys for the power company consented to act, and thereafter did act, in conjunction with the attorneys for the surety company in the conduct of the case. Aside from the matter of the argument of the motion for new trial, appellant makes no claim that plaintiff's attorneys interfered with their conduct of the defense in the Bergen Case. While appellant's attorneys may not have had "full and exclusive control" thereof, the absence of any complaint that the defense was interfered with by plaintiff's attorneys would seem to indicate that the point now made is without merit.

Appellant cites Todd v. Union Cas. & Surety Co., 70 App. Div. 52, 74 N. Y. Supp. 1062, wherein it is stated:

"If he [the plaintiff] has performed, then that fact must be alleged without qualification. If he has not performed, for the reason that defendant waived performance, then the conditions waived and the facts and circumstances constituting such waiver must be alleged."

Peek v. Steinberg, 163 Cal. 127, 133, 124 Pac. 834, is also cited to the same effect. As seen, in the present case, both the fact of performance and the fact of waiver, "with the facts and circumstances constituting such waiver," were alleged.

[3] "The findings of the trial court are to receive such a construction as will uphold rather than defeat its judgment." Haller v. Yolo Water & Power Co., 34 Cal. App. 317, 167 Pac. 197. The finding that plaintiff "performed all the conditions of said policy" may be considered as surplusage, as the evidence fully justifies the further finding of waiver on the part of defendant, and this disposes of the further contention of appellant that said findings are inconsistent.

[4, 5] 4. Appellant complains that the finding that "Feemster & Walker, Denson, Cooley & Denson, and Chas. E. Bush, Esq., were all acting as the legal representatives of both said Tulare County Power Company and Pacific Surety Company, and were co-operating in the defense of said action under the terms of said insurance policy," is inconsistent with the further finding that E. I. Feemster, in making the motion for new trial, "was representing the Pacific Surety Company, and not the Tulare County Power Company." We cannot see that these findings are inconsistent, but if it be conceded that they are, we do not perceive how any harm could have resulted to the defendant therefrom.

[6] 5. The point is made that there is no evidence supporting certain of the findings essential to the support of the judgment. The findings referred to we have already considered in connection with the consideration of other points urged as grounds upon which a reversal of the judgment should be ordered. We will not enter herein upon an analytical examination of the evidence for the purpose of showing, as easily it may thus be shown, that there is no merit in this point. It is enough to say that there is but one of the findings of which it is asserted that there is no evidence to support them which might justly be held to be amenable to that criticism, and that finding is the one to the effect that plaintiff had performed all the conditions of said insurance policy imposed upon it; but as to that finding it is, as above suggested, immaterial whether it does or does not derive support from the evidence, since the court also found, upon ample evidence, that the defendant had waived any breach of any of the conditions of the insurance policy of which the plaintiff might have been guilty, and also waived any defense which might have been based upon any such breach.

[7] 6. It is next argued that "the policy did not cover this accident because no premium was received based upon the compensation paid the employés of plaintiff who negligently installed the Bergen plant." The argument is that the installation of the wires on the Bergen plant "was made three months prior to the accident and the premium was based upon the pay roll from June 16, 1913: * * * that none of the compensation paid prior to the issuance of the policy entered into the computation of the premium. No consideration passed from plaintiff to defendant to cover insurance for negligence occurring prior to the issuance of the policy."

The policy agreed to indemnify the assured "against loss or expense arising or resulting from claims upon the assured for damages on account of bodily injuries, including death therefrom, accidentally suffered, or alleged to have been suffered, during the period of this policy, by any person or persons not employed by the assured by reason of the operation of the business described in the schedule

* * * when such injuries or death result from accident occurring within the period hereinafter mentioned."

The accident in question happened "during the period of this policy," and we think it entirely immaterial that the installation of the wires which caused the accident occurred two months prior to the issuance of the policy. Nor is it material that defendant, as is the claim, may not have learned of the date of the installation of the plant until after the trial of the Bergen Case. The fact, if known to the defendant before the trial, could not have excused the power company from liability for the accident, and could have availed defendant nothing, because its liability was for accidents occurring during the life of the policy.

[8] 7. Section 3 of the policy reads as follows:

"No action shall lie against the company for any recovery under this policy, unless it shall be brought by the assured for loss or expense actually sustained and paid in money by the assured in satisfaction of a judgment after actual trial of the issue, nor unless such action be brought within one year after such payment."

There was introduced in evidence an agreement, of date June 30, 1915, between Tulare County Power Company and Mt. Whitney Power & Electric Company, supplemented by an agreement of August 2, 1915, whereby said Mt. Whitney Company purchased the properties of the Tulare County Power Company, and wherein it was recited that the judgment in the Bergen Case was a lien upon said properties and that the balance due the Tulare Company under said agreement of sale should not be paid by the Mt. Whitney Company until said judgment and lien had been fully satisfied of record.

It appeared that the Mt. Whitney Company paid $14,000 of the Bergen judgment and the Tulare Company paid $1,036.10 thereof. It is claimed by appellant that this payment by the latter company does not constitute the payment provided in said section 3 of the policy.

Appellant cites Philadelphia Pickling Co. v. Maryland Casualty Co., 89 N. J. Law, 330, 98 Atl. 433. There a policy of insurance was issued by the defendant to "Philadelphia Pickling Company," which was in reality Sallie Wittenberg, she having adopted that trade-name. One Chambers, an employé, was injured in the assured's factory, and brought suit and recovered judgment. After the verdict and before final judgment, Sallie Wittenberg transferred her business to the plaintiff, Philadelphia Pickling Company, a corporation, which took over the assets and assumed the liabilities of the trade-name, including the Chambers claim. The policy was attempted to be passed by a parol transfer and delivery, but at the time of the incorporation of the plaintiff the policy had expired. The corporation paid the Chambers judgment, and brought the action against the surety company to recover the money paid. Said the court:

"Clearly the appellant cannot recover as the assured under the policy. The difficulty, however, is this: Sallie Wittenberg never suffered any loss. She never paid any money. The money that was paid was paid by the present appellant, the Philadelphia Pickling Company, Incorporated. * * * There was no loss under the policy. While it is true Sallie Wittenberg had assigned her cause of action, she could not assign any loss, for she had already had that loss made good to her by the Philadelphia Pickling Company, not by way of indemnity, but as a part of the purchase price of the property."

The facts in the case at bar differ from those in the above case in the following particulars: The assured here did suffer loss; there was loss under the policy; the assured did not assign its cause of action, but itself prosecuted the suit. The check of the Mt. Whitney Company for $14,000 was drawn to the order of plaintiff, and bore the indorsement that it was in full satisfaction of the Bergen lien. This check, together with one of the plaintiff for $1,036.10, was delivered to the county clerk and by him to Mrs. Bergen. It is said, in J. Frank & Co. v. New Amsterdam C. Co., supra:

"It is therefore immaterial to the insurance carrier how or when that corporation [plaintiff] obtained the money or the credit which enabled it to pay Cousins [judgment creditor] the amount due."

And it was said, in Rodgers v. Pacific Coast Casualty Co., supra, that when the judgment against the assured became final the liability of the insurer became fixed, and it would have been competent for the assured to assign her claim against the insurer to the judgment creditor in satisfaction of the judgment. We can see no merit in the point under discussion.

[9, 10] 8. Appellant contends that the court erred in allowing interest from the date of the entry of the Bergen judgment and in allowing plaintiff's attorney's fees. This contention must be sustained. A contract of indemnity is to be strictly construed, and the contract of indemnity measures the rights of the parties thereto, and, consequently, the liability of the indemnitor. The defendant here agreed to indemnify the plaintiff "against loss or expense arising or resulting from claims upon the assured for damages," etc., to the extent of $5,000 in the case of bodily injuries or death to one person, etc. In addition, the indemnitor agreed that, in the event of any suit brought against the assured to enforce a claim for damages covered by the policy, it "will defend such suit,

whether groundless or not, in the name and on behalf of the insured," and that "the expenses incurred by the company in defending such suit, including costs, if any, taxed against the assured, will be borne by the company whether the judgment is for or against the assured."

It is claimed by the respondent that interest upon the judgment is a part of the costs or expenses of the litigation. But this cannot be so. The "costs" referred to in the contract of indemnity refer to the costs of defending the suit for the recovery of damages against the assured, and certainly it cannot reasonably be said that interest on the judgment recovered against the assured is any part of the cost necessarily incurred or to be incurred in defending the action in which said judgment was obtained. As stated, the assured is bound by the limitation as to reimbursement prescribed by the contract of indemnity, and obviously the allowance of interest on the judgment from the date of its entry and pending the appeal therefrom would result in extending the liability of the indemnitor beyond the amount to which the contract of indemnity expressly limits such liability. This conclusion as to interest is supported by the cases generally.

In Maryland Casualty Co. v. Omaha Electric L. & P. Co., 157 Fed. 514, 519, 85 C. C. A. 106, the United States Circuit Court of Appeals of the Eighth District, considering the precise point under discussion in an action on bond such as the one involved herein, said:

"Is the interest accrued after the original judgment was rendered, and pending the appeal in the Supreme Court, an expense or outlay incident to defending the suit, and when paid by the assured does it constitute a loss within the meaning of the policy? In answering this question we must not forget that the matter resides in the domain of contract, and that the contract measures the rights of the parties. They agreed that defendant's limit of liability should be $5,000, except as it might be increased by failure on its part to pay the cost of making the defense. The interest, in our opinion, is not a part of such cost. It may be remotely related to the delay occasioned by making a defense, in that if no appeal had been prosecuted and no supersedeas secured, the judgment as an indirect result would probably have been paid, and no interest would have accrued. But this is a forced and unnatural view to take. An agreement to pay the cost of making a defense in the common and well-understood acceptance of the term fairly and reasonably contemplates the attorney's fees, court costs, stenographer's fees, and other expenditures necessary and directly required to present the defense, and does not include the collateral and indirect results of doing so."

See, also, Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co., 240 Fed. 36, 153 C. C. A. 72, 77; Davison v. Maryland Casualty Co., 197 Mass. 167, 83 N. E. 407; Munro v. Maryland Casualty Co., 48 Misc. Rep. 183, 96 N. Y. Supp. 705; National & Providence Worsted Mills v. Frankfort Marine & Plate Glass Ins. Co., 28 R. I. 126, 66 Atl. 58; Stephens v. Pennsylvania Casualty Co., 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478.

The sum of the rule as to interest in such cases is this: That an assured who pays a judgment for the full amount limited in a liability policy indemnifying against actual loss, or a judgment for a smaller amount than such limited sum, can recover the sum with interest only from the time of such payment, but that interest accruing on the judgment pending an appeal therefrom is not an expense of defending the action. The case of Saratoga Trap Rock Co. v. Standard Accident Ins. Co., 143 App. Div. 852, 128 N. Y. Supp. 822, sets forth and elaborately examines the reasons for the disallowance of interest upon a judgment pending an appeal therefrom or before the judgment has become final (which occurs only when the judgment has been affirmed by the appellate court) in a case, like the one involved herein, in which a security company has bound itself to indemnify the judgment debtor against loss by reason of such judgment. The case is an instructive one on the proposition, but it is not necessary to do more than refer to it herein.

Counsel for respondent declare that interest ought to be allowed upon the judgment for the reason that the defendant, by exercising its right of appeal in the Bergen Case, delayed the payment of the judgment and thus permitted the interest to accumulate thereon. A similar position was taken in Maryland Casualty Co. v. Omaha Electric L. & P. Co., 157 Fed. 514, 85 C. C. A. 106, and was disposed of by the court in said case as follows:

"The argument of plaintiff's counsel that the defendant, by exercising its right of appeal, and by superseding the execution of the judgment pending that appeal, caused the accumulation of interest in question, and thereby created an additional charge against the plaintiff for which it should be held responsible as a loss to the plaintiff, is more specious than sound. The fallacy rests in a failure to recognize the advantage which the appeal gave the plaintiff. By reason of it plaintiff was permitted to retain and use the $5,000, which otherwise would have been paid out by it. The value of the use is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance in demanding it when due. Accordingly the assured lost nothing by the delay occasioned by the appeal or by paying the interest which accumulated pending the appeal. The assured stood after paying the interest exactly as it would have stood if it had paid the judgment of $5,000 on January 3, 1902, when originally rendered. Nothing was lost by the appeal, as the interest ultimately paid was neutralized by the use and enjoyment of the money before that time."

The judgment in the Bergen Case was rendered and entered on the 23d day of May, 1914, and was paid by the plaintiff herein on February 1, 1917. It follows that interest on the judgment between those dates is not recoverable by plaintiff.

[11] The attorney's fee of $250, awarded by the judgment to plaintiff's attorneys should not be allowed. The fact is that the surety company notified plaintiff that it would defend the Bergen action and did defend it, and the participation therein by plaintiff's attorneys was by defendant's permission, and was not required by the terms of the policy. Indeed, the evidence clearly enough shows that the part taken in said action by the attorneys for the plaintiff were wholly voluntary and gratuitous on their part. Moreover, in a letter of January 17, 1914, to Feemster & Walker, attorneys of the plaintiff, Mr. Cooley, one of defendant's attorneys, wrote that the expense of plaintiff's attorneys was "to be borne by the assured."

[12] 9. It is lastly contended that the court erred in denying defendants' motion for a change of venue. The affidavits upon which the motion was made showed that defendant was a resident of and had its principal place of business in San Fransisco; that the insurance policy was made and countersigned in San Francisco and was to be performed there; that it was customary amongst insurance companies to make payments to the persons insured at the home office, or principal office, of such companies. Respondent contends that the action was properly tried in Tulare county because the contract was made and was to be performed, the liability sued on arose and the breach occurred in said county. Const. art. 12, § 16. Section 1626 of the Civil Code reads:

"A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."

In answer to the affidavit made on behalf of defendant on the application to change the place of trial, H. H. Holley deposed as follows:

"That at the time of the execution and delivery of the policy No. C. P. 2374, * * * affiant was the agent of defendant Pacific Surety Company, through whom said policy was solicited and delivered; that said policy was received by affiant in Visalia, Tulare county, by mail from the head office of said defendant, and affiant acting as the agent of defendant personally delivered said policy to said plaintiff in Tulare county; and during the time affiant was the agent of said defendant, it was the practice and custom of defendant to pay its losses occurring in Tulare county by sending drafts to affiant, as its local agent, and affiant would thereupon deliver said drafts personally to the beneficiaries of defendant's policies, who suffered losses."

It is true that a different state of facts was set up in the affidavits filed by defendant, but the court did not hold with it. Under the authority of Ivey v. Kern County Land Co., 115 Cal. 196, 201, 46 Pac. 926, the court was justified in finding, from the facts set forth in the Holley affidavit, that the contract was made in Tulare county, and was to be performed therein. The business of plaintiff was conducted in that county, and the liability of the defendant under the policy arose therein.

The judgment should be modified by eliminating therefrom the sum of $250, attorney's fees, and the sum of $1,017.80, interest on the sum of $5,460 from May 23, 1914, to February 1, 1917, and, as so modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

Opinion of Supreme Court In Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District is denied.

In so far as the claim of interference by the respondent in the matter of the motion for new trial is concerned, we base our denial of a hearing in this court upon the finding of the trial court substantially to the effect that Mr. Feemster represented appellant. which we believe under all the circumstances shown by the record to be sufficiently supported by the evidence.

All concur.

43 Cal. App. 469

TAKEBA v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN JOAQUIN COUNTY et al. (Civ. 2048.)

(District Court of Appeal, Third District, California. Oct. 8, 1919.)

1. PROHIBITION ⊂=28—DECISION OF MERITS OF CONTROVERSY WHEREIN WRIT IS SOUGHT.

On application for a writ of prohibition to prevent a receiver from selling a certain apricot crop, title to which was in dispute, the ownership of the fruit cannot be decided, where it appears that the court had jurisdiction to appoint the receiver.

2. RECEIVERS ⊂=2—RETROACTIVE EFFECT OF AMENDMENT OF STATUTE EMPOWERING APPOINTMENT.

The amendment of 1919 (St. 1919, p. 251) to Code Civ. Proc. § 564, adding subdivision 6, which provides that a receiver may be appointed in unlawful detainer, where the superior court

has exclusive original jurisdiction, not being a change of remedy merely, is not retroactive.

3. RECEIVERS ⊂⊃4, 16—PRESERVATION OF PERISHABLE PROPERTY AS GROUND FOR APPOINTMENT.

Where title to perishable property is in litigation, and it appears that plaintiff has an interest therein which is reasonably certain, the court may appoint a receiver, and an action to recover possession of leased property involving ownership of apricot crop, came under Code Civ. Proc. § 564, subd. 7, providing for such appointment "in all other cases where receivers have been appointed by the usages of courts of equity."

4. PROHIBITION ⊂⊃3(1), 10(1)—PURPOSE AND FUNCTIONS OF WRIT.

The sole function of a writ of prohibition is to arrest or prevent the prosecution of proceedings before, or to be taken by, any tribunal, board, or corporation, whether exercising judicial or ministerial functions, when such proceedings are without, or in excess of, jurisdiction, in view of Code Civ. Proc. § 1102, and the writ will issue only where there is not a plain, speedy, and adequate remedy at law, as provided by section 1103, and cannot be used to undo something which has already been done; that being the function of the writ provided for in sections 1067 and 1068.

5. RECEIVERS ⊂⊃34—NONJOINDER OF SUBSEQUENT PURCHASER OF PROPERTY INVOLVED.

The jurisdiction of the court to appoint a receiver in a suit wherein the ownership of an apricot crop was involved is not affected by the fact that a subsequent purchaser of the crop from one of the litigants was not joined, and had no opportunity to protest against the appointment.

6. PROHIBITION ⊂⊃3(1)—EXISTENCE OF REMEDY BY INTERVENTION.

Where a dispute has arisen between a landlord and a tenant as to the ownership of an apricot crop, wherein a receiver has been appointed, a subsequent purchaser of the crop from the tenant, having obtained knowledge of the action, could have intervened and have his rights litigated and adjudicated, hence was not without adequate and sufficiently speedy legal remedy, entitling him to writ of prohibition.

7. PROHIBITION ⊂⊃3(1)—EXISTENCE OF OTHER REMEDY.

Where, in a controversy between a landlord and a tenant over the possession of an apricot crop, a receiver has been appointed to take charge of the crop, a subsequent purchaser thereof could have sued the receiver and his bondsmen in conversion, or claim and delivery, or for damages for its wrongful taking and appropriation, hence was not without an adequate, speedy, legal remedy, entitling him to writ of prohibition.

Original Application by T. Takeba against the Superior Court in and for the County of San Joaquin and others, for a writ of prohibition to require restoration of property. Writ denied.

W. Goodwin Williams and John R. Cronin, both of Stockton, G. M. Steele, of Lodi, and George F. McNoble, of Stockton, for petitioner.

Wm. E. Kleinsorge and Elliott & Atkinson, all of Sacramento, Clarence E. Fleming, of Los Angeles, and Arthur L. Levinsky, of Stockton, for respondents.

HART, J. This is an original application for a writ of prohibition. The petition alleges as follows:

That there is pending in the superior court in and for the county of San Joaquin, before Hon. George F. Buck, the judge thereof, an action in which Charles W. Mier is plaintiff and M. Mizushima is defendant. In the complaint in said action it is alleged: That plaintiff is the owner and entitled to the possession of certain real property in the county of San Joaquin. That on the 4th day of November, 1918, Laura M. Eagan was the owner of said property; that she and defendant entered into a lease of said property, among the terms of said lease being the following: That the terms of the contract should apply only to the crops grown on said land during the season of 1918–1919. The tenant agreed to furnish all labor and supplies free of cost to the owner, and agreed properly to cultivate said land. All fruit grown upon the land was to be marketed in the name of the owner. Said lease contained the following covenant:

"It is further understood and agreed that should said owner sell the whole or any part of said ranch during the life of this agreement, and the purchaser is not willing to abide by the terms of this agreement, then said tenant will accept reasonable compensation for his labor up to that time performed on the whole or the portion of said ranch which may be sold. In case of disagreement as to the amount of compensation to which said tenant shall be entitled for said labor performed, each of the parties, said owner and said tenant, may select an arbitrator, and those two may select a third person and a decision of a majority of said three arbitrators shall be accepted as final and binding on the parties to this agreement."

It was then alleged in the complaint that defendant entered into possession of the land and was in possession thereof at the time of the commencement of the action. "That on the 2d day of May, 1919, said Laura M. Eagan sold and conveyed said above-described real property to the plaintiff herein and so notified said defendant in writing" on said day, that the plaintiff was not willing to abide by the terms of said lease, as provided in the portion of the lease above quoted, and that, on the 2d day of May, 1919, plaintiff and Laura M. Eagan tendered defendant the sum of $1,000 "for and as reasonable compensation for the labor of said defendant performed on said premises during the term of

said lease," which tender defendant refused to accept; that, on the 3d of June, 1919, plaintiff notified defendant in writing of the appointment of an arbitrator and demanded that defendant appoint another, for the purpose of fixing the amount of compensation to be paid defendant for his labor, which defendant neglected and refused to do, and that, on said last-mentioned date, plaintiff caused to be served on defendant a notice to quit and surrender possession of said premises, which defendant refused; that approximately 30 acres of said land were planted to peach trees, and approximately 15 acres to apricot trees, and that the crop of apricots was ready to be harvested and was of the value of $4,500; that defendant wrongfully claims the ownership of said apricots, and that unless restrained he will sell and dispose of said crop. The prayer of the complaint was for judgment for restoration of the premises, and that defendant be ordered to surrender possession thereof upon the payment of a reasonable compensation for his labor; and that defendant be restrained from selling or disposing of said crop of apricots or committing any waste of the premises.

On the 11th day of June, 1919, the court issued a restraining order as prayed for in the complaint, and set the 16th day of June as the date upon which defendant might show cause why an injunction should not issue. On said last-named date, defendant filed an affidavit in opposition to the issuance of an injunction, a hearing was had upon the order to show cause, and the restraining order was dissolved. On the 29th day of July, 1919, defendant filed an answer in the action.

On August 8, 1919, an affidavit was filed in support of plaintiff's application to have a receiver for the premises appointed, and on August 11th defendant filed an affidavit in opposition thereto. On August 12, 1919, the court appointed E. A. Humphrey as receiver of said real property.

The petitioner herein, T. Takeba, on August 19, 1919, filed a petition in said action, in which it was alleged that, on the 18th of June, 1919, the defendant Mizushima had conveyed to one J. A. Ballantyne all his right, title, and interest in and to said crop of apricots, and that on June 24th said Ballantyne, for a good and valuable consideration, sold said crop of apricots to petitioner; that subsequent to the 24th of June, 1919, petitioner harvested and sold said crop of apricots; that there was a crop of peaches growing upon said land, which the receiver threatened to harvest. Petitioner asked that the court revoke or modify the order appointing receiver; that the receiver be directed to cease from interfering with petitioner in the harvesting of said crop of peaches; and that he surrender full possession and control to petitioner of said crop.

Said petition of T. Takeba came on for hearing in the superior court on the 22d day of August, 1919, and was by the court denied.

The petition for writ of prohibition was filed in this court on the 26th day of August, 1919, and, after setting out the proceedings above referred to, alleged that the receiver was in possession of and was harvesting said crop of peaches, and threatened to sell and dispose of the same; that petitioner had no knowledge of the application made for the appointment of said receiver, nor was he afforded any opportunity to be heard in opposition thereto. The prayer of the petition is for a writ of prohibition directed to the superior court of the county of San Joaquin and to the receiver to prohibit them from exercising any control over the property of petitioner, and that all property taken by respondents be restored to petitioner.

The petition here asks that the writ prayed for be made to run against the receiver as well as against the court appointing the receiver; but, as is said in Havemeyer v. Superior Court, 84 Cal. 327, 389, 24 Pac. 121, 137 (10 L. R. A. 627, 18 Am. St. Rep. 192):

"Property in the hands of a receiver is in the hands of the court. The receiver is the mere instrument of the court, and what he does the court does. It is the court, therefore, and not the receiver, which holds, administers, and disposes of the property in his hands; and so long as the property remains undisposed of, action by the court is necessary. * * * The writ runs to the court, and operates directly upon the court, but indirectly upon the receiver. If it is served upon the receiver, it is only that he may have timely notice that the proceedings of the court are arrested, and may stay his hand, as he is bound to do, having no power to act independently of the court, from which he derives all his authority."

The sole and only question to be determined in this proceeding is, manifestly, whether the respondent court stepped beyond its jurisdiction in appointing a receiver in the case of Mier v. Mizushima, mentioned above, and in taking, through the receiver so appointed, possession of the fruit referred to in the petition for this writ.

[1] Numerous affidavits have been filed herein touching the merits of the controversy; that is, affidavits addressed to the question as to the ownership of the fruit. But we cannot decide that controversy in this proceeding. If it appears that the court was within its jurisdiction under the law in appointing the receiver, then the inquiry, so far as this proceeding is concerned, is at an end.

Section 564 of the Code of Civil Procedure enumerates, in as many different subdivisions thereof, a number of occasions upon which,

upon a proper showing, the superior court may appoint a receiver. As said section read before an amendment thereof by the Legislature of 1919 (St. 1919, p. 251), whereby a new subdivision was added thereto, the only subdivision of said section from which the authority for the appointment of a receiver could be drawn in a case of the character of the one involved herein was subdivision 6. In 1919, however, the Legislature added to the section the following provision, numbered 6:

"In an action of unlawful detainer, in those cases in which the superior court has exclusive original jurisdiction."

The subdivision which, previous to said amendment, was numbered 6 is still retained in said section as No. 7.

The amendment above mentioned did not take effect until 90 days after the adjournment of the Legislature of 1919 (Const. art. 4, § 1. See page 204, Treadwell's Const.), which was on the 22d day of April, 1919. The action involved herein, in which the receiver was appointed, was instituted on June 10, 1919, which was before the amendment referred to went into effect.

[2] It is contended by the attorneys for the respondents that the said amendment of section 564 of the Code of Civil Procedure, since it involves a change only in the matter of a remedy, is retroactive in its effect, and that therefore the respondent court acted, when appointing the receiver, within or under a provision of law expressly authorizing the appointment of a receiver in cases of unlawful detainer, of which said court has original jurisdiction, and that this is such a case. We are unable to coincide with that view. The power vested by the Codes in superior courts to appoint receivers in actions pending before them involves in its effect more than a mere remedy. Of course, the power is in a sense remedial, but in its exercise the substantive rights of the parties are necessarily dealt with. When exercised, it means the taking of property by the court from one who may turn out to be the rightful owner thereof, and transferring it, pro re nata, to an agent of the court vested with power to handle and dispose of it according as the court may direct for the purposes of the action in which such agent or receiver is appointed. There is no power vested in the courts more jealously guarded or safeguarded than this very power to appoint a receiver to take, for the court, the possession and control of the property of others, and this is because, as above suggested, the exercise of the power may mean the divesting the owner of his lawful right to remain in possession of his property. It is therefore obvious that, while the power to appoint a receiver is provisional and an ancillary remedy, its scope may go beyond that of a mere remedy and strike at the very substance of a person's property rights. It cannot therefore be well contended that a legislative amendment extending the power of the superior courts in the matter of appointing receivers or giving such courts the right to appoint an officer with the usual powers of such a representative of the court is retroactive. At the time the court made the appointment in this case, it was limited in its power to do so by the law as it then read. The Legislature having taken upon itself the right to name the cases in which a receiver may be appointed, its statute enumerating those cases is the measure of the power of the superior courts in that particular, and if the right to appoint a receiver in this case did not exist by virtue of the statute when the appointment was made, then it is very obvious that the court was without authority to make the order.

[3] But we think the respondent court was authorized to act in this case, upon a proper showing, of course, upon the provisions of what was formerly subdivision 6 of the Code section above named, but which is now, and has been since the above considered amendment of 1919, subdivision 7. It reads:

"In all other cases where receivers have heretofore been appointed by the usages of courts of equity"

Where the dispute in a litigation is as to the title to the property involved therein, and it is made satisfactorily to appear that the property is of such a character or is in such a situation as that it is likely to be lost or destroyed or greatly deteriorated in value in the hands of the party in possession before the merits of the controversy can be adjudicated, and a satisfactory showing is made that the plaintiff has some interest in the property, or that the plaintiff's right thereto or to some portion thereof is reasonably certain, the court may, in the exercise of its discretion, appoint a receiver to take custody of the property pending the litigation and the determination of the rights of the parties. This means of course, that the court itself may take possession or custody of the property and hold or dispose of it, according as the nature of the property or the exigencies of the situation with respect to it may require.

[4] That the court did not transcend its lawful authority in making the appointment cannot, it seems to us, for a moment be doubted. Whether the facts disclosed to the court on the application for the appointment of a receiver were such as legally to warrant it in putting in operation or applying its jurisdiction in that regard in the action involved herein presents another and an entirely different question, but one which we are precluded from inquiring into or reviewing in this proceeding. The sole function or office of the writ of prohibition is to arrest

or prevent the prosecution of proceedings before or to be taken by any tribunal, corporation, board, or person whether exercising judicial or ministerial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, etc. (Code Civ. Proc. § 1102), and will issue only where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc. § 1103). Thus it is plain that the sole object of the writ is to prevent the taking of some action or the doing of some act on the part of an inferior tribunal, board, etc., which has not been done but which such tribunal or board or person threatens to do. Obviously, as the very name of the writ plainly implies, its object is not to undo something which has already been done. There is another writ whose specific office is to do that. Code Civ. Proc. §§ 1067, 1068.

When the application was made for this writ, the very action to prevent which this writ was sought had already been done. The receiver had then been appointed, and the action of the respondent court in that particular had been fully completed. But the theory of the petitioner in applying for this writ was that the order appointing the receiver was void, and that, therefore, as was held in the Havemeyer Case, supra, the action of the receiver in taking the property and threatening to dispose of it constituted the action and the threatened action of the court which could be prevented through the operation of this writ. We hold, however, that the order appointing a receiver here was, under the law, within the jurisdiction of the court. In the Havemeyer Case, the respondent court, in a proceeding instituted by the Attorney General of the state in quo warranto against the American Sugar Refinery Company, a California corporation, to have the forfeiture of its charter declared, made an order appointing a receiver, and the Supreme Court held that the superior courts were wholly without the right or jurisdiction to appoint a receiver of a corporation in an action in quo warranto, the purpose of which is to cause its charter to be forfeited, and that, therefore, the appointment of a receiver in that case was void ab initio. Hence it was said in that case that it was proper to arrest and annul the action of the receiver done under that void order, the action of the receiver within the scope of his assumed powers as such being the action of the court. It was further said in that case (quoting from the syllabi):

"The operation of the writ of prohibition is primarily and principally preventive, rather than remedial, and is excluded when the action of the inferior tribunal is fully completed, and nothing remains to be done under its void order; but if its action is only partially and not fully completed, further proceedings may be stayed, and in such case the office of the writ is so far remedial that it will annul such prior proceedings as may be necessary to make the remedy complete."

Here, as before stated, the action of the court in appointing a receiver was fully completed, and when the receiver proceeded to exercise the functions or perform the duties of his receivership, by taking charge of the property, he was then acting under a lawful and not a void order of the court, and with full authority to do the things his office required of him. And so he has continued, as such receiver, to act in the premises in every step he has taken, so far as we are advised by the petition here. Obviously, this case is in no sense similar or analogous to the Havemeyer Case.

[5] The plea of the petitioner that he was not a party to the action of Mier v. Mizushima, that he had no knowledge of the application by the plaintiff for the appointment of a receiver, and had no opportunity to be heard in opposition to said application, reveals as to him, perhaps, an unfortunate situation but it does no more than that, so far as the present proceeding before us is concerned. The power of the court to appoint a receiver still existed, notwithstanding that he or other parties who might claim an interest in the property of which the receiver was authorized under his appointment to take possession were not made parties to that action. It may be, and probably is, true that at the time of the preparation and filing of the complaint in said action the plaintiff had no knowledge of any claim of petitioner to the fruit. In any event, as stated, the court's jurisdiction to appoint a receiver is in no wise affected by the fact that the petitioner was not a party to the suit, and was without opportunity to protest in court against the appointment of the receiver.

[6, 7] We may add, although the suggestion is wholly gratuitous so far as the requirements of the decision herein are concerned, that the petitioner is not without an adequate and sufficiently speedy legal remedy. In the first place, it may be observed that, having in some way obtained notice of the commencement of the action of Mier v. Mizushima (he filed a petition asking for the revocation of the order appointing a receiver), he could have intervened in that action, and therein had his rights litigated and adjudicated. And he still has remaining to him an action against the receiver and his bondsmen in conversion or claim and delivery for the return of the property or for damages or the value thereof, in case it cannot be returned, for the wrongful taking and appropriation thereof, assuming it to have been so taken and appropriated.

However, it is plain that the writ of prohibition is not the proper remedy for the correction of the action of the court in appointing the receiver in the action of Mier v. Mizushima, and the alternative writ or or-

der to show cause must therefore be discharged; and it is so ordered.

We concur: ELLISON, Presiding Judge, pro tem.; BURNETT, J.

43 Cal. App. 442

SWARTZ v. BURR et al. (Civ. 2160.)

(District Court of Appeal, Second District, Division 2, California. Oct. 4, 1919.)

1. EVIDENCE ⟸459(2) — PAROL EVIDENCE SHOWING OFFICER'S CONTRACT WAS FOR COMPANY.

Parol evidence may be invoked to hold a corporation upon a contract, entered into by its president or manager in his own name, if it was intended for and inured to the benefit of the corporation and there is anything on the face of the instrument suggesting that it was made for an undisclosed principal.

2. CORPORATIONS ⟸402—CONTRACT OF OFFICER.

The law is not scrupulously particular in discriminating between the contracts of one who owns practically all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity.

3. CORPORATIONS ⟸79—CONTRACT BY OFFICER; SUFFICIENCY OF EVIDENCE.

In suit to recover money paid and to cancel a note given for corporate stock, evidence *held* to justify the finding that both plaintiff and the individual defendant, president and general manager of the corporation, made the contract for the transfer of the stock on the understanding that the individual defendant's voice was the voice of the company and that whatever he agreed to would bind the company.

4. CORPORATIONS ⟸79—KNOWLEDGE OF OFFICER'S CONTRACT.

A corporation is presumed to know of the execution, of a contract for the transfer of its stock on its behalf, by its president and general manager, the terms of the contract, and that itself was the recipient of the consideration.

5. CORPORATIONS ⟸79 — CONTRACT BY OFFICER; SUBJECTION OF COMPANY TO OPTION.

Where the president and general manager of a company on its behalf agreed to sell its stock to plaintiff, consummation of the executory contract and permanent transfer of the stock being dependent on the condition precedent that at expiration of one year plaintiff should elect to retain it, the corporation which had received the money paid and the note executed by plaintiff, with knowledge of the contract, held money and note subject to the exercise of plaintiff's option to retain the stock, not being able to accept benefits and repudiate obligations.

6. APPEAL AND ERROR ⟸1011(1)—REVIEW OF FINDINGS.

The appellate court will not disturb the findings of the trial court sustained by evidence.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by E. F. Swartz against E. Burr and the Burr Creamery Company, a corporation. From judgment for plaintiff, defendants appeal. Affirmed.

F. G. Tyrrell, A. L. Abrahams, and Chas. W. Fricke, all of Los Angeles, for appellants.

Daly & Daly, of Long Beach, for respondent.

SLOANE, J. The plaintiff brought this action to recover $3,000, and cancel a promissory note for $2,000, in pursuance of the terms of an agreement in writing as follows:

"Los Angeles, Cal., Oct. 8th, 1913.

"This agreement entered into this 8th day of October, 1913, by and between E. F. Swartz, party of the first part of Fresno, Cal., and E. Burr, party of the second part of Los Angeles, California, witnesseth: That in consideration of the first party paying second party the sum of three thousand ($3,000.00), receipt of which is hereby acknowledged and note for two thousand dollars ($2,000.00), due on or before 15 months from date hereof, second party agrees and does hereby deliver to first party fifty shares of the capital stock of the Burr Creamery Company to be held for a period of one year by first party. If at the expiration of that time first party desires to sell said stock he agrees to sell only to second party who agrees to pay first party for same the sum of $5,000.00 with interest at 8 per cent. per annum. In the event first party is satisfied to remain a stockholder after a period of one year then he will participate in any and all dividends, improvements and increased assets of the corporation, share and share alike with other stockholders. E. F. Swartz.
"E. Burr."

It is alleged in the complaint, and the court on the trial found, that although this agreement was executed in the name of the defendant E. Burr, and ostensibly as his personal obligation, it was made for and as the contract of the defendant Burr Creamery Company, a corporation of which E. Burr was the president and general manager. Judgment was against the corporation.

[1] It has become a well-settled rule of evidence under the decisions in this state, at least, that parol evidence may be invoked to hold a corporation upon a contract entered into by its president or manager in his own name, if it was intended for and inured to the benefit of the corporation, and there is anything on the face of the instrument suggesting that it was made for an undisclosed principal. West v. Prather & Co., 7 Cal. App.

81, 93 Pac. 892; Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252; S. P. Co. v. Von Schmidt Dredge Co., 118 Cal. 368, 50 Pac. 650; Escondido Oil, etc., Co. v. Glaser, 144 Cal. 494, 77 Pac. 1040; Pacific Improvement Co. v. Jones, 164 Cal. 260, 128 Pac. 404. In S. P. Co. v. Von Schmidt Dredge Co., supra, the court says:

"Thus the rule is well settled that where a reading of a simple contract, however inartificially it may be drawn, discloses that it is executed for or on behalf of a principal. * * * or even leaves the matter one of doubt, parol evidence may be employed to determine whose contract it is, and this even in cases where the instrument is sufficiently clear in its terms to bind the agent."

The opinion further adopts with approval the following quotation, italicized as here shown, from Abbott's Trial Evidence:

"If upon the face of the instrument there are indications suggestive of agency, such as the addition of words of office or agency to the signature, or the imprint of the corporate title on the paper, parol evidence is competent to show whom the parties intended should be bound or benefited. And even where the contract *bears no such suggestion* on its face, the rule as now generally received is, that parol evidence is competent, either in favor of or against the corporation."

The same citation from Abbott's Trial Evidence is approved in Bean v. Pioneer Mining Co., 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106.

The reference in the foregoing contract to the Burr Creamery Company as a possible party in interest is obscure at best. But it does appear that the stock involved is that of the Burr Creamery Company, that the delivery of the stock is something less than an executed transfer, and is to be held only for a year at the option of the purchaser, and that the right to participate in the dividends, improvements, and assets of the corporation, by virtue of said stock, is to be postponed until the purchaser has made his election to retain it. At any rate the trial court did admit parol evidence to explain the contents and execution of this instrument, to which no exception seems to have been taken; and the main question appears to be whether the evidence is sufficient to sustain the findings of the court that "E. Burr did not in any of the matters upon which this action is based act in an individual capacity, nor otherwise, except for and on behalf of the defendant corporation," and "that said agreement was authorized and ratified by said corporation, and it received and accepted and used for its corporate purpose all the benefits of said agreement." That the transaction was wholly for the benefit of the corporation is not disputed. The stock bargained for was the unissued stock of the company. The $3,000 payment was to the order of the corporation, and was used for its benefit, and the note for $2,000 was executed to the corporation, as payee, and the reservation of dividends and profits during the year in which the option was to be exercised inured to the corporation.

[2] That the plaintiff did not enter into this agreement with Burr in his individual capacity is not so clear. Nominally the transaction was with Burr personally. The only theory on which it can be held that the minds of the parties met on an obligation intended to bind the corporation is that Burr considered himself, in the negotiations, and was considered by plaintiff, as being the personification of the corporation. If the evidence had disclosed that this was a "one man corporation," and that Burr was the only person beneficially interested in it to any material extent, there would be no difficulty in maintaining this theory. The law is not scrupulously particular in discriminating between the contracts of one who practically owns all the stock of a corporation and controls its affairs, as to whether he executes a contract relating to the corporate business in his individual or in the corporate capacity. While such is not the situation here, so far as shown by the evidence, it does fairly appear that the defendant E. Burr not only was the president and manager of this company, but that he ran its affairs largely in his own discretion. The vice president of the company, who was a party to the negotiation of this agreement, represented to plaintiff that "Burr is the corporation." The fact that his name identifies the corporation, and that he is the only member or officer of the corporation connected, so far as the record discloses, with the defense of this action, tends to confirm such a conclusion.

[3, 4] It may reasonably be inferred from the evidence that both Burr and the plaintiff entered into this contract on the understanding that Burr's voice was the voice of the corporation, and that whatever he agreed to would bind the corporation. It may also be found, as a legal inference from Burr's relation to this company, that the corporation is presumed to know of the execution of this contract, and its terms, and that it was the recipient of the consideration. Goodwin v. Central Broadway Bldg. Co., 21 Cal. App. 376, 131 Pac. 896; Balfour v. Fresno Canal Co., 123 Cal. 397, 55 Pac. 1062; Montecito Valley Co. v. Santa Barbara, 144 Cal. 597, 77 Pac. 1113; Anderson v. Kinley, 90 Iowa, 554, 58 N. W. 909.

This brings us to a consideration of the question as to whether there is anything in the terms of the agreement to put the corporation on inquiry as to its liability thereon, or to estop it from repudiating the agreement and retaining the consideration. The corporation had notice that this was a contract for the transfer of a block of its un-

issued capital stock; that it had received the $3,000 cash payment, and that the note was made payable to it, in its corporate name; that while E. Burr is named as the "second party" to this agreement, and signs it in his individual name, the contract recites that this $3,000 which was paid the corporation was paid to the "second party" to the contract; and that the note which names the corporation as the payee was executed to the "second party." The corporation further knew that Burr was its president and manager, and had been intrusted by it with a large measure of discretionary control of its affairs.

[5, 6] Furthermore, it is indicated on the face of this contract that the sale of stock is in a sense not a completed, but an executory or conditional, sale. It recites that "said second party does hereby deliver to first party fifty shares of the capital stock of the Burr Creamery Company to be held for a period of one year by first party," with the condition that the second party may terminate the purchase at his option and receive his money back. And there is the further implied agreement that the corporation may retain all dividends and profits of the shares of stock until the election of the party of the first part to retain the stock. All of these conditions tend to identify the corporation as the party in interest designated as the "second party." If this appeared on the face of the agreement to be a completely executed sale of the shares of stock, and the consideration paid, with the only condition a condition subsequent—that if after a year the purchaser was dissatisfied E. Burr would repurchase the shares from him—doubtless the only remedy of the plaintiff would be on such new and independent contract to repurchase. But if the agreement for the sale of the stock to plaintiff can be considered executory, and its consummation dependent on the condition precedent that at the expiration of one year plaintiff elects to retain it, then the corporation which has received the money and the note, with knowledge of the contract, holds them subject to the exercise of plaintiff's option, and must repay the money, and cannot collect the note, but must surrender it for cancellation in the event plaintiff decides not to retain the stock. It cannot accept the benefits and repudiate the obligations. Pauly v. Pauly, 107 Cal. 8, 40 Pac. 29, 48 Am. St. Rep. 98. Such seems to have been the view taken by the trial court under the evidence. We will not disturb its findings. The contract not being an executed contract of sale, but merely one whereby plaintiff, in effect, was given the optional right either to purchase at the end of the year or to receive back that which the corporation had received from him through Burr, the case is in no wise analogous to those cases wherein the purchaser and owner of stock seeks to enforce a contract of resale by attempting to compel "B." to purchase the stock under a contract that was made with and in the name of "A."

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(43 Cal. App. 549)

NORMAN B. LIVERMORE & CO. v. GUARDIAN CASUALTY & GUARANTY CO. (Civ. 2320.)

(District Court of Appeal, Second District, Division 1, California. Oct. 10, 1919. Hearing Denied by Supreme Court Dec. 8, 1919.)

1. APPEAL AND ERROR ⟸110—ORDER DENYING NEW TRIAL NOT APPEALABLE.

An order denying a motion by plaintiff for a new trial cannot be appealed from.

2. HIGHWAYS ⟸113(5)—LIABILITY ON BOND OF CONTRACTOR ON STATE HIGHWAY.

A surety on a bond of a state highway contractor, made pursuant to the provisions of St. 1897, p. 201, amended by St. 1911, p. 1422, was not liable to one who leased a steam shovel to another, who furnished the shovel to a subcontractor, although it was agreed between the subcontractor and the one who furnished him the shovel and the lessor of the shovel that the the rent for the shovel should be paid to the lessor, and an order on the contractor was given by the subcontractor for the payment of the same; the contractor agreeing, but failing to pay the same to the lessor, and the one furnishing the shovel not being agent for the lessor under the circumstances.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Norman B. Livermore & Co. against the Guardian Casualty & Guaranty Company. From a judgment in favor of the defendant, and an order denying a new trial, plaintiff appeals. Appeal from order dismissed, and judgment affirmed.

W. E. Lady and V. J. Cobb, both of Los Angeles, and Arthur H. Redington, of San Francisco, for appellant.

James, Smith & McCarthy and Schweitzer & Hutton, all of Los Angeles, for respondent.

CONREY, P. J. [1] The plaintiff has appealed from the judgment and from an order denying its motion for a new trial. As there is no right of appeal from such a motion, the latter appeal will be dismissed.

On the 6th day of April, 1915, Brashear-Burns Company, a corporation, as contractor, entered into an agreement with the California highway commission for the construction of a portion of the state highway in Orange

county. At the same time and in connection therewith, the defendant Guardian Casualty & Guaranty Company, as surety, together with said contractor, as principal, executed a bond to the state for due payment to be made by the principal for all labor, materials, and supplies furnished for the work of construction under the principal contract. This bond was made pursuant to the provisions of an act approved March 27, 1897. Stats. 1897, p. 201, amended Stats. 1911, p. 1422.

On the 4th day of May, 1915, Brashear-Burns Company entered into a subcontract with W. S. Cook for the performance of work which was a part of the principal contract. Thereupon Cook entered into a contract with one W. F. McDowell whereby it was agreed that McDowell would furnish a certain steam shovel to be used in the performance of the work contracted to be done by Cook. That steam shovel was furnished and used in the performance of said work. Thereafter Brashear-Burns Company's contract with the state was duly completed and the work accepted. Thereafter, and within the period limited by said act of 1897, as amended in 1911, plaintiff filed a duly verified statement of claim, stating that such steam shovel was furnished by it to be used, and that the same was used, in the performance of the work contracted to be done by Cook under his contract with Brashear-Burns Company. This claim was filed with the California highway commission and conformed to the requirements of the statute. Thereupon the plaintiff, claiming to be a person coming within the class of persons for whose benefit said statutory bond was given, brought this action to recover from the defendant the amount so set forth in its verified statement of claim.

On the 2d day of March, 1914, the plaintiff entered into a written contract with W. F. McDowell concerning said steam shovel in substance as follows: It is stated in the instrument of contract that the plaintiff (therein called lessor) leased to McDowell (therein called lessee) the said steam shovel for a term ending February 5, 1915, for the total rental of $4,749, of which $750 was paid in cash on delivery of the steam shovel, and the remainder was to be paid in accordance with 10 installment notes of which the last was to fall due on the 5th day of February, 1915. It was further agreed as follows:

"Lessee covenants that it will keep said steam shovel in first-class repair and working order during the term of this lease; that it will not remove it from the state of California or assign this lease without the consent in writing of the lessor; and that it will, upon the termination of this lease, return and surrender possession of said steam shovel to lessor at San Francisco, Cal., in as good condition as when taken, ordinary wear and tear excepted. Lessor agrees that lessee may, at the expiration of this lease, and within 10 days thereafter, provided it shall have promptly and duly paid the entire rental herein specified, and shall have performed all the other conditions and covenants hereof, and shall have paid for all extra parts and repairs furnished or made by lessor during the time hereof, elect to purchase said steam shovel for the sum of one dollar, and if lessee so elects, and so notifies lessor, said steam shovel shall, upon payment of said sum, become and be the property of the lessee, and lessor will execute a bill of sale thereof. In case of any breach of this agreement by the lessee, arising by failure of said lessee to pay rent as the same becomes due, or otherwise, the lessor may, at his option, forthwith terminate this lease, and may enter upon the premises of the lessee and retake possession of the said steam shovel wherever found, and said lessee hereby agrees to said lessor's entry and retaking possession, and releases said lessor from any cause of action which the lessee might otherwise have on account of said entry or removal or retaking of possession."

It will be noted that in May, 1915, when McDowell agreed with Cook for the furnishing of the shovel to be used in the performance of the Cook contract, the specified term named in the contract between plaintiff and McDowell had expired. McDowell was then delinquent in his payment to plaintiff to the extent of more than one-half of the total rental or price therein named. The evidence further shows, however, that the plaintiff had made no attempt to interfere with McDowell's possession of the shovel and had not given any notice of termination of the lease or contract. Prior to this time, and while delinquent in payments on the contract, McDowell had used the shovel on two other contracts. In each of those instances he had made arrangements with the person by whom the shovel was used, whereby they made payments to the plaintiff for account of McDowell. That was done with the consent of the plaintiff, although it is not clear from the terms of the contract that any such consent was necessary. In like manner, when McDowell entered into his contract with Cook, it was made a part of their agreement that, during the time that the shovel was used upon that contract, the Brashear-Burns Company should deduct from the moneys payable to Cook the sum of $400 per month and pay the same to the plaintiff. Thereupon Cook, on the 5th day of May, 1915, executed a written order to Brashear-Burns Company, directing that it pay to the order of the plaintiff the sum of $400 per month during the time that the shovel was used on the said highway work, said payments to be charged against the money due Cook from Brashear-Burns Company. An acceptance of that order was indorsed thereon, on the same day, signed "Brashear-Burns Company, by F. J. Truman, Secretary." None of the moneys mentioned in this order were paid. The evidence shows without dispute that the reasonable value of the use of the shovel was $400 per month. The controversy herein relates,

not to the amount of the claim, but goes to the question of any liability at all of the defendant as surety on said bond.

[2] The liability of defendant as surety on the bond executed by it cannot be maintained by plaintiff by proving that the shovel, used as it was in the described work, was furnished by McDowell; yet in fact that is the effect of the evidence, and we think there is no merit in appellant's contention that, in bringing the shovel to the place of work, for use therein, McDowell was acting as agent for the plaintiff. Counsel have debated the question whether the "lease" contract between plaintiff and McDowell was a lease or was a conditional sale. That question need not be decided. If the contract was one of conditional sale, it remained in force by manifest intention of the plaintiff, which had never demanded or attempted to recover possession. If the contract was only a "lease" or bailment, then McDowell was a bailee holding over after expiration of the time limited in the lease, and liable to his lessor as such bailee. Under either interpretation, he held possession of the shovel in his own right, and not as agent for the plaintiff. The evidence well supports the court's finding that it was not furnished to Cook by the plaintiff

The appeal from the order is dismissed. The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

43 Cal. App. 559

FOX v. CRANE et al. (Civ. 2981.)

(District Court of Appeal, First District, Division 1, California. Oct. 11, 1919.)

1. BILLS AND NOTES ⟸160—NEGOTIABILITY OF NOTE UNAFFECTED BY PROVISION AS TO ATTORNEY'S FEES.

In view of the change in the statute, so as to admit of a condition in a note with reference to attorney's fees, a note does not lose its negotiability by reason of a provision that, should suit be commenced or an attorney employed to enforce payment, the maker will pay an additional sum as attorney's fees in such suit, on the theory that attorney's fees were provided for, though suit was not brought.

2. BILLS AND NOTES ⟸158—PROVISION FOR COMPOUNDING INTEREST DOES NOT AFFECT NEGOTIABILITY.

A provision in a note for one year for compounding interest after maturity does not impair the negotiability by introducing an element of uncertainty as to amount.

3. BILLS AND NOTES ⟸338—ACQUISITION IN "USUAL COURSE OF BUSINESS."

As applied to commercial paper, the term "usual course of business" means the delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it, when offered for the purpose for which it is transferred.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usual Course of Business.]

4. BILLS AND NOTES ⟸338—ACQUIREMENT IN DUE COURSE OF BUSINESS.

Where plaintiff, after consulting one of the makers, who assured him that the note was good and that he signed it, accepted it in exchange for real property, plaintiff acquired it in due course of business.

Appeal from Superior Court, San Diego County; C. M. Andrews, Judge.

Action by C. W. Fox against Alex T. Crane and others. From a judgment in favor of defendant Crane, plaintiff appeals. Reversed.

Sweet, Stearns & Forward, of San Diego, for appellant.

E. S. Torrance, of San Diego, for respondent Crane.

Eugene Ferry Smith, of San Diego, for respondent McKee.

KERRIGAN, J. This action was brought by plaintiff, appellant herein, to recover judgment on a promissory note for $5,000, dated May 13, 1913, executed by defendant Alex T. Crane, and made payable one year after date to the order of C. W. McKee and Kit Carson, defendants herein. Before maturity the note was indorsed and delivered to appellant, together with three other promissory notes; the four notes amounting to the sum of $14,500. These notes were transferred by defendant Crane to plaintiff in payment for certain real property situated in the city of San Diego. To secure their payment a declaration of trust was entered into by the parties, under which the property was conveyed to a certain trust company, to be held by it in trust and until the notes were paid, or to be sold by the company in the event of the nonpayment thereof. For failure to pay two of the notes when they became due, the trust company sold the real property as provided by the terms of the declaration of trust.

As a defense to the note sued upon, defendant claimed that it was nonnegotiable, and that he had been induced to execute the same through fraud on the part of the payees. Plaintiff claimed, however, that the note had been transferred to him before maturity, in due course, and for a valuable consideration, and that the defense of fraud could not be set up as against him. The trial court found the instrument to be negotiable, and that the plaintiff had acquired it before maturity, duly indorsed, in good faith, and without any notice, information, or knowledge whatever of any claim of defendant that he had any defense thereto, but further

found that defendant was induced to sign it by fraud, and that plaintiff did not acquire it in the usual course of business or for a valuable consideration, and accordingly rendered judgment in favor of defendant Crane. Judgment went against Carson by default.

[1] The principal contention in the court below related to the question as to whether or not the instrument sued upon was a negotiable promissory note. Defendant claimed that it was nonnegotiable by reason of certain conditions therein contained. The finding of the trial court being against him upon this question he presents the same objection here.

The note reads as follows:

"$5,000.00 San Diego, Cal., May 13, 1913.

"On or before one year after date, for value received, we or either of us promise to pay to the order of C. W. McKee at the Merchants' National Bank of San Diego, the sum of $5,000.00, with interest thereon at the rate of 7 per cent. per annum from date until paid, payable annually, and if not so paid to be compounded and bear the same rate of interest as the principal, and should the interest not be paid when due then the whole sum of the principal and interest shall become immediately due and payable at the option of the holder of this note. All payable in U. S. gold coin, and should suit be commenced, or an attorney be employed to enforce the payment of the note, we agree to pay an additional sum of 1 per cent. on principal and accrued interest as attorney's fees in such suit. Alex T. Crane.

"Kit Carson."

Two reasons are urged by respondent in support of his contention that the note is not a negotiable instrument. The first of these is that the provision, "Should * * * an attorney be employed to enforce the payment of this note, we agree to pay an additional sum of 1 per cent. on principal and accrued interest as attorney's fees," brings about this result. This contention is based upon the construction given to a similar provision by our Supreme Court in Adams v. Seaman, 82 Cal. 636, 23 Pac. 53, 7 L. R. A. 224. Since the rendition of that decision the statute has been changed so as to admit of a condition with reference to attorney's fees. Considering the changed condition of the statute, we fail to see how the reasoning in that decision has any application to the instant case.

In Glen v. Rice, 174 Cal. 269, 162 Pac. 1020, the identical condition here involved was contained in the note there sued upon, and the note was held to be negotiable in form. It is claimed, however, that the objection here raised, viz. that the condition complained of admits of an interpretation that an attorney would be entitled to a fee, even though he did not bring suit, was not urged in that case, and for that reason the decision is not authority upon the question. The question of the character of the note was before the court, and was passed upon, and is decisive of this question.

[2] The second reason urged against negotiability of the note relates to the provision allowing compound interest after maturity; the presence of this provision being claimed to have this effect, in support of which contention we are cited to the cases of Cornish v. Wolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598, Hegeler v. Comstock, 1 S. D. 138, 45 N. W. 335, 8 L. R. A. 393, Rudolph v. Hudson, 12 Okl. 516, 74 Pac. 946, and Bracken v. Fidelity Trust Co., 42 Okl. 118, 141 Pac. 6, L. R. A. 1915B, 1216. The note sued upon in Cornish v. Wolverton, supra, presents a different question. There the interest on the note was payable semiannually and the note did not mature for five years. In the instant case the interest was payable annually, and, as the note was payable one year from date, no interest would be due until the maturity of the note. Hegeler v. Comstock, supra, was not followed in the later case of Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859, and Rudolph v. Hudson, and Bracken v. Fidelity Trust Co. are both expressly overruled in the later case of Bank v. Gleichmann, 50 Okl. 441, 150 Pac. 908, L. R. A. 1915F, 1203. In the case last cited the cases are reviewed, and the conclusion reached that the decided weight of authority is to the effect that a provision in a note for an increased rate of interest after maturity, in case of default, does not introduce such uncertainty of amount into the instrument as to impair its negotiability. See, also, note in 125 Am. St. Rep. 204, and Glenn v. Rice, 174 Cal. 269, 162 Pac. 1020.

For the reasons given, we conclude that the court correctly determined that the note was negotiable.

[3, 4] We are of the further opinion, however, that the evidence fails to support the findings of the trial court that the appellant did not acquire the note in the ordinary course of business, and that he did not acquire it for value or pay a valuable consideration for the transfer and delivery thereof from McKee to himself. The evidence upon this subject is without conflict. Appellant owned and sold his land in San Diego to McKee for the sum of $15,000; $500 was paid in cash, and the balance by four promissory notes, two of which were signed by defendant McKee as maker, and the remaining two by defendants Crane and Carson, as makers, in favor of defendant McKee, and indorsed by him and delivered to plaintiff at the time the contract of purchase was made. No fraud on the part of plaintiff is charged. The evidence of defendant Crane himself affirmatively shows that plaintiff visited him and informed him of the transaction, and

asked him if the notes were good, and was informed by Crane that they were and that he had signed them. Under these circumstances we fail to see how the notes were not acquired for value and in the usual course of business.

As applied to commercial paper, the term "in the usual course of business" means the delivery for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it when offered for the purpose for which it was transferred. 2 Raad, Com. Paper, § 988. And one who receives a note in exchange for real property acquires it in the usual course of business. Cunningham v. Holmes, 66 Neb. 723, 92 N. W. 1023.

Here there is no claim, and the evidence presents no facts which show any fraud or lack of fair dealing on the part of plaintiff. He suffered a detriment by being deprived of a right to dispose of his land during the time the property was held in trust. We conclude, therefore, that the note was acquired by plaintiff for value, and in the usual course of business, and without any notice of fraud, and before its maturity.

For the reasons given, the judgment appealed from is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 570

BRADFORD BAKING CO. v. WEBER BAKING CO. (Civ. 3034.)

(District Court of Appeal, First District, Division 2, California. Oct. 14, 1919.)

1. TRADE-MARKS AND TRADE-NAMES ⟸71—CONTROL OF USE TO PROMOTE UNFAIR COMPETITION.

A name or mark of such nature that no one may acquire an exclusive right to its use, and which cannot become a trade-mark, may become a trade-name, and the use of it to promote unfair competition may be prevented or redressed.

2. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—EVIDENCE SHOWING UNFAIR COMPETITION OF DEFENDANT.

Under admission of allegations of plaintiff's complaint and exhibits in evidence, *held*, that the court should have found that plaintiff had acquired the right to the use of the term "German Toast" as a trade-name for its bread as against the defendant, and that defendant was guilty of unfair competition in the use of the term upon labels upon its bread.

3. TRADE-MARKS AND TRADE-NAMES ⟸84—ABANDONMENT OF ILLEGAL USE NO GROUND FOR REVERSAL OF JUDGMENT FOR PLAINTIFF.

That defendant has abandoned use of wrapper in question is not a sufficient reason why judgment denying relief to plaintiff should not be reversed, since a voluntary abandonment will not afford plaintiff adequate relief, as defendant might resume the use of the label.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the Bradford Baking Company against the Weber Baking Company. Judgment denying relief, and plaintiff appeals. Reversed, with directions.

Richard A. Dunnigan, of Los Angeles, for appellant.

Clyde E. Cate, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal from a judgment for the defendant in an action brought to enjoin the defendant from using the words "German Toast" upon wrappers used on bread manufactured by the defendant. The action was based upon the ground that the words "German Toast" had been copyrighted by plaintiff, and upon the further ground that the use of these words by the defendant upon its wrappers was with the fraudulent intent to injure and divert the business of the plaintiff and to deceive and mislead previous purchasers and consumers of the plaintiff's bread. At the time of the trial the parties stipulated that all the facts set forth in the complaint were true, except that defendant specifically denied that the name "German Toast" was susceptible of being appropriated as a trade-mark, and also specifically denied that the wrappers used by the defendant are similar to those used by the plaintiff, and also denied that said wrappers used by the defendant are such wrappers as would have a tendency to deceive the public, or to cause the public to believe that the bread manufactured by defendant was the same bread sold by the plaintiff. No evidence was introduced, other than the wrappers used by the plaintiff and the defendant. The appellant urges two points for a reversal: First, that the words "German Toast" were the subject of registration, and were registered by the plaintiff, who thereby acquired a property right in the same; and, second, that even though the first contention be unsound, yet the plaintiff had used its label and trade-name for about four years, and built up a demand for the product so designated before the defendant applied the name to its product, and that the defendant was guilty of a fraud in using this name subsequently with reference to a product of the same character as the product of the plaintiff.

[1] It is not necessary for us to decide here whether the words "German Toast" are words in which the plaintiff may acquire a property right as a trade-mark, because a name or mark of such a nature that no one may acquire an exclusive right to its use, and which cannot become a trade-mark, may become a trade-name, and the use of it to promote un-

fair competition may be prevented or redressed. 38 Cyc. 684; Schmidt v. Brieg, 100 Cal. 672, 35 Pac. 623, 22 L. R. A. 790; Weinstock, Lubin & Co. v. Marks, 109 Cal. 535, 536, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57. As against a particular defendant using the name upon a similar product, it is only necessary to show such facts as to put in operation the rules governing unfair competition. The facts bearing upon this question which were alleged in the complaint and admitted by the stipulation are that the plaintiff and its predecessors in interest have continuously, since the 20th day of March, 1913, been the manufacturers and vendors of bread, and that said plaintiff and its predecessors have been the exclusive owners of the trade-mark, label, and trade-name consisting of the phrase "German Toast" since said time; that since the 29th day of May, 1916, the plaintiff has used the said trade-name "German Toast" upon the wrappers inclosing its product, together with a pictorial representation on said wrappers as shown in the exhibit attached to the complaint; that the plaintiff and its predecessors have been the exclusive owners of said trade-name since March 20, 1913, and have used said trade-name to designate the origin and ownership of the manufacturer, and to designate the bread manufactured by it in its said business, and that, prior to the use of said trade-name by plaintiff, the same had never been used by any other person, firm, or corporation; that by reason of plaintiff's long experience and great care in its business of manufacturing the said bread, and by reason of the good and useful quality of said article, the same became, and was at the time of the grievance set forth in the complaint, widely known under the said trade-name to the community as a valuable and useful article, and had acquired a high reputation as such, and commanded an exclusive sale at the city of Los Angeles and elsewhere, which sale was the source of great profit to plaintiff; that on or about the 3d day of June, 1916, notwithstanding the long and quiet use enjoyed by plaintiff of said trade-name, the defendant, well knowing plaintiff's right to the same, willfully, wrongfully, and unlawfully, disregarding the rights of the plaintiff herein and with intent to injure and destroy the business of the plaintiff, prepared and offered for sale and sold an article of bread in imitation of plaintiff's bread and with intent to deceive and defraud the public and the buyers and consumers of plaintiff's bread and to defraud the plaintiff, caused the said bread to be wrapped in paper wrappers similar in size and shape to those used on plaintiff's bread, and caused the same to be labeled with a similar device, a label upon which is inscribed the name "German Toast," etc., as shown by exhibit attached to the complaint. The labels used by the plaintiff and defendant, as appears from the exhibits, are of the same general size and shape and on each appears the words "German Toast," in precisely the same style of printing and of precisely the same size, with the capital letters blocked in the same manner and the words underlined alike.

[2] We consider it unnecessary to discuss here in detail the points of similarity in the labels and the particulars in which they differ. It is not necessary that the defendant should have duplicated the label used by the plaintiff before relief may be had. Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57. Under the admissions hereinbefore enumerated and the exhibits in evidence, we think the court should have found that the plaintiff had acquired the right to the use of the term "German Toast" as a trade-name for its bread as against the defendant, and that the defendant was guilty of unfair competition in the use of its said label upon its bread. Under such circumstances, an injunction should have been granted restraining the defendant from using the said wrapper on the bread manufactured and sold by it. Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704; Modesto Creamery Co. v. Stanislaus, etc., Co., 168 Cal. 289, 142 Pac. 845.

[3] The respondent urges in its brief as a reason why the case should not be reversed that it has already abandoned the use of the wrapper in question. The record contains no such information but a voluntary abandonment would not afford the plaintiff adequate relief, as the defendant might later decide to resume the use of the label. If the label has been abandoned in good faith and for all time, an injunction can do the defendant no harm, and it is a protection to which we deem the plaintiff entitled.

The judgment is reversed, with directions to the trial court to grant an injunction restraining the use by the defendant of the label involved here.

We concur: BRITTAIN, J.; NOURSE, J.

43 Cal. App. 574

ASELS v. ASELS. (Civ. 2042.)

(District Court of Appeal, Third District, California. Oct. 14, 1919.)

1. APPEAL AND ERROR ⟸1011(1)—REVIEW OF FINDINGS ON CONFLICTING EVIDENCE.

Findings of fact on conflicting evidence will not be disturbed on appeal as unsupported by the evidence.

2. PARTITION ⟸22—WAIVER OF RIGHT.

The right of partition conferred by Code Civ. Proc. § 752, on cotenants may, by contract, be waived under Civ. Code, § 3513, permitting any one to waive the advantage of a law intended solely for his benefit, as distinguished from one established for a public reason.

3. PARTITION ⟸22—RELEASE FROM AGREEMENT WAIVING RIGHT.

The consideration for plaintiff's agreement with defendant that land owned by them should not be partitioned being plainly a part of the agreement that defendant, who was to farm the land, should keep books accessible and intelligible to plaintiff, showing his expenditures therefor, and should account to her for all grain raised thereon and sold by him, she was released by his failure so to do.

Appeal from Superior Court of San Joaquin County; George F. Buck, Judge.

Action by Jannett Asels against David Asels. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, for appellant.

C. W. Miller, of Stockton, for respondent.

BURNETT, J. The action was for partition of 640 acres of land in San Joaquin county, which in 1906 was purchased in the joint names of plaintiff and defendant with money which was partly community and partly the separate money of the plaintiff, but the moneys had been so intermingled that it was held by the trial court to have become community property. The court ordered a partition of the land, and from the final decree of partition this appeal has been taken. The only defense to the action grew out of and was based upon an agreement in writing made by the parties on the 20th day of October, 1916. Said agreement recited that plaintiff and defendant were the owners of the land (describing it), and that there had been a misunderstanding and disagreement between them as to the distribution of the money received from the crops raised on said land, and that they had consulted with their respective counsel and had agreed upon—

"and do hereby agree upon the following:

"(1) That there shall be no division or partition between the parties hereto, of the hereinbefore described land and premises."

Paragraphs 2 and 3 of said agreement related to certain moneys in the possession of the Fabian-Grunauer Company and moneys deposited in the Bank of Tracy in the name of either or both of the parties to the agreement, being moneys received for the sale of grain raised on said land during the farming season of 1915 and 1916, and it provided that these moneys should be divided equally between said parties, and that said division should constitute a full and final settlement as to all matters between them after the date of the agreement.

Paragraph 4 is as follows:

"It is mutually contracted and agreed by and between the parties hereto that the said David Asels shall farm the hereinbefore described land, as he has done in the past, and he shall keep a book wherein shall be truly set forth all expenditures made by him, which said book shall always be accessible to the said Jannett Asels, and any matters therein set forth which she does not understand, shall be fully explained to her by the said David Asels, and she shall be informed of all costs and expenses of farming, and upon a sale of the crops each year, there shall be deducted from the amount realized from said sales all of the aforesaid expenses, and the balance of the moneys realized, each year, from the sale of crops raised on the aforesaid lands, shall be divided equally among and between the parties hereto, which said division shall be made upon the sale of said crops, each year."

The fifth paragraph recited that the said David Asels was the owner of the live stock and farming implements and machinery used in farming said land, and provided that he would make no charge for the use of the same "in and about the farming and harvesting of the crops raised on the aforesaid lands."

The sixth and concluding paragraph of said agreement provides—

"That the parties hereto being agreed among themselves to the foregoing, and then having consulted their respective attorneys in the presence of all the parties hereto, and of the said attorneys, and knowing the contents of this instrument, each of the parties hereto does freely and voluntarily execute this instrument which has been drawn, and is executed for the purpose of, and it does settle all matters of difference in regard to money matters, heretofore existing between the parties hereto up to this date."

In reference to this agreement the court found—

"That the said defendant, David Asels, did not keep and has not kept all of the terms and conditions on his part to be provided and kept as in said agreement provided, in this, that the said David Asels did not keep a book wherein should be truly set forth all expenditures made by him in the farming of said lands, and that no such book was always, or at all, accessible to the said Jannett Asels, and no matters re-

quired to be set forth in said book which the said Jannett Asels did not understand, were fully, or at all explained to her by the said David Asels, and she was not, and since the execution of said agreement has not been, informed of all the costs or expenses of farming said lands, and the said defendant David Asels did not and has not, upon a sale of the crops each year, deducted from the amount realized from said sales all of the aforesaid expenses, and divided equally between himself and plaintiff the balance of the moneys realized each or either year from the sale of crops raised on the aforesaid lands, either upon the sale of said crops or at all."

Then follows a finding that 350 sacks of barley raised on said premises in 1916 and 75 sacks in the year 1917 were sold by defendant and unaccounted for to plaintiff, and that plaintiff often demanded of defendant an accounting for the same, which he refused to give or render.

[1] This finding of the court that he had failed to keep his covenant and agreement is attacked by the appellant on the ground that it is unsupported by the evidence. As to this, however, appellant is entirely in error. It is true there is a substantial conflict, but there is positive and unequivocal testimony on behalf of plaintiff in favor of the finding, and by that we are, of course, concluded. As to his failure to keep a book of accounts and render it accessible at all times to plaintiff it is sufficient to quote the following testimony of plaintiff:

"Q. Has he ever shown you any book of account since the date of this paper? A. No, sir. Q. Did you ask him in 1917? A. Yes, sir. Q. To see the account? A. Yes, sir. Q. What reply did he make? A. He said he hadn't any —had no book—didn't have to keep a book. Q. Don't you know Mr. Asels showed you—he had two books that he showed you on each occasion when you wanted to see them, and that he gave you a written statement, and you examined it, and when he settled with you he wanted you to sign it, and you refused? A. I never saw any of these books at all. I kept asking him time after time for those books. He said he had none; he didn't have to keep them. Q. Sure of that? A. Yes, sir."

The evidence is equally as clear that the defendant failed to account for a large quantity of grain raised on said premises. It seems unnecessary to quote the testimony as to this, which is set out in the brief of respondent. It is true that plaintiff claimed that he overlooked the two lots of grain worth about $1,100, but the court no doubt believed that his concealment of the facts was deliberate and willful, and that it was his purpose to appropriate to himself plaintiff's one-half of the proceeds of said grain. The lower court also concluded that his failure to keep a book of account, or to show it to plaintiff, or to explain the items of expenses in regard to the farming of the land was also willful and deliberate, and that it was in pursuance of his purpose to appropriate a portion of the proceeds from the ranch to which plaintiff was rightfully entitled. In view of the familiar and well-established rule as to conflicting evidence it would be altogether improper for an appellate court to hold that any of the findings of the lower court is unsupported.

[2] As to the legal effect and integrity of said agreement of October 20, 1916, little needs to be said. The right to partition was conferred upon either party by section 752 of the Code of Civil Procedure, but that this right may be waived is established by section 3513 of the Civil Code and by the decisions of the courts. The law upon the subject is summed up in Freeman on Cotenancy and Partition (2d Ed.) § 442, as follows:

"We have spoken of the right of partition as an absolute right incident to every species of cotenancy, * * * and as yielding to no considerations of hardship or inconvenience. In so speaking, we have had in view the law of cotenancy and partition as it exists independent of express or implied agreements between the respective parties in interest. There are cases from which it may be inferred that the right to partition cannot be waived, and that, to an application for partition, no other defense will be noticed by the courts than that the parties do not hold the property together undivided."

The learned author thereupon cites cases apparently so holding, but concludes as follows:

"But we think the decided preponderance of authority supports the proposition that the general principle of law that the right to partition is absolute must be confined 'in its application to ordinary joint tenancies or tenancies in common, where the right to partition is left to result as an ordinary legal incident of such tenancy, and that it was never intended to interfere with contracts between the tenants modifying or limiting this otherwise incidental right, nor to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards.'"

[3] We think it equally plain that the consideration which moved plaintiff to agree that the land should not be divided was the promise on the part of the defendant to keep said books showing his expenditures in farming the land, and to render them accessible and intelligible to her, and also to account to her for all the grain raised upon said premises that should be sold by defendant. In other words, it cannot be successfully controverted that these covenants were mutual and concurrent, and that upon the failure of either party to keep his agreement the other would be released from any legal or moral obligation to carry out his own promise or covenant. Any other construction of said agreement of October 20, 1916, appears unreasonable and opposed to the manifest in-

tention of the parties. We are satisfied that the findings of the court are amply supported, and that these findings warrant a judgment in favor of plaintiff.

The judgment is affirmed.

We concur: HART, J.; ELLISON, Judge pro tem.

43 Cal. App. 564

Ex parte LOWRIE. (Cr. 682.)

(District Court of Appeal, Second District, Division 1, California. Oct. 13, 1919.)

1. LOTTERIES ⊂⊃3—BANKING GAME OF RAZZLE-DAZZLE NOT A "LOTTERY."

The banking game of razzle-dazzle, played with chips and dice for merchandise, *held* not to constitute a "lottery" within the meaning of Pen. Code, § 319.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lottery.]

2. GAMING ⊂⊃68(½) — RAZZLE-DAZZLE A "BANKING GAME."

The acts of petitioner for habeas corpus in operating with chips and dice the game or device known as "razzle-dazzle" for prizes of merchandise *held* to constitute a misdemeanor as defined by Pen. Code, § 330, providing that every person who conducts any banking game with dice for money, or other representative of value, is guilty of a misdemeanor, a "banking game" being a game where there is a fund against which everybody has a right to bid, the bank being responsible for payment of all funds, taking in all it wins and paying out all it loses.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Banking Game.]

3. GAMING ⊂⊃68(½)—CHIPS USED IN BANKING GAME AS REPRESENTATIVE OF VALUE.

Chips costing ten cents apiece, and redeemable in merchandise at that value by the banker, used to pay losses and receive winnings in the banking game of "razzle-dazzle," *held* included within the language of Pen. Code, § 330, prohibiting all banking games "played for money, checks, credit, or other representative of value."

4. GAMING ⊂⊃63(3)—STATUTE RELATING TO "BANKING GAME" NOT REPEALED BY IMPLICATION.

Pen. Code, § 330a, does not repeal by implication the provisions of section 330, rendering a misdemeanor the playing or carrying on of any banking game played with cards, dice, etc., for money or other representative of value.

In the matter of the application of John N. Lowrie for writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

John S. Cooper, of Los Angeles, for petitioner.

Thomas Lee Woolwine, Dist. Atty., of Los Angeles, and Bonner Richardson, Deputy Dist. Atty., of Los Angeles, for respondent.

SHAW, J. Habeas corpus. At the time of the issuance of the writ herein petitioner was imprisoned under a complaint charging him with conducting a lottery or scheme for the distribution by chance of property to the complainant, and the public, for which chances valuable considerations were paid, and which alleged unlawful scheme was conducted "in the manner following and no other, to wit: In that the said defendant, John N. Lowrie, did have five dice and a cup, which said dice were dice having six bases or faces and no more, and which dice were in the form of cubes with the faces thereof numbered consecutively from one to six, and were used in the following manner in the conducting of said lottery: That complainant James F. Smith and the public were invited to engage in said lottery, and to play the same. That complainant paid to defendant the sum of $1, and received therefor from said defendant 10 white chips. That complainant laid one of the chips upon the board, and the other players engaged therein did likewise. That the defendant then threw the dice, and when the dice were exposed said defendant counted the number of pairs, and there were one pair of 4's. The defendant then handed the cup and dice to complainant, who thereupon threw the dice, and there was exposed upon the upper side one pair of 6's. That thereupon defendant handed to complainant a white chip of the same kind that he had purchased. Then the cup was handed to the other players, who did throw the dice, and who won and lost, and when each player lost, the defendant took a white chip, and when each player won the defendant gave the player a white chip. In some instances a player would place upon the board more than one chip, and when he won the defendant would give to him an equal number of chips, and when he lost the defendant would take all the chips deposited by the player upon the board. When the player had finished playing the game he was invited by the defendant to surrender his chips and receive therefor merchandise only to the value of his chips, each chip being computed at ten cents and merchandise distributed to each winner by defendant; and if the player had no chips he received nothing. Which said scheme for the distribution of property by chance, raffle and gift enterprise is designated and known as razzle-dazzle."

[1, 2] The greater part of the argument of counsel is devoted to the question as to whether the complaint charges defendant with conducting a lottery as defined by section 319, Penal Code, in the chapter designated as chapter 9 and entitled "Lotteries," as claimed by respondent, and with which contention petitioner takes issue. Under our

view of the case it is unnecessary to discuss the points made for and against this proposition by the respective parties or to review the many authorities cited by each in support of his contention. Suffice it to say that, in our opinion, the facts alleged, and which we have fully set out, do not constitute a lottery within the meaning of the statute. Nevertheless, we are of the opinion that the acts with the commission of which defendant is charged constitute a misdemeanor as defined by section 330, Penal Code, under chapter 10 thereof, entitled "Gaming." This section provides that—

"Every person who deals, plays, or carries on * * * or who conducts * * * any game of faro * * * or any banking * * * game played with cards, dice, or any device, for money, checks, credit, or other representative of value * * * is guilty of a misdemeanor. * * *"

A banking game, as defined in People v. Carroll, 80 Cal. 153, 22 Pac. 129, "is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won, and paying out all that is lost. The fund which is provided for that purpose is generally called the bank, and the person who conducts it the banker." And in Shaw v. State, 35 Tex. Cr. R. 394, 33 S. W. 1078, it is said, in effect, that where a person threw the dice, took the bets, stood behind the table, and was one against many, he was the dealer of the game, and hence the game was a banking game. From the allegations of the complaint it clearly appears that defendant was engaged in conducting a game wherein, to any one wishing to play the same, he sold ten white chips for a dollar, one or all of which chips each of the purchasers thereof might lay upon the table as a bet, and in each case the defendant covered the bet by a like number of chips. He then threw the dice from the box, followed by the others doing likewise, the result of which determined who lost or won, and the bets were paid accordingly. All chips won by defendant went into a common fund kept by him, called the bank, and out of which he paid all losses. That it was a banking game we entertain no doubt. Ex parte Williams, 7 Cal. Unrep. 301, 87 Pac. 565.

[3] Conceding the character of the game as stated, petitioner properly claims that under section 330, Penal Code, he could not be guilty of an offense unless it was "played for money, checks, credit, or other representative of value," none of which terms, he insists, can be said to include the white chips constituting the stakes played for in the instant case; in support of which contention he cites the Williams Case, supra. In that case a slot machine was used by the defendant's customers in gambling for cigars and tobacco, and while the court held that it constituted a banking game, it was also held that cigars were not moneys, checks, nor credits, nor were they included within the term "other representative of value"; and hence the acts with which Williams was charged did not constitute an offense within the meaning of the statute. We may concede the correctness of the court's conclusion in that case. The game which defendant is charged with conducting was not played for cigars or other merchandise, but for chips, each of which under the agreement and scheme represented the value of ten cents and was redeemable at such value by the defendant as banker, in merchandise selected by the winner of the chips, and hence they were representative of the value of the merchandise so received in exchange therefor. Had the chips been redeemable in money of the realm, it seems, under the decisions in the Williams Case and People v. Carroll, supra, there would be no question as to the acts alleged constituting an offense. But the merchandise given in exchange for the chips must be deemed of value and the value of the goods which, in accordance with the scheme, were given in exchange for the chips won was represented by the chips, possessing no intrinsic value whatever. Hence, conceding the correctness of the Williams Case, wherein it was held that the cigars constituting the stakes were not representative of value, it is distinguishable from the facts in the present case, in that the chips played for were, under the scheme and agreement, intended to and did represent ten cents each in value, to be paid for and redeemed in merchandise.

[4] There is nothing in section 330a, Penal Code, upon which to claim a repeal by implication of the provisions of section 330.

The writ is discharged, and petitioner remanded to the custody of the sheriff of Los Angeles county.

We concur: CONREY, P. J.; JAMES, J.

43 Cal. App. 405

EDWARDS v. BODKIN. (Civ. 2826.)

(District Court of Appeal, Second District, Division 1, California. Oct. 2, 1919.)

1. FORCIBLE ENTRY AND DETAINER ⟸4—ENTRY WITHOUT FORCE OR THREATS.

One was not guilty of forcible entry under Code Civ. Proc. § 1159, where his entry was not accompanied by any kind of violence or circumstance of terror, and where he did not turn out party in possession by force, threats, or menacing conduct.

2. FORCIBLE ENTRY AND DETAINER ⟸29(4)—EVIDENCE INSUFFICIENT TO SHOW DEMAND.

In forcible detainer action, evidence *held* insufficient to support finding of a demand upon defendant for surrender of premises required by Code Civ. Proc. § 1160, subd. 2.

3. FORCIBLE ENTRY AND DETAINER ⟸30(1)—RECOVERY OF POSSESSION NECESSARY TO AWARD OF DAMAGES.

Damages for forcible entry are not awarded unless the plaintiff recovers the possession of the premises in controversy.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by William B. Edwards against Patrick H. Bodkin. Judgment for plaintiff, and defendant appeals. Reversed.

Duke Stone and H. C. Wesley, both of Los Angeles, for appellant.

William B. Edwards and Sarau & Thompson, of Riverside, for respondent.

CONREY, P. J. The complaint stated a cause of action in forcible detainer. The trial court in its decision of the case found that on or about December 17, 1912, the defendant unlawfully and forcibly entered upon the described premises. The complaint alleged an unlawful entry during the absence of the plaintiff, but did not allege a forcible entry. The complaint also alleged, and the court found it to be a fact, that on said 17th day of December the plaintiff made demand in writing upon the defendant to deliver to the plaintiff the possession of said premises, and that the defendant refused for a period of five days thereafter to surrender possession thereof to the plaintiff; the court did not find that the entry was made during the absence of the plaintiff, but that fact was not denied.

Forcible entry is defined as follows (Code Civ. Proc., § 1159):

"Every person is guilty of a forcible entry who either:

"1. By * * * any kind of violence or circumstance of terror enters upon or into any real property; or,

"2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the party in possession."

[1] There is no evidence to show that defendant's entry upon the premises on the 17th day of December, 1912, was accompanied by any kind of violence or circumstance of terror, or that the defendant turned out by force, threats, or menacing conduct the party in possession. It follows that there was no forcible entry.

At the trial evidence was produced showing that the defendant had also entered upon the land on the 23d day of November, 1912, and remained there for a few hours. The evidence does not show where the plaintiff was at the time of such entry, but it does show that a short time thereafter, and on the same day, the plaintiff appeared on the premises accompanied by a constable, by whom the defendant was arrested. Defendant's occupancy at that time continued for only a few hours, and he did not enter again until the 17th day of December following. We have carefully examined the evidence showing the circumstances of said entry of November 23, 1912, and we are satisfied that it is not sufficient to support the claim of forcible entry at that time.

[2] If this action can be maintained at all, it must be as an action of forcible detainer under subdivision 2 of section 1160 of the Code of Civil Procedure. According to that section, a person is guilty of forcible detainer who, "during the absence of the occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof for the period of five days, refuses to surrender the same to such former occupant." If it be granted that defendant's entry under the circumstances shown by the evidence herein was an unlawful entry made during the absence of the occupant, nevertheless the action must fail because there is no evidence sufficient to support the finding of a demand made for the surrender of those premises. The plaintiff testified that on the evening of December 17, 1912, he gave to the defendant a copy of "a notice." Neither the notice nor any copy thereof was produced to the court, and the plaintiff did not testify to the contents of the so-called notice. Instead of such evidence, the plaintiff called as his own witness the defendant, who testified that on the evening of December 17, 1912, the plaintiff served on him "some kind of a notice." Being asked to state the contents of the notice, he replied:

"The notice said that he wanted me to leave there, and not contaminate the vicinity with my presence. That was the words."

This is all of the evidence of any notice served by the plaintiff upon the defendant. So far as appears from this evidence, the property in question was not mentioned in the notice, nor was any demand made that the defendant surrender the same.

During the pendency of this action and

prior to the trial thereof defendant, Bodkin, as plaintiff in an action of ejectment against Edwards, obtained a judgment against Edwards for possession of the property described in the complaint in this action. At the time of trial of this action that judgment had become final, and the same was introduced in evidence herein by the defendant, Bodkin. It was therein determined that at all times after June 1, 1912, Bodkin was the owner and entitled to possession of the land described, which was the same land described in the complaint in this action. Presumably by reason of that judgment, the court in this present action refused to award judgment for possession in favor of plaintiff, Edwards, but granted judgment for damages, as for a period of forcible detainer, down to the time of entry of the judgment in the ejectment case. If the court was right in refusing to award possession to the plaintiff, it is doubtful whether damages could be separately granted.

[3] In Brawley v. Risdon Iron Works, 38 Cal. 676, the court said that in an action of forcible entry or forcible detainer the substance of the recovery, when the plaintiff is successful in the action, is the possession of the premises. "Damages for the forcible entry are not awarded, unless the plaintiff recovers the possession of the premises in controversy."

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

43 Cal. App. 568

LEAKE v. CITY OF VENICE et al. ALLES et al. v. SAME. BRAUN, BRYANT & AUSTIN v. SAME. (Civ. 3108.)

(District Court of Appeal, Second District, Division 1. California. Oct. 13, 1919.)

1. APPEAL AND ERROR ⊂=353—EXTENSION OF TIME ONLY BY PENDENCY OF NEW TRIAL PROCEEDINGS.

Under Code Civ. Proc. § 939, the 60-day limit of time for appealing from a judgment cannot be extended except by the pendency of the proceedings on motion for new trial.

2. NEW TRIAL ⊂=139—WAIVER OF DEFECT IN SIGNATURE OF NOTICES OF MOTION.

Where appellants and their single counsel requested another attorney to become an attorney of record for appellants, no formal substitution in conformity with Code Civ. Proc. § 284, being made, and authorized him to sign notices of motion for new trial, and when he came to do so such other attorney signed the notices in his own name alone, such notices were in fact the intended act of appellants and their first counsel, the physical fact of signature was merely a mode of identification for the benefit of respondents, and, having received copies and acknowledged receipt without objection, respondents waived the matter of signature, and cannot deny the validity of the notices.

3. NEW TRIAL ⊂=137—LACK OF SIGNATURE TO NOTICES OF MOTION NOT JURISDICTIONAL.

Though the law requires that notices of motion for new trial be signed, failure to observe the requirement does not establish a defective jurisdiction any more than in the case of a complaint filed without signature, which does not make the pleading a nullity.

4. APPEAL AND ERROR ⊂=345(1)—TIME FOR APPEALING AS AFFECTED BY DEFECTIVE NOTICE OF MOTION FOR NEW TRIAL.

A notice of motion for new trial, with defect in signature waived by the parties, suspends running of limitations as affecting appeal.

Appeals from Superior Court, Los Angeles County; Russ Avery, Judge.

Actions by E. O. Leake, by Fred L. Alles and others, and by Braun, Bryant & Austin against the City of Venice and others. From the judgments, defendants other than the City appeal. On motion to dismiss. Motion denied.

C. E. McDowell and E. B. Coil, both of Los Angeles, for appellants.

Goudge, Robinson & Hughes and E. O. Leake, all of Los Angeles, for respondents.

CONREY, P. J. [1] Respondents move to dismiss the appeals from the judgments herein, on the ground that no appeal was taken until more than 60 days after entry of judgment in each of the three cases included in the consolidated record on appeal; it being contended by respondents that no proceeding on motion for new trial was pending at any time in either of said actions.

Under section 939, Code of Civil Procedure, the 60-day limit of time for appealing from a judgment cannot be extended, except by the pendency of proceedings on motion for a new trial. The records on which the motion to dismiss is based are alike in the several cases.

At and before the time of entry of the judgments, C. E. McDowell was the sole attorney for appellants. Within the time required by law, a notice of intention to move for a new trial was, in each case, served and filed. These were sufficient in all respects, unless they were void by reason of the fact that they were signed by E. B. Coil as attorney for defendants, and not by C. E. McDowell. As shown by affidavits contained in the bill of exceptions, Coil had been requested, by McDowell and by the defendants, to become an attorney of record for defendants in the action, together with McDowell, and had been authorized on behalf of both McDowell and the defendants to sign the notices. By an oversight, due only to inadvertence, Coil omitted to use the name of McDowell in the

notices, and signed them by his own name alone. At that time no formal substitution of attorneys, conforming to the requirements of the Code of Civil Procedure, § 284, had been made. When those notices were served on the attorneys of the plaintiffs, they indorsed thereon acknowledgments of receipt of copies, and made no objection to the notices at that time. When the motions for new trials were about to be heard by the court (that being long after the time within which notice of intention to move for a new trial could have been given), the plaintiffs for the first time suggested that the notices of intention were insufficient because not signed by the attorney of record.

[2-4] So far as respondents are concerned, the situation is not different from that which would have existed if McDowell himself had prepared and served the notices, but had inadvertently omitted to sign his name thereto. For the notices were in fact the intended act of McDowell and of his clients. This being so, the physical fact of signature on the paper was merely a mode of identification, required for the benefit of respondents, which they might waive. Having received the copies and given acknowledgment of receipt thereof, without seasonable objection, respondents should not later be heard to deny the validity of notices so given. Livermore v. Webb, 56 Cal. 489. While the law requires that such notices be signed, failure to observe this requirement does not establish a defect of jurisdiction, any more than in the case of a complaint filed without signature. But the omission of the signature to a complaint does not make the pleading a nullity. Canadian Bank v. Leale, 14 Cal. App. 307, 111 Pac. 759.

The motion to dismiss is denied.

We concur: SHAW, J.; JAMES, J.

(43 Cal. App. 435)

CHASE v. OEHLKE et al. (Civ. 2368.)

(District Court of Appeal, Second District, Division 1, California. Oct. 3, 1919.)

1. PLEADING ⊜129(1)—ADMISSIONS BY FAILURE TO DENY.

Allegations of complaint not denied must be deemed to be true.

2. LANDLORD AND TENANT ⊜79(2), 110(1) — LIABILITY OF ASSIGNEE OF LEASE UNDER NAKED ASSIGNMENT.

Where a tenant holds under a mere naked assignment of a lease, his liability is limited to occupancy of premises, and terminates with abandonment of possession; the sole basis of his obligation being the privity of estate under Civ. Code, § 822.

3. LANDLORD AND TENANT ⊜195(1), 208(2)—LIABILITY OF ASSIGNEE FOR RENT.

Assignees of lease who by express terms in writing covenant and agree to pay the rent reserved in the lease are liable, upon abandonment of possession of premises before expiration of term, for the rent in the same manner and to the same extent as if they had been original lessees, such assignees having two sets of obligation, those arising from relation of landlord and tenant based upon privity of estate, and the others due to privity of contract by the terms of which the obligation of assignees of the lease is to be measured.

4. LANDLORD AND TENANT ⊜208(2) — CONSIDERATION FOR LESSEE'S ASSIGNEE'S COVENANT TO PAY RENT.

Covenant of assignee of lease to pay the rent reserved in the lease is based upon the consideration of the transfer of the lease.

5. LANDLORD AND TENANT ⊜225—ACTION ON COVENANT TO PAY RENT BY ASSIGNEE OF LEASE.

Under Civ. Code, § 1559, lessor may bring action against assignee of lease on assignee's covenant to pay the rent reserved in the lease; such covenant having been made for benefit of lessor.

6. LANDLORD AND TENANT ⊜195(1) — RELEASE OF TENANT'S LIABILITY BY POSSESSION OF LANDLORD.

In lessor's action against assignees of lease who had covenanted to pay the rent reserved in lease, but had repudiated lease and abandoned premises before expiration of term, and the landlord unsuccessfully tried to obtain another tenant, the principle that landlord's unqualified possession of premises releases tenants from further liability upon theory of rescission was not applicable, in absence of allegation or finding that lessor had taken unqualified possession, or any possession.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Charles W. Chase against William Oehlke, F. D. Griffith, Ella Swickard, and others. Judgment for plaintiff against defendants Griffith and Swickard, and they appeal. Affirmed.

E. A. Miller, of Los Angeles, for appellants.

Charles W. Chase, of Los Angeles, in pro. per.

SHAW, J. [1] This action to recover rent under the terms of a written lease and covenants of the assignments thereof arose out of the following facts: On February 1, 1913, plaintiff executed to one William Oehlke a lease to certain premises for the term of two years at a specified rental. Oehlke assigned the lease to J. F. Petell, by whom it was assigned to F. D. Griffith, who in turn assigned the same to defendant Ella Swickard, and in each case the assignee agreed in writing to carry out and fulfill the terms of the lease in the place and stead of his assignor, all of which facts were set forth in the complaint, which also alleged that the

rent reserved in said lease was fully paid up to and including the month of March, 1914, at which time defendant Swickard, as the last assignee of the lease, was in possession of the premises, and "that about the latter part of the month of March, A. D. 1914, the defendant Swickard abandoned and left said demised premises, and removed therefrom and repudiated said lease, and refused then and always thereafter to be bound by the same, and refused to be bound by any of the terms thereof, all of which was without the consent and against the wishes of the plaintiff," who did not at any time terminate said lease nor exercise any right or option to terminate the same, which allegations, since not denied, must be deemed, as found by the court, to be true.

The appeal is by defendants Griffith and Swickard, against whom judgment was rendered for the balance of the rent due from March 31st to the end of the term specified in the lease.

[2, 3] Appellants' first contention is that, as assignees of the lease, their liability as tenants of the property was, as to the landlord, limited to their occupancy of the same, and terminated with their abandonment of possession. This is true where the tenant holds under a mere naked assignment of the lease, since the sole basis of his obligation is what is termed the privity of estate (section 822, Civ. Code; Samuels v. Ottinger, 169 Cal. 209, 146 Pac. 638, Ann. Cas. 1916E, 830; Carter v. Hammett, 18 Barb. (N. Y.) 608; Bonetti v. Treat, 91 Cal. 226, 27 Pac. 612, 14 L. R. A. 151, under which the liability grows out of the relation of landlord and tenant. Where, however, as in the instant case, the assignees by express terms in writing covenant and agree to pay the rent reserved in the lease, it presents two sets of obligations and rights; one comprising those due to the relation of landlord and tenant based upon privity of estate, and the other due to privity of contract by the terms of which the obligation of assignees of the lease is to be measured. Samuels v. Ottinger, supra; Brosnan v. Kramer, 135 Cal. 39, 66 Pac. 979; Tiffany on Landlord and Tenant, § 181; 18 Am. & Eng. Encyc. of Law, 675.

[4, 5] As stated, the action is based upon the covenants made by the appellants—the consideration therefor being the transfer of the lease—to pay the rent reserved therein. The contract was for the benefit of the lessor and, regardless of whether or not he was a party to the transfer, he was entitled to maintain an action thereon. Tiffany on Landlord and Tenant, § 158; Civ. Code, § 1559. Appellants having upon sufficient consideration assumed and agreed to pay the rent, their obligation is identical with that of the original lessee upon his express covenants so to do, and when they, as alleged and found, repudiated the lease and abandoned the premises, the plaintiff was entitled to stand upon the terms of the contract made with the lessee and his assigns for the lessor's benefit, and sue thereon to recover the rent which they had agreed to pay, in the same manner and to the same extent as though they had been the original obligors under the terms of the lease. The error of appellants' counsel is due to the fact that he assumes the action to be based upon the relation of landlord and tenant, rather than upon express covenants.

[6] It is next contended that where a tenant abandons leased property and repudiates the lease, if the landlord takes the unqualified possession thereof, the tenant, upon the theory of a rescission, is released from further liability, in support of which may be cited Baker v. Eilers Music Co., 26 Cal. App. 371, 146 Pac. 1056, and Rehkopf v. Wirz, 31 Cal. App. 695, 161 Pac. 285. The principle announced in those cases, however, is not applicable to the facts in the case at bar, for while, as heretofore stated, plaintiff alleged a repudiation of the lease and abandonment of the demised premises, for which, without success, he tried to obtain a tenant, it is neither alleged in the answer nor found by the court that plaintiff, as in the cases cited, took unqualified possession, or any possession, of the premises so leased. No such issue was involved in the case. There is no merit in the claim that under the terms of the lease the tenant was given the option to cancel and terminate the lease by an actual surrender of possession and payment of rents due or to become due from the subletting of a part of the property.

As appears from the record the appellants in consideration of an assignment of the lease covenanted and agreed to pay the rent accruing thereunder from the date of such assignment, which covenant they repudiated by refusing to pay the rent, and abandoned the leased premises. Whereupon plaintiff, without any allegation or finding that he took possession of the premises, or rented them to another, brought suit upon the contract to recover the rent, for which judgment was properly rendered against appellants.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

43 Cal. App. 588

THOMPSON v. THOMAS et al. (Civ. 3006.)

(District Court of Appeal, First District, Division 1, California. Oct. 15, 1919. Hearing Denied by Supreme Court Dec. 11, 1919.)

1. MORTGAGES ⊂⊃310 — RIGHTS OF SUCCESSIVE GRANTEES TO RELEASES OF MORTGAGED PROPERTY.

Where mortgage gave mortgagee right to release part of property without affecting her right against any one liable for indebtedness secured, or her right to look to remainder of mortgaged premises as security for full payment, *held*, that mortgagee, though having notice of several successive alienations of parts of mortgaged premises, could grant partial release of mortgaged premises for less than market value of property released and enforce balance of claim against remainder of property.

2. MORTGAGES ⊂⊃310 — PROVISION GIVING RIGHT TO RELEASE PART OF PROPERTY VALID.

Provision of mortgage, giving mortgagee right to release part of property without affecting her right against any one personally liable for the indebtedness, or her right to look to remainder of mortgaged premises as security for full payment of indebtedness, is not contrary to public policy.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Mary O. Thompson against John R. Thomas and others. From the judgment rendered, plaintiff appeals. Reversed and remanded.

Hahn & Hahn and C. E. Musick, all of Pasadena, for appellant.

Frank C. Dunham and Geo. W. Carey, of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from a judgment in an action to foreclose a mortgage. The facts are as follows:

On August 13, 1913, a note, secured by the mortgage in question, was executed by the defendant Thomas to the plaintiff in consideration of a loan of $4,000; the mortgage covering a number of lots of land situate in San Bernardino county. On March 7, 1914, Thomas executed and delivered to Harold P. Collins a grant deed covering a portion of the mortgaged property. This deed was taken subject to the mortgage, and also contained a provision that the grantee agreed to pay the same. On September 12, 1914, Thomas conveyed the remaining lots, except three thereof, to defendant Callie L. McDowell, the deed reciting that the lots were subject to the mortgage. On September 23, 1914, Harold P. Collins by deed conveyed the property acquired by him above mentioned to R. F. Howard, this deed also being made subject to the mortgage. On July 7, 1915, the mortgagee, with actual notice of the aforesaid conveyances and of their terms, in consideration of the sum of $350, released the lots conveyed to Collins and by him subsequently transferred to Howard. In its findings the court places a value of $2,000 upon these lots. The various instruments referred to were all duly recorded.

The mortgage contained the following provision:

"The mortgagor agrees that the mortgagee may at any time without notice release portions of said mortgaged premises from the lien of this mortgage without affecting the personal liability of any person for the payment of said indebtedness, or the lien of this mortgage upon the remainder of the mortgaged premises for the full amount of said indebtedness then remaining unpaid."

The court in its decree decided that this provision of the mortgage was invalid, and in ordering judgment for the plaintiff directed as a credit upon the amount claimed the sum of $2,000, which the court found to be the value of that part of the mortgaged premises released by her to Howard. The plaintiff appeals from the judgment.

[1] As we view the record, there is only one important point in the case. The appellant contends that under the provision of the mortgage quoted she had a right to grant the partial release of the mortgaged premises to Howard for less than the market value of the property so released and to hold the remainder for the balance. Generally this could not be done, for the rule appears to be that a mortgagee, with notice of several successive alienations of parts of the mortgaged premises primarily liable for the payment of the debt, cannot be permitted to charge other portions of the premises with the payment of the mortgage debt without deducting therefrom the market value of the part released. Woodward v. Brown, 119 Cal. 283, 51 Pac. 2, 542, 63 Am. St. Rep. 108; Irvine v. Perry, 119 Cal. 352, 51 Pac. 544, 949; Blood v. Munn, 155 Cal. 228, 100 Pac. 694; Humboldt Savings Bank v. McCleverty, 161 Cal. 285, 119 Pac. 82, 2 Jones on Mortgages (7th Ed.) § 722 et seq.; 27 Cyc. 1372. In other words, under this principle of equity the plaintiff, having knowledge of the several conveyances of portions of the mortgaged premises made subsequent to the giving of the mortgage, and of their terms, could not release the parts thereof conveyed to Howard for less than their reasonable value and enforce the balance of her claim against the remainder of the land. But the provision in the mortgage upon which this controversy turns appears to have been inserted therein for the express purpose of avoiding the application of this equitable doctrine, and we perceive no reason why the provision should not be given the effect intended. Any person dealing with the mortgaged property did so charged with knowledge of the terms of

the mortgage, one of which expressly gave to the mortgagee the right to release part of the property covered thereby without affecting her right against any one personally liable for the payment of the secured indebtedness, or her right to look to the remainder of the mortgaged premises as security for the full payment of the indebtedness remaining unpaid.

[2] We cannot regard as meritorious the respondents' suggestion that this provision of the mortgage is contrary to public policy and, therefore, void. The law of this state gives very wide latitude to persons in respect of making contracts affecting their private interests, and we see no reason for holding that considerations of public policy forbid persons from entering into a contract by which they provide, as was done in this case, for the effect of a release of a portion of the mortgaged premises. If we are correct in this view, it results that the trial court erred in its conclusion of law by which it credited upon the mortgage indebtedness the sum of $2,000 on account of the release by plaintiff of the lien of her mortgage upon that part of the premises transferred to R. F. Howard, instead of the sum of $350, and also in its conclusion of law that the provision of the mortgage hereinbefore set forth was not binding upon purchasers or lienholders for value when actual notice of their interest has been brought home to the mortgagee, and also in its conclusions of law numbered IV and V in so far as they are affected by the construction of the said provision of the mortgage adopted by said trial court.

The judgment is therefore reversed, and the cause remanded to the trial court for further proceedings in accordance with the views herein expressed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 456

CALVERT et al. v. G. G. BURNETT ESTATE CO., Inc. (Civ. 2905.)

(District Court of Appeal, First District, Division 2, California. Oct. 6, 1916.)

LANDLORD AND TENANT ⇐167(5)—LIABILITY OF LANDLORD FOR INJURIES ON SIDEWALK.

Despite charter of the city of San Francisco, art. 6, c. 2, § 16, and article 1, § 5, the owner of a building is not liable for injuries to a pedestrian from failure to keep the sidewalk in repair where the building is occupied by a lessee who has agreed to repair, and where the owner has no notice, actual or constructive, of the defect.

Appeal from Superior Court, City and County of San Francisco; Geo. E. Crothers, Judge.

Action by Elizabeth Calvert and Joseph Calvert against the G. G. Burnett Estate Company, Incorporated. From judgment for defendant, plaintiffs appeal. Affirmed.

A. Schapp and W. H. R. McMartin, both of San Francisco, for appellants.

Black & Clark, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment in favor of the defendant in an action to recover for personal injuries sustained by the plaintiff, Elizabeth Calvert, and alleged to have been caused by the negligence and carelessness of the defendant corporation in permitting and allowing the sidewalk in front of a building owned by it to become defective. The defendant corporation is, and was at the time of the accident, the owner of a certain building on Turk street near Market street, which was occupied by a tenant holding under a written lease. The facts are practically undisputed, and the court found that, at the time of the leasing of the premises by the defendant to the tenant, the said premises, including the sidewalk in front thereof, were in first-class condition, and that there were no holes, breaks, or depressions or other defects of any kind whatsoever in the sidewalk, and that said premises were in all respects in good condition; that the tenant expressly agreed in the said lease that all repairs necessary to the said premises should be made by said tenant at its own cost and expense and that the lessor should not be called upon to make any repairs whatever; that the lease was in full force and effect at all times mentioned in the complaint; that whatever holes or breaks may have occurred in the sidewalk were made without the knowledge of the defendant and without any negligence on the part of the defendant; and that they were not either knowingly, negligently, or carelessly allowed or permitted to remain or continue in said sidewalk by said defendant. The evidence is undisputed that the defendant had no knowledge of any breakage in the sidewalk until after the accident. Upon these facts the record presents but one question: Whether the owner of a building is liable in damages for injuries resulting from failure to keep the sidewalk in repair, where the building has been leased and is being occupied by a lessee who has agreed to repair, and where the owner has no notice of any defect in the sidewalk, and there are no facts in evidence which would have put a reasonably prudent man upon inquiry.

Appellant admits that formerly, in this state, the owner of property was not liable for failure to keep the sidewalk in front thereof in repair. She recognizes the rule as announced in the case of Eustace v. Jahns,

38 Cal. at page 17, where the court said, in speaking of the duty of a property owner to repair the public highway:

"As the defendant's responsibility in this action, if any exists, rests solely upon allegations of nonfeasance, or neglect of duty, devolved from the fact of his possession and control of the lot fronting on the side of the street where the defect occasioning the injury existed, and not upon any pretense or allegation of any affirmative action, misfeasance, or malfeasance, it follows that, unless there exists some positive legislative enactment imposing such duty, the responsibility cannot attach. From a most careful consideration of all the statutes relating to the public streets and highways of the city and county of San Francisco, we find no personal duty primarily or inceptively cast upon the individual owners of lots or lands therein, in respect to the care, management, control, improvement, or repair of the public streets and highways. * * *"

In the case of Martinovich v. Wooley, 128 Cal. 143, 60 Pac. 760, the court says:

"A sidewalk is a part of the highway. Bonnett v. San Francisco, 65 Cal. 231 [3 Pac. 815]; Ex parte Taylor, 87 Cal. 94 [25 Pac. 258]. At common law, no duty was cast upon the owner of the abutting property to maintain the street in good repair. If such duty exists in this state, it must be by virtue of some statutory enactment. Since culpable negligence cannot exist except from failure to perform a duty imposed by law or by contract, if the duty to repair the sidewalk in this instance was not cast upon defendants they were not responsible for its condition, and the general demurrer was properly sustained."

The court then calls attention to the statutory provision wherein it is made the duty of the superintendent of streets to require by notice in writing the making of necessary repairs by the property owners, and also calls attention to the fact that the statute imposes a liability upon the property owner for injuries occasioned by defects in the street fronting his property if such defects shall have existed for the period of 24 hours or more after notice thereof by the superintendent of streets. The court then quotes from the case of Eustace v. Jahns, supra, and declares the law to be that a duty to repair is cast upon the property owner only after notice given by the superintendent of streets as required by the act, and after such notice has been disregarded for the specified time.

The appellant in the present case contends that the law has been changed since these cases were decided, that amendments to the charter of San Francisco have placed a primary responsibility upon owners of property, with relation to the repair of the sidewalk in front of the same, and that such responsibility is not dependent upon notice by the superintendent of streets of a defective condition. Reliance is placed upon the portion of section 16 of chapter 2 of article 6, which provides that—

"Until the sidewalk or roadway of any improved street in the city and county of San Francisco is finally accepted, * * * the obligation to repair, reconstruct or improve the same is imposed upon the owner or owners of the lots fronting thereon."

The appellant points out that section 21 of the Statute of 1862, p. 401, providing that not less than the whole width of the street shall be accepted, has been changed by section 23 of the present charter, which provides that not less than the width of the roadway shall be accepted, and argues that this change indicates an intention that the city shall not now accept the sidewalks. This argument is supported further by calling attention to other amendments to the charter which appellant construes as indicating an intention in harmony with her views. Upon this assumption appellant's argument proceeds, and it is urged that, as the sidewalk in the case at bar was not accepted, the above-quoted provision of section 16, chapter 2, of article 6, becomes applicable. Reliance is then placed upon section 5, art. 1, providing that no recourse shall be had against the city and county for damages suffered by reason of the defective condition of any sidewalk which has not been finally accepted by the supervisors of the city and county as by law or in the charter provided, but, in any such case, the person or persons on whom the law may have imposed the obligation to repair such defect in any such sidewalk shall be liable to the party injured for the damage suffered or sustained.

In passing we call attention to the fact that the language of section 16, above quoted, "until the sidewalk * * * is finally accepted, * * *" by its very terms recognizes the fact that at some time certain sidewalks may be accepted. But we deem it unnecessary for us to decide here whether or not the city accepts the sidewalks in accepting the "roadway," or whether a change has been made in this respect by the amendments to the charter upon which appellant relies. Because, even though we accept appellant's position, for the purpose of the determination of this case, and agree that the sidewalk in front of defendant's house was not accepted, and that the primary responsibility for its repair rested upon the abutting property owner, and that he was not entitled to formal notice of defects from the superintendent of streets, yet the above-quoted language of the charter, imposing upon the owner such responsibility and declaring his liability for injury suffered by reason of his failure to meet his obligation in this respect, is not such as to make the owner an insurer of all persons passing along said sidewalk. We think, if such an unusual liability were sought to be placed upon owners of property, that the charter would have been more specific in stating it. An owner is primarily responsible for the repair of all

portions of his premises, and yet he must have notice of defects before he can be held liable in damages for failure to repair. He is not an insurer with respect to the condition of his premises generally, although primarily liable. It seems clear to us that even if the appellants' contention be granted, nevertheless the owner is only liable for failure to perform the duty to repair his sidewalk, placed upon him by the charter, under the same circumstances as he would be liable for the failure to repair any other portion of the premises of which he is the owner, i. e., he is liable for a negligent failure to repair, and negligence cannot exist without knowledge of defects or circumstances which would put a prudent man upon inquiry. Even conceding that the defendant is not entitled to the formal notice by the superintendent of streets, he must yet have some notice—some knowledge of the need of repairs acquired in some manner.

In the case of Kalis v. Shattuck, 69 Cal. 596, 11 Pac. 346, 58 Am. Rep. 568, the court says that it is well settled that a landlord is not liable for the consequences to the plaintiff of a nuisance in connection with a building in the possession and control of his tenants unless "(1) the nuisance occasioning the injury existed at the time the premises were demised; or (2) the structure was in such a condition that it would be likely to become a nuisance, in the ordinary and reasonable use of the same for the purpose for which it was constructed and let, and the landlord failed to repair it (Jessen v. Sweigert, 66 Cal. 182 [4 Pac. 1188]; Rector v. Buckhart, 3 Hill [N. Y.] 193; Mullen v. St. John, 57 N. Y. 567 [15 Am. Rep. 530]; Hussey v. Ryan [64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772]; Wood on Nuisances, §§ 295, 676; Wood on Landlord and Tenant, 918); or (3) the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury." Appellant argues that the present case comes within the second class because, as any sidewalk was bound to wear out in the course of time with the ordinary and reasonable use of the same for the purpose for which it was constructed, that it was bound in time to become a nuisance. We think the court did not mean that everything which was not absolutely impervious to wear and tear was to be in contemplation of law a prospective nuisance. And as we see from the language last quoted, ordinarily the owner of a building which is in the possession of a tenant would not be liable to third persons for injuries resulting from a defective condition of any portion of the premises unless the building had been defectively constructed or he had notice of such defective condition. Practically the same rule has been applied with regard to a sidewalk in front of premises, for in the case of Frassi v. McDonald, 122 Cal. 404, 55 Pac. 139, 141, the court said:

"The owner of property fronting on the street is not an absolute guarantor that no opening may be found in his sidewalk. * * * Before liability attaches to the owner in such a case, he must have known of its defective condition, or, as a careful, prudent man, should have known it."

This case is quoted with approval in the case of Rider v. Clark, 132 Cal. 387, 64 Pac. 564. In the latter case the court lays down the rule that, when a tenant enters into possession under a lease, the landlord parts with all his right to and control over the premises and is not liable to third persons, except for such defects in the premises or defective construction as existed in the premises when let to the tenant, and numerous authorities are cited in support of this statement. The liability in actions like the present is predicated upon negligence or want of care. The landlord cannot be guilty of negligence in failing to repair when he does not know of any defect in the premises and is not charged with such knowledge as a reasonable man. This seems to be the law, not only in this state, but in other jurisdictions as well. Hutchinson v. Cummings, 156 Mass. 329, 31 N. E. 127.

Unless the provisions of the charter relied upon by the appellant make the owner an insurer, the findings of the trial court that the holes in the sidewalk alleged to have caused the injury to the plaintiff were made without the knowledge of the defendant, and that they were not knowingly, negligently, or carelessly allowed or permitted to remain or continue in said sidewalk by the defendant, make necessary its conclusion that the defendant in the present action is not liable. It is not necessary for us to discuss the relative rights and duties of the defendant and the city authorities under the charter provisions relied upon by the appellant. It is sufficient for the present case to decide that such provisions do not make the owner of property an insurer of the safety of persons using the sidewalk, nor a guarantor that the sidewalk contains no openings.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

181 Cal. 514

In re SPENCER'S ESTATE. (L. A. 6186.)

(Supreme Court of California. Nov. 15, 1919.)

1. WILLS ⊜489(2) — INTERPRETATIVE TESTIMONY TO AID IN CONSTRUCTION.

Interpretative testimony is inadmissible to show that the word "personal" in a residuary bequest to "personal legatees named" in the will was not used to differentiate people from corporations named, but to distinguish personal friends from relations.

2. WILLS ⊜487(3)—EVIDENCE OF DECLARATIONS INADMISSIBLE TO SHOW INTENT.

In view of Civ. Code, §§ 1324, 1318, 1340, evidence of an oral declaration of the testator at variance with the express language of his will is inadmissible to show his intent in using a well-understood word.

Department 2.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Henry F. Spencer, deceased. From an order of partial distribution, certain legatees appeal. Affirmed.

Alexander Heyneman, of San Francisco, for appellants.

Jefferson P. Chandler, of Los Angeles, for respondents.

Richards, Heaney & Price, of Santa Barbara, for executors.

MELVIN, J. This is an appeal from an order of partial distribution in the estate of Henry F. Spencer, deceased, by certain legatees under the will.

The whole controversy centers around the intended meaning of the word "personal" as inserted by testator's order in the will after

the reading of the first typewritten draft, and the substitution of the number "15" for the number "26."

The will, after two paragraphs, one directing the payment of debts and the other bequeathing a certain watch to a friend, provides for the disposition of the remainder of the property in 26 numbered "clauses," and preliminary to these clauses is the direction that those from and including 1 to and including 15 shall be paid in full, even if any deficiency must be made good by abatement or cancellation of legacies from and including 16 to and including 24. These latter are all legacies to religious, educational, and eleemosynary societies or corporations, while the first 15 are to persons. It is evident, therefore, that the mind of the testator was directed to the two general classes of bequests, namely, one to personal and another to artificial entities. It is to be noted, further, that by the first "clause" bequests are made to Henry Spencer Smith and Lucia W. Smith, children of a deceased sister. Small bequests are also made therein to three sons of Bradford Smith "in token of remembrance," but it does not appear whether or not said Bradford Smith was related to the sister of the testator. In the "clause" numbered 2 a bequest is made to Lucy A. Weed, testator's sister. Clause 25 contains a bequest to a religious newspaper. The final provision, No. 26, so far as pertinent to this discussion, is as follows:

"All the rest, residue and remainder of my estate, real, personal and mixed, which I may own or possess at the time of my death, or may in any way be entitled to, and all rights in action as well as in possession, I give, devise and bequeath in the manner following, to wit:

"To Henry Spencer Smith and Lucia W. Stimson, hereinbefore mentioned as Lucia W. Smith, one-eighth part each, and one-fourth part I give, devise and bequeath to my sister, Lucy A. Weed, and the remaining one-half part to the personal legatees named in the foregoing clauses of this my will from and including 1 to and including 15 in proportion to each of said legatees as the amount of his or her legacy bears to the total amount of the legacies bequeathed."

[1] The will was a typewritten document except that the word "personal," before the word "legatees," was written in ink, and the number "26," following the word "including," had been stricken out and the number "15" had been written above it in ink. Both changes were attested by the initials of the witnesses to the will, and there is no contention but that they were regularly made at testator's request. But the statement is made that the word "personal" was not used to differentiate the people, to whom various sums were bequeathed, from the societies and corporations, but to distinguish personal friends from collateral relations. To state this contention is almost to answer it. If the meaning for which appellants contend could be attributed to the word "personal," then there would be no necessity for including clauses 1 and 2, wherein the collateral kinsfolk are made beneficiaries. Yet the words "from and including 1 to and including 15" are used. This language is entirely in accord with the usual meaning of the word "personal" because clause 15 marks the end of the series of bequests to persons. All those following are to organizations, not to persons. There is no ambiguity in the language, and therefore no reason for interpretative testimony. We know of no use of the word "personal," either technical or colloquial, which would justify its employment in distinguishing those not related from those who are.

Appellants insist that the testator could not possibly have intended to give to Henry Spencer Smith, Lucia W. Stimson, and Lucy A. Weed each three portions of the property, namely, a legacy of a definite amount of money, a certain fraction of the residue, and a further sum to be computed according to the rules of proportion. But why not? He intended two portions for each stranger to the blood. Is it remarkable that he favored his sister, his nephew, and his niece above those not of his family? These favored ones were the only relatives specified in the will, unless Bradford Smith's sons (to whom small sums "in token of remembrance" were given) were grandnephews, which does not appear, and even if it did their legacies were so small as to indicate that testator did not consider them peculiar objects of his bounty. It is true that there were legacies of $2,500 each to Charles J. and Arthur A. Adams, described as "my nephews," but it was admitted that they were nephews of testator's predeceased wife. There is nothing remarkable, therefore, in the fact that his favored relatives, his sister Lucy (to whom there was a direct bequest of $7,500 in her own right), his niece Lucia, and his nephew Henry (bequeathed respectively $7,000 and $10,000), should also share twice in the residue.

[2] Henry F. Spencer was blind when the will was executed in January, 1916. The scrivener who prepared the testament was Mr. Jarrett T. Richards, an attorney at law. At the time of the hearing in the probate court he was too ill and infirm to attend, and appellants sought to introduce his deposition for the purpose of showing what occurred at the time of the emendations of the text of the will. This deposition was properly excluded, for the reason that the plain terms of the instrument required no exposition. Words of a will are to be taken in their ordinary and usual meaning. Section 1324, Civ. Code; Fancher v. Fancher, 156 Cal. 13, 103 Pac. 206, 23 L. R. A. (N. S.) 944, 19 Ann. Cas. 1157; Estate of Purcell, 167 Cal. 176, 138 Pac. 704; Garner v. Purcell, 173 Cal. 495, 160 Pac. 682. Resort may be had to evi-

dence of the facts or circumstances surrounding the execution of the will when the language is ambiguous or doubtful. Section 1318, Civ. Code, which, it is to be noted, excludes a testator's oral declarations; section 1340, Civ. Code; Estate of Murphy, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110. But we are bound by the terms of the will as written (Estate of Rounds, 181 Pac. 638), when they are clear. The purport of the testimony in the deposition (elicited largely by leading questions which were none the less suggestive because, "owing to the advanced age of the witness," counsel sought to draw his attention to certain "salient facts") was that witness told the testator that by the expression "personal legatees" he would be indicating "those personal legatees in contradistinction to collateral," and that "people other than Henry Spencer Smith, Lucia W. Stimson, and Lucy A. Weed" were to receive half of the residue. This advice was given, said witness, after testator had declared that he did not want his relatives to share ratably with the other legatees in one-half of the residue described in clause 26. If such testimony had been introduced its tendency would have been not to clarify the terms of the testament, but to show that Mr. Richards and the testator had used a well-understood word with a meaning not attributed to it generally by users of the English language. Moreover, the very essence of the testimony offered and rejected, indeed, its only material part, was an oral declaration of the testator at variance with the express language of the will. Such declarations must be excluded. Sections 1318, 1340, Civ. Code.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

43 Cal. App. 507

McCOMISH v. KAUFMAN. (Civ. 2024.)

(District Court of Appeal, Third District. California. Oct. 10, 1919. Hearing Denied by Supreme Court Dec. 8, 1919.)

1. FIXTURES ⟸27(2)—LANDLORD'S WAIVER OF RIGHT TO FIXTURES BY NEW LEASE.

Notwithstanding fixtures placed by the tenant might have become a part of the realty and belonged to the landlord on expiration of the original lease, the landlord could by subsequent lease waive the right thereto (Civ. Code, § 3513) and grant the tenant a right to remove the fixtures during a new term, and, if he did so, the tenant's removal of them would be legal.

2. FIXTURES ⟸35(2)—EVIDENCE OF WAIVER BY LANDLORD OF RIGHT TO FIXTURES.

In a landlord's action to recover possession of fixtures removed by a tenant, evidence *held* sufficient to support a finding that the landlord executed a new lease, expressly agreeing that the defendant had 30 days in addition to time allowed by prior lease during which to remove such fixtures.

3. APPEAL AND ERROR ⟸204(3) — NECESSITY OF OBJECTIONS TO EVIDENCE VARYING CONTRACT.

Objection to the admissibility of parol evidence as having the effect of adding to the terms of a written contract cannot be questioned for the first time in the appellate court.

4. FRAUDS, STATUTE OF ⟸157—FAILURE TO OBJECT TO PAROL EVIDENCE.

Parties who, without objection, permit parol evidence to be introduced to add to the terms of a written contract, waive all question of inadmissibility of such evidence under the statute of frauds.

Appeal from Superior Court, Colusa County; Wm. M. Finch, Judge.

Action by C. D. McComish against C. C. Kaufman. Judgment for defendant, and plaintiff appeals. Affirmed.

Ralph C. McComish, of San Jose, and Alva A. King, of Colusa, for appellant.

Elise Harlan and Millington & Millington, of Colusa, for respondent.

ELLISON, Judge pro tem. Plaintiff brought this action to recover possession of 235 opera chairs, a lot of scenery, stage fixtures, and an electric sign. From a judgment in favor of defendant, the plaintiff appeals.

On the 12th day of March, 1912, the plaintiff gave to the defendant a lease of a room in a building in the town of Colusa, known as the "Herald Building," to be used for the purpose of moving picture entertainments. At the time the lease was executed, the defendant was in possession of the premises and had been for some time under prior contract with plaintiff. The lease was for a term ending December 31, 1913, with the option to the defendant of a two years' extension. The rental was $35 per month. At the date of the lease there was certain personal property in the room consisting of chairs, scenery, and other articles used in the moving picture business, which concededly belonged to the defendant. The lease stated that this furniture and fixtures were pledged to the plaintiff for the faithful performance of the conditions of the lease. Defendant exercised his option and held under this lease until December 31, 1915. Thereafter he held the premises and conducted the moving picture business in said room as a tenant at will or from month to month without any written lease until August 5, 1918, at which time plaintiff served upon him a written notice to vacate within 30 days.

Upon receiving said notice, defendant had an interview with plaintiff and informed him that 30 days was too short a time within which to move his fixtures and furniture and asked for a new lease for a longer term than

30 days, and stipulated that, if such additional time were given he would pay an increased rental, and remove all his property, including the property here involved, before the expiration of such new lease. As a result of this interview, the plaintiff gave to the defendant a new lease of the premises. This lease was dated August 12, 1918. The property leased was described as "that room known as the 'Gem Theater' located in the Herald Building in the town of Colusa." The term was for one month beginning the 1st day of September, 1918, and ending the 30th day of September, 1918. The rental for the month was $60. No mention was made in the lease of the fixtures or furniture. Within the life of the new lease the defendant removed from the building all the property, the subject of this litigation.

The appellant's position may be fairly stated as follows: When the lease of August 12, 1918, was executed, the fixtures, which had been put in the building during the existence of a prior lease and not removed before its expiration, had become the property of the plaintiff, and, the new lease not providing for their removal by the tenant, he had no right to take them from the building. In support of his position, he quotes from Wadman v. Burke, 147 Cal. 354, 81 Pac. 1013, 1 L. R. A. (N. S.) 1192, 3 Ann. Cas. 330, as follows:

"And it follows that, whatever was a part of the freehold when the lessee accepted and began, his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in as a trade fixture under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate, and the fixtures annexed, which have become part of it."

The decisions present some apparent conflict upon the matter set forth above.

Thus, it was held in Woods v. Bank of Haywards, 10 Cal. App. 93, 106 Pac. 730, that a holding over from month to month after the expiration of a written lease amounted to a continuance of the original holding and that the tenant's right of removal was not lost. A petition for hearing by the Supreme Court was denied.

[1] Conceding for the purposes of the argument only that the law is as claimed by appellant, still, after the original term has expired, the plaintiff could waive the right claimed and could by contract grant to his tenant the right to remove the fixtures during the new term which expired September 30, 1918, and, if he did so, the removal by defendant would be a legal act.

"Any one may waive the advantages of a law intended solely for his benefit." Civ. Code, § 3513.

In finding 9 is this language:

"Plaintiff did make, execute and deliver to defendant his certain agreement in writing whereby he did let and lease to the defendant that room known as the 'Gem Theater' located in the Herald Building upon the 31st day of September, 1918 (?) (12th day of August [?]) at an increased rental and plaintiff then and there expressly agreed that defendant should have thirty days in addition to the time given by said prior lease and notice during which defendant could and should remove all property from the room occupied by the defendant and known as the 'Gem Theater' and said defendant so agreed to remove said property before September 31, 1918, and said defendant so agreed and did pay said increased rental and prior to September 31, 1918, did remove said property."

[2] This finding, in connection with the others, is sufficient to support the judgment, and, if it is to stand, the judgment must be affirmed. Counsel for appellant attacks it upon the ground that it is not supported by the evidence. The evidence in the record amply sustains the finding.

The defendant testified:

"I told Mr. McComish when he handed me this notice: 'Isn't that rather short time for me to move out? Isn't that rather short notice for me to get the things moved out? This is a mighty short time to move all of this furniture and fixtures and get everything out immediately. It would be impossible to do it in thirty days.' And he said: 'Well, I will see about it,' and a few days afterwards he came and said: 'I am willing to sign up an agreement that you have another month.' Q. For what purpose? A. I should have another month to get out my stock. Q. And did you sign such an agreement? A. Yes, and he charged me $10 a month more for the privilege of giving me 30 days of getting my stuff out."

It is true the plaintiff denied this conversation, in part, at least. His testimony, at most, only raises a conflict, but does not alter the fact that the record contains sufficient evidence, if accepted by the court, to sustain the finding. The court accepted it and its action is binding on this court.

[3] Counsel raises the point that the evidence of plaintiff above quoted is inadmissible, because it was parol evidence introduced for the purpose and had the effect of adding to the terms of a written contract. This evidence was admitted without objection, and its admissibility cannot be questioned for the first time in this court.

[4] "Parties who permit a fact to be proved by incompetent evidence, without objection, waive all question of inadmissibility. This is true even under the statute of frauds, and as to witnesses incompetent to testify." Walberg v. Underwood, 180 Pac. 55.

"Conceding now that the contract declared on was void, by reason of the statute of frauds, because it was verbal, still, as no objection was made by plaintiff to the evidence

when offered, it must be held that the right to invoke the statute of frauds was waived by the appellant, and it cannot now be invoked in this court as a reason why the judgment should be reversed or a new trial granted. The defense of the statute of frauds can be waived, and that it was waived by the plaintiff in failing to object at the time to the parol evidence when offered, we think there can be no doubt." Nunez v. Morgan, 77 Cal. 427, at page 433, 19 Pac. 755.

The finding of the court that the plaintiff for an increased rental agreed that defendant might have until September 30, 1918, to remove the property in dispute, being supported by the evidence, is decisive of the case, and renders a discussion of other points unnecessary.

The judgment is affirmed.

I concur: BURNETT, J.

HART, J. I concur in the judgment and also in the proposition, stated by the acting presiding justice, that the point made by appellant that the parol testimony disclosing the purpose for which the new or additional lease was given to the defendant is incompetent, and therefore was inadmissible, is not reviewable because it was not objected to and hence the objection must be deemed to have been waived. But I do not think that that testimony was incompetent. The terms of the additional lease were these, to wit: That the defendant might use and occupy the room known as the "Gem Theater" situated in the Herald Building, in the town of Colusa, for the term of one month, beginning on the 1st day of September, 1918, and ending September 30, 1918, for the sum or rental of $60 for said month. These terms could not, of course, be changed by parol. The defendant could not have proved by parol, except under a plea of fraud or mistake, that the lease was for a longer term than one month or that the rental was less than that specified in the writing. But the testimony referred to was not offered for that purpose. It was not offered to vary the contract as it was written in any respect or to substitute new terms for those expressed in the writing. Its sole purpose was to show the reason why the lessee asked for and secured an extension of the lease for one month. The obvious purpose of the testimony was to show that the plaintiff recognized the defendant's ownership of the furniture and fixtures and his right to remove them upon the expiration of the term and that his failure to remove the property within the original term or at the expiration thereof was because he did not have sufficient time within which to do so. I do not understand the main opinion to hold that the testimony was inadmissible, but the conclusion therein upon the question of its admissibility is upon the assumption that it was improper testimony, hence these views by me, and with these views I perceive no conflict in anything said in the case of Harrison v. McCormick, 89 Cal. 327, 329, 26 Pac. 830, 23 Am. St. Rep. 469, cited by appellant. In that case it was held that—

"Where a contract for the sale of merchandise is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence is inadmissible to show a sale by sample."

The rule so stated is unquestionably correct, but it does not fit this case as to the point here considered.

43 Cal. App. 490

STONE v. McWILLIAMS. (Civ. 2922.)

(District Court of Appeal, First District, Division 1, California. Oct. 9, 1919.)

1. APPEAL AND ERROR ⊂=957(1)—JUDGMENT ⊂=139—DISCRETION OF COURT IN VACATING DEFAULTS.

Applications to be relieved from an order or judgment by default are addressed to the sound legal discretion of the trial court, and its action upon such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion.

2. JUDGMENT ⊂=139—VACATION OF DEFAULT HELD NO ABUSE OF DISCRETION.

Where defendant, who was over 70 years of age, totally blind, and illiterate, defaulted in an action by plaintiff, who claimed that he had broken a contract whereby plaintiff was to care for him during his declining years, etc., *held* that, under the circumstances, the vacation of the default could not be deemed abuse of trial court's discretion, notwithstanding plaintiff's showing that shortly before commencement of the action defendant had withdrawn his money from a bank and transferred his real estate with the apparent intention of protecting himself against her claim.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by Callie Stone against George W. McWilliams. From an order setting aside a default and vacating judgment entered thereon in her favor, plaintiff appeals. Affirmed.

Stanley Moffatt, of Fresno, for appellant.

Burns & Watkins, of Fresno, and E. S. Reichard, for respondent.

KERRIGAN, J. This is an appeal from an order setting aside a default and vacating the judgment entered thereon in favor of plaintiff.

The default was taken in an action commenced by the plaintiff against the defendant to recover the sum of $1,000 for breach of contract. The complaint alleged that the

parties entered into an agreement by the terms of which the plaintiff was to make her home with the defendant, keep house for him, and give him such care and attention necessary for the comfort of a man of his age and condition during the remainder of his life, in return for which she was to receive board and lodging for herself and two minor children, with the further advantage that the defendant would by last will and testament leave to plaintiff whatever property he might own at the time of his death. It further appears that the plaintiff entered upon the performance of this agreement, and remained at the home of defendant for about one year, when, after a quarrel with him, she left, and shortly thereafter commenced this action. The summons and complaint were served upon defendant by a deputy sheriff, and, defendant making no answer thereto, plaintiff caused his default to be entered, upon which the court rendered judgment in plaintiff's favor for $1,000, the amount demanded. Within a reasonable time under the attending circumstances defendant moved the court to set aside his default and to vacate the judgment upon the ground of his mistake, inadvertence, and excusable neglect. The court granted the motion, imposing terms under which the defendant was required to pay into court for the use of plaintiff the sum of $50.

[1, 2] From the record it appears that the defendant is over 70 years of age, totally blind, illiterate, and unable to write his name. Upon the motion to set aside the default he made and filed an affidavit which stated, among other matters, that at the time the summons and complaint were served upon him he was wholly unfamiliar with court proceedings, and neglected to make seasonable answer to the complaint by reason of what he understood the deputy sheriff to advise him or inform him he might safely do at the time that officer made such service; his advice or information being to the effect that under the circumstances of the case it would be needless for the defendant to do anything, either in the way of writing a letter to the plaintiff or her attorney or otherwise, and that no trouble would ensue from such inactivity. On the other hand, it is stated in the counter affidavit filed by the plaintiff in opposition to the motion that shortly before the commencement of the action the defendant withdrew his money from a bank and transferred his real estate with the intention apparently of protecting himself from any claim plaintiff might make or prosecute, but the steps he took in this behalf are the subject-matter of another action instituted by plaintiff; and, whatever his object may have been, he seems to have believed that he was acting within his legal rights. In any event, we do not think this circumstance would warrant us in holding that the court abused its discretion in setting aside the defendant's default. It is invariably held that applications to be relieved from an order or judgment by default are addressed to the sound legal discretion of the trial court, and that its action upon such applications will not be reversed on appeal unless it clearly appears that the court abused its discretion. Nicoll v. Weldon, 130 Cal. 667, 63 Pac. 63. In the case of Berri v. Rogero, 168 Cal. 736, 145 Pac. 95, which, upon the facts, was less favorable to the party appealing from the order vacating the default than the present case, the court said:

"The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary."

Here the defendant made a seasonable application to be relieved from his default and filed an affidavit of merits showing a good defense. His age, blindness, and illiteracy might well have appealed to the court to exercise its discretion in his favor even more liberally than in ordinary cases. It does not appear that the plaintiff has suffered any prejudice, or that any injustice will result to her from a trial of the case upon the merits. Under these circumstances we are not inclined to hold that the court abused its discretion in granting defendant's application.

The order is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 502

BONNARJEE et ux. v. PIKE et ux.

(Civ. 3020.)

(District Court of Appeal, First District, Division 1, California. Oct. 10, 1919.)

1. BROKERS ⊜8(3)—EVIDENCE OF AGENCY FOR BOTH PARTIES.

In an action for damages for false representations as to property exchanged, which representations were made by the broker negotiating the transaction, evidence *held* to show that the broker was the agent of both plaintiffs and defendants.

2. FRAUD ⊜58(1)—EVIDENCE OF VALUE OF REAL ESTATE EXCHANGED.

In an action for damages resulting from fraudulent representations in an exchange of real estate, evidence as to value of properties *held* sufficient to support the court's finding in plaintiff's favor as to damages.

3. EVIDENCE ⊜113(8, 11)—RENTAL AND SALE PRICE TO DETERMINE VALUE.

In an action for damages resulting from an exchange of properties, in which there were

false representations as to value, evidence of a bona fide rent paid for the use of the property is generally admissible, as is also the price actually paid at bona fide sale of the property whose value is in dispute, made about the time the transaction arose.

4. FRAUD ⟸11(2)—REPRESENTATION OF VALUE AS MATTER OF FACT.

A representation as to value of property is often a representation of fact and actionable, if false, especially where the purchaser to whom the representation is made is so situated as to have no means of investigation, and therefore relies on the statements of value made by the vendor or his agent.

5. PRINCIPAL AND AGENT ⟸171(4)—RATIFICATION; ACCEPTANCE OF BENEFITS OF FALSE REPRESENTATIONS.

When a false representation of value is made by vendor's agent in the transaction of his principal's business, the latter accepting the benefit of the transaction, is liable in damages for the agent's wrongful act (Civ. Code, § 2330).

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Basanta C. Bonnarjee and wife against George W. Pike and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Henry K. Norton and Wilbur Bassett, both of Los Angeles, for appellants.

John F. Poole and Valentine & Newby, all of Los Angeles, for respondents.

KERRIGAN, J. This action was brought by the plaintiffs, who are husband and wife, to recover from the defendants, also husband and wife, the sum of $3,000 as damages resulting from an exchange of properties by the respective parties, brought about by the aid of false representations on the part of the agent who negotiated the transaction. Judgment went for plaintiffs in the sum demanded, and the defendants appeal.

The appellants make several contentions in support of their appeal, among them being that the evidence is insufficient to show that the agent in the transaction was in fact the defendants' agent; that it is also insufficient to show the values of the respective properties upon the difference in which the court based the amount of damages allowed; and, furthermore, that the appellants are not responsible for the fraudulent representations of the agent, even conceding that he acted for them. The facts are substantially these:

Basanta C. Bonnarjee (hereinafter referred to as the plaintiff), a native of India and a convert to the Christian religion, was living with his wife in Chicago, and there owned a brick building. Desiring by reason of his wife's illness to go to Los Angeles and there reside, he sought the services of one Wendell, a real estate broker, and a member of a church which the plaintiff sometimes attended. Stating his desire to Wendell, the latter immediately informed him:

"I know a person over there [Southern California], and he wanted me to exchange his property, and he wants to come here, and we all want him to come. He is a good man, and belongs to our church. He is a Sunday school superintendent, a sanctified man, and I will write him and see if he has the property still left, and will exchange that with you."

Wendell accordingly wrote to the defendants, with whom he had a previous acquaintanceship, having visited them at their home in Los Angeles. They also were members of a church of the same or an allied denomination, and Wendell addressed them as "Dear Brother and Sister," and in signing his letters seldom omitted an allusion to the founder of the Christian religion. This, also, was the practice of the defendant George W. Pike, who, in his correspondence both with Wendell and the plaintiff, also invariably preceded his signature with the words "Your brother in Christ." In his first letter to Pike, Wendell gave full particulars of the plaintiffs' property, including the price, which was put at $5,500, and stated that they would trade with the defendants for their cottage, "if the price was right." The correspondence which ensued resulted in an exchange of properties; the plaintiffs transferring to the defendants their said house at a valuation of $5,500, subject to a mortgage of $1,500, and receiving from the defendants their cottage at a valuation of $4,500, subject to a mortgage of $1,300, and a vacant lot, situated on a hillside, over a mile from transportation facilities, barren of street improvements of any kind, and the taxes on which were $5 per annum, at a valuation of $2,500, and subject to a mortgage of $1,000; the agreement of exchange also provided that the plaintiffs should pay to Wendell, not only a commission on their own account, but also one agreed to be due to him from the defendants upon this transaction.

There was testimony in the case from which the court was justified in finding that the value of the plaintiffs' property was the figure at which it was put in the transaction. This was the price paid for it by the plaintiffs, and it was rented for $40 per month, one of the conditions of the lease being that the tenant should make all repairs, and, according to the testimony of the plaintiff, could have been rented for more. He testified that he could easily have rented it for $50 per month, but, having a good tenant, whom he described as a prompt payer, he accepted the lower rent. As to the defendants' property, it was testified to that the cottage was worth from $2,000 to $2,500 only, and was subject to a mortgage of $1,300, which would make their equity therein of the value of from $700 to $1,200; that the vacant lot was worth, one witness testified, $400,

and another, $500. Burdened as it was with a mortgage of $1,000, secured directly by the defendants from an old lady (whether a member of their church does not appear), the equity therein would have no value.

During the negotiations the plaintiff expressed grave concern to Wendell that the defendants' property was not of the value at which the trade was sought to be made. Wendell quieted him by saying:

"Don't you worry about that. I told you that Brother Pike is a good man, and he will never do anything at all that is wrong, * * * and now here is an opportunity for you, and you are getting a bargain. * * * On the price which you are getting, I tell you it is a bargain. I was there, and I have seen the property; both of these properties I have seen, and I can assure you they are worth just what Brother Pike wants for it, and he would not misrepresent at all, so you can take his word for it, and when you go there you will find that you are not at all anyway loser, but you get a bargain."

The plaintiff's wife was equally dubious about the value of the defendants' property, but her fears were also overcome by similar assurances from Wendell. He said:

"Sister Bonnarjee, don't worry anything at all. I am doing the best I can for you, and when you go there you will see that you have made a bargain. Brother Pike is a good man; he belongs to our church, so you can take his word for it, and you will see when you go that it will be all right. You are getting a bargain."

[1] We think the trial court was fully justified in holding that Wendell was the agent both of the plaintiffs and the defendants. Bearing on the question of his employment is the direction contained in one of Pike's letters to Wendell:

"If I can trade in both places, I would say you can see what you can do."

Clearly in seeing what he could do he was acting for defendants. In addition to the fact that the defendants recognized their liability to pay Wendell a commission upon the transaction (for which, of course, they were not liable, unless he was their agent), the evidence also shows that by their direction he received and receipted for money due them incidentally from this same transaction, gave to the plaintiff instructions as to the form of the deed to be executed by him and his wife, recorded it, and during the course of the same negotiation was intrusted by defendants with a third piece of property for disposal.

[2, 3] The evidence as to value sufficiently supported the court's finding thereon. "A bona fide rent paid for the use of property may generally be shown as an aid in establishing its value." 13 Ency. of Evidence, 435. "In several jurisdictions the price actually paid at a bona fide sale of the property the value of which is in dispute, about the time the transaction arose, may be proved as an aid in determining its value." Id. p. 447.

[4, 5] That a representation as to the value of property is often a representation of fact, and actionable, if false, is well established, especially where the vendee to whom the representation is made is so situated as to have no means of investigating the question for himself, and therefore relies on the statements of value made by the vendor or his agent. Crandall v. Parks, 152 Cal. 772, 93 Pac. 1018; Phelps v. Grady, 168 Cal. 73, 77, 141 Pac. 926. It is equally well settled that, when such a representation is made by an agent in the transaction of his principal's business, the latter, accepting the benefit of the transaction, is liable in damages for the agent's wrongful act. Civ. Code, § 2330; Riser v. Walton, 78 Cal. 490, 21 Pac. 362.

We conclude from the foregoing that the court's findings are sufficiently supported by the evidence, and that the judgment entered in the plaintiffs' favor was the correct legal conclusion therefrom.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 84

GENTLE v. WARREN et al. (No. 3020.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1919.)

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by John R. Gentle against T. C. Warren and others. Judgment for defendants, and plaintiff appeals. Affirmed.

C. A. Stice, of Los Angeles, for appellant.
H. E. Gleason and F. M. Shepard, both of Los Angeles, for respondents.

THOMAS, J. This is an action brought by the plaintiff against defendants for the purpose of setting aside a certain deed made by one Anna Gentle, plaintiff's deceased wife, to defendants, on the ground that it was made as the result of fraud and undue influence exerted upon the grantor, and because her mind was in a weakened condition—which defendants denied. The court found in favor of defendants on all the issues, and entered judgment accordingly. From the judgment so entered, plaintiff appeals.

For a reversal of the judgment plaintiff attacks one of the findings as not supported by the evidence. That finding, so far as the same is objectionable to plaintiff, is as follows: "That it is not true that her mind was weakened and affected, or weakened or affected, on the 9th day of March, 1916; but the court finds that on the said 9th day of March, 1916, the mind of Anna J. Gentle was in a sound, strong, and normal condition."

No evidence has been called to our attention which shows that there is any conflict, so far as the condition of deceased's mind is concerned. This is not only a case where there is evidence to support the finding, but the plaintiff's own evidence, as well as defendants', supports it, and for this reason we are unable to agree with the appellant's contention.

No other point is urged.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

43 Cal. App. 746

PEOPLE v. MARTINEZ. (Cr. 472.)

(District Court of Appeal, Third District, California. Oct. 23, 1919.)

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Jesse Martinez was convicted of rape, and he appeals. Judgment amended, and judgment and order affirmed.

A. J. Carlson, of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

ELLISON, Presiding Judge pro tem. Defendant was informed against by the district attorney of Stanislaus county, state of California, in which he was charged "with having, on or about the 20th day of August, 1918, in the county of Stanislaus, state of California, and prior to the filing of this information, willfully, unlawfully, and feloniously accomplished an act of sexual intercourse with and upon one Catherine Medina, then and there a female under the age of 18 years, to wit, of the age of 12 years, and not then and there the wife of the said 'Jessie' Martinez."

Defendant, on the 1st day of July, 1919, secured from this court an order extending his time to and including the 20th day of July, 1919, within which to file his opening brief on appeal from the judgment of conviction; the Attorney General, by stipulation, having previously agreed thereto. No brief was filed by either party, nor was any appearance made by the defendant at the argument on the day set therefor in this court, nor was any further stipulation or order made extending defendant's time to file his brief. Upon motion by the Attorney General the cause was accordingly submitted on the record.

In the case of People v. Young, 176 Pac. 696, under a similar set of circumstances, the court held that it must be assumed that the appeal has been abandoned and the judgment should be affirmed for want of prosecution. See, also, People v. Wong Bow, 175 Pac. 802, People v. Schiaffino, 181 Pac. 813, and People v. Mediani, 181 Pac. 673.

Notwithstanding the foregoing, we have carefully perused the pleadings, the evidence and the instructions, together with the rulings of the court upon the admission and rejection of evidence, and are fully convinced that the defendant, after a fair and impartial trial, was justly convicted of the crime of statutory rape with which he was charged. No sufficiently prejudicial errors appear in the record to warrant any interference with the action of the lower court.

The judgment is amended by striking out the words "for the term of not more than fifty (50) years, the exact term to be determined as provided by law," and, as so amended, the judgment and the order are affirmed.

We concur: HART, J.; BURNETT, J.

43 Cal. App. 553

McDOUGALL v. ROBERTS et al. (Civ. 2995.)

(District Court of Appeal, First District, Division 1, California. Oct. 11, 1919.)

1. FRAUD ⟸34 — RESCISSION AND RESTITUTION NECESSARY TO RECOVERY FOR UNDUE INFLUENCE.

Prompt rescission and offer of restitution are essential to recovery on the ground of undue influence; and, since neither is alleged, the complaint fails to state a cause of action for undue influence.

2. FRAUD ⟸45 — ALLEGATION THAT REPRESENTATION WAS UNTRUE.

It is essential to an action for false representation that the representation be alleged to be untrue.

3. FRAUD ⟸41—ALLEGATION OF FALSITY.

An inference is not a sufficient allegation of falsity of representation.

4. FRAUD ⟸45—ALLEGATION A MERE OPINION.

Allegation that defendants represented that it was to plaintiff's best interests to dispose of his property was one of mere opinion, complaint not showing its falsity, but alleging plaintiff had been subjected to many business cares, etc., and was not capable of devoting to affairs of his business or his said stock, transferred to defendants, ordinary care or attention.

5. FRAUD ⟸45 — COMPLAINT BASED ON FRAUDULENT MISREPRESENTATION INSUFFICIENT.

Allegation of representation that plaintiff was about to be indicted by grand jury, that defendants had great influence with the United States district attorney, and could through him either cause or prevent an indictment being found against plaintiff, and that if plaintiff did not sign the papers involved herein he would be indicted was insufficient to state a cause of action at law for fraud, the falsity of the representation not being alleged.

6. PAYMENT ⟸82(1)—RECOVERY OF COMMISSION PAID.

Plaintiff, who, though knowing all the facts, paid defendant commissions demanded, cannot recover; there being no basis for recovery, aside from allegation as to plaintiff's mental weakness, not amounting to incompetency.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by D. McDougall, administrator of the estate of Theodore Wiesendanger, deceased, against C. Wesley Roberts and others. Judgment denying relief, and plaintiff appeals. Affirmed.

F. F. Oster, Peyton H. Moore, and A. W. Ashburn, all of Los Angeles, for appellant.

M. K. Young, of Los Angeles, W. W. Middlecoff, of Visalia, Gibson, Dunn & Crutcher, James E. Degnan, and Hunsaker & Britt, all of Los Angeles, M. M. Armstrong, of Rawlins,

Wyo., and C. S. Anderson, of Los Angeles, for respondents.

KERRIGAN, J. The complaint herein presents an action for damages based upon the fraud of defendants, one of whom was plaintiff's attorney. It recites, in substance, that while plaintiff was sick in body and mind he was induced to transfer, for a consideration of less than $100,000, real and personal property worth $1,403,060. The complaint was filed about a year and a half after the transaction occurred, and was in three counts. The trial judge sustained defendants' demurrer to the first and second counts of the second amended complaint, without leave to amend. As to the third count he granted plaintiff leave, within 15 days after notice, to apply to the court on 5 days' notice for leave to file an amended third count. In accordance with the leave so granted plaintiff served and asked leave to file his third amended complaint. The motion to amend was opposed by defendants upon the ground, among others, that the proposed complaint did not state facts sufficient to constitute a cause of action, that said motion was not made in good faith, and that the allegations of the proposed amended complaint were sham and false.

Upon the hearing defendants offered and the court received in evidence, without objection, the original complaint, the first and second amended complaints, together with the demurrers and answers thereto, and also the deposition of plaintiff, which had been taken and was on file. After argument and before decision plaintiff withdrew his proposed complaint, and asked for and received permission of the court to submit a further amended pleading. Thereafter plaintiff served an amended pleading, which he styled "third amended complaint," and moved for leave to file it. Defendants objected thereto, urging in opposition all of the objections they had theretofore made to the filing of an amendment. Permission to file the amended document was denied by the court upon the ground, among others, that the proposed complaint did not state facts sufficient to constitute a cause of action, that the alleged cause of action was barred by the statute of limitations, and that said motion was not made in good faith, and that the allegations of the proposed amended complaint were sham and false. Judgment followed for defendants, and plaintiff now takes this appeal.

As grounds for reversal it is urged: First, that the trial court erred in sustaining the demurrers to the second amended complaint and in rendering judgment of dismissal thereof; and, second, the trial court erred in denying plaintiff's application to file his proposed third amended complaint.

As stated by counsel for appellant, the main question here involved is as to whether or not the second amended complaint and the proposed third amended complaint state facts sufficient to constitute a cause of action, for the allegations contained in these two documents are substantially the same. In passing upon the demurrers of the defendants to plaintiff's second amended complaint the trial judge filed an opinion, which has been made a part of the record herein. As we think it correctly states the law with reference to the questions presented on this appeal, we hereby adopt it as the opinion of this court. It is as follows:

"This case is before the court upon the demurrers of the defendants to plaintiff's second amended complaint. The injury complained of by plaintiff is that defendants have secured from him property worth $1,403,060 for the sum of $100,000 'and other considerations,' including the assumption of debts of plaintiff, to plaintiff's damage in the sum of $1,310,560. The complaint is in three counts.

[1] "It is conceded by defendants that the facts stated in each count sufficiently allege undue influence, but it is claimed that the remedy therefor is rescission and not damages. It was so held by our Supreme Court in Bancroft v. Bancroft, 110 Cal. 379, 42 Pac. 896. Prompt rescission and offer of restitution are essential to a recovery on the ground of undue influence. Neither is alleged in the complaint, and hence the complaint fails to state a cause of action for undue influence. Plaintiff argues that this restitution is unnecessary, citing More v. More, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76. This case is discussed in Henry v. Phillips, 163 Cal. 135, 143, 124 Pac. 837, Ann. Cas. 1914A, 39, and does not apply to the case at bar.

[2] "Plaintiff claims, however, that the complaint states a cause of action for fraudulent representations. Omitting certain allegations in the complaint as to what the defendants conspired to do, and assuming that the alleged representations are statements of fact, it is not alleged that the said statements were in fact untrue, or that they were known to defendants to be untrue. In the first count the alleged misrepresentation is 'that if he (the plaintiff) did not sell all of his stock to the defendants he would be subjected to a criminal prosecution' 'upon a criminal charge in the United States District Court of the Southern District of California.' It is not alleged that this statement was untrue, and, treating it as an actionable misrepresentation, rather than a mere expression of opinion (for which no action would lie) it is essential to a plea of false representation that it be alleged to be untrue.

[3] "In the second count the alleged misrepresentation is that defendants 'did * * * represent that it was to plaintiff's best interest that plaintiff at once dispose of all his real property,' etc. It is claimed that while ordinarily such a statement as this would be but an expression of opinion, in this case, where such statement is made to plaintiff by his attorney, he had a right to rely thereon and to treat the same as a statement of fact (citing Phelps v. Grady, 168 Cal. 73, 141 Pac. 926; Henry v. Continental, etc., 156 Cal. 667, 105 Pac. 960). Assuming that this statement comes within the principle of these cases, it is nowhere alleged that this statement or advice was

untrue. Inferentially it may be so alleged as growing out of the vast disproportion between the value received and given, but an inference is not a sufficient allegation of falsity.

[4] "It is alleged in another count that the 'plaintiff was engaged in a large amount of litigation connected with his interest in the said Conservative Investment Company (the corporation whose stock was transferred by plaintiff to defendants), and had been subjected to many business cares and worries of a vexing and harassing nature growing out of such litigation, and because thereof he was not physically or mentally capable of devoting to the affairs of his said business or to the management of his interests and real property or his said stock in said Conservative Investment Company, ordinary care or attention.' While this allegation is for the purpose of showing plaintiff's susceptibility to undue influence or fraud, it nevertheless serves to show that the defendant attorney might have stated the truth when he said that it was for the best interest of a man who was losing his mind and health over litigation to sell his interest in the property involved therein. The quotation is made here merely to enforce the principle that the untruth of the alleged representation must be alleged in order to effectively allege fraud. However, I think the allegation is one of a mere opinion so general in its nature as to be insufficient to constitute a misrepresentation as distinguished from a mere opinion.

[5] "The third count alleges a representation 'that plaintiff was about to be indicted by the said grand jury; * * * that defendants had great influence with said United States district attorney, and could, through him, either cause or prevent an indictment being found against plaintiff,' and that if plaintiff did not sign the papers involved herein he would be indicted by said grand jury, and if he did he would not be so indicted. This could be but the expression of an opinion, except as to the statement 'that he was about to be indicted,' and that one of the defendants had great influence with the said United States district attorney. It is not alleged that these statements were untrue; and, while undue influence may be predicated thereon, the falsity of the statements or opinions must, as has already been said, be alleged in order to base thereon an action at law for fraud.

"These three counts therefore fail to state a cause of action.

"It is claimed by the plaintiff that he has stated a cause of action because of the alleged misconduct of plaintiff's attorney and the active participation of the other defendants therein. That such conduct would justify an action for rescission is admitted; that it would justify an action to recover secret profits is admitted also, or cannot be denied. But, as has been said, the complaint fails to allege restoration or an offer to restore, and hence fails as an action for rescission; and, while alleging that the attorney has a one-tenth interest in the purchasing syndicate, it fails to allege any profit therefrom, and does not purport to ask for an accounting of profits realized. It is worthy of observation, too, that the contract set up by the plaintiff affirmatively shows on its face that the said attorney had an interest in the subject-matter of $26,500 separate and distinct from his interest as an attorney for plaintiff; and, while the plaintiff alleges that he was ignorant that his attorney would be one of the purchasing syndicate, he was not ignorant that said attorney had an interest in the contract adverse to him. For the reason stated, the complaint fails to state a cause of action against said defendant.

[6] "As to defendant Roberts, the plaintiff claims special injury because he demanded and received a commission of $2,500. Aside from the allegations of plaintiff's mental weakness (not amounting to incompetency) there seems to be no basis for the recovery of this amount. The defendant demanded the compensation, and the plaintiff, knowing all the facts, paid him. He cannot recover.

"* * * In the event that no application is made for leave to amend as herein provided, or if said leave be denied, judgment will go for defendants."

Respondents insist that the record as presented does not entitle appellant to a review of the judgment. Considering the conclusion we have reached, this point becomes unimportant.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 579

MURPHY v. HELLMAN COMMERCIAL TRUST & SAVINGS BANK et al.

(Civ. 3026.)

(District Court of Appeal, First District, Division 2, California. Oct. 14, 1919.)

1. MORTGAGES ⊂⊃411—RIGHT TO FORECLOSE NOT LOST BY OBTAINING JUDGMENT AGAINST PRIMARY DEBTOR.

Notwithstanding Code Civ. Proc. § 726, providing that there can be but one action for enforcement of any right secured by mortgage, where mortgage was taken as collateral security for payment by another, as primary debtor, of the purchase price for live stock specified in a lease note, mortgagee did not lose his right to foreclose by first obtaining judgment against the primary debtor on the contract of purchase, in view of Civ. Code, § 2845, providing that a surety may require his creditor to proceed against the principal; for section 726 applies to the primary debtor, for whose benefit it was enacted, and not to an individual guarantor or surety, or to a subsequent indorser upon a note, nor to any case where there is no privity of contract existing between the two obligations; that is, where the primary debt and mortgage debt are separate and distinct obligations.

2. GUARANTY ⊂⊃27—NO LIABILITY OF GUARANTOR BEYOND EXPRESS TERMS.

A guarantor cannot be liable beyond the express terms of the contract of guaranty.

3. PRINCIPAL AND SURETY ⟸59—NO LIABILITY BEYOND EXPRESS TERMS OF CONTRACT.

Under Civ. Code, § 2844, a surety has all the rights of a guarantor, and, under section 2836, cannot be held beyond the express terms of his contract.

4. MORTGAGES ⟸118—EXTENT OF LIABILITY UNDER MORTGAGE TO SECURE PURCHASE PRICE PAYABLE BY ANOTHER.

Mortgagors, to secure payment of a stipulated price by the purchaser of live stock, being limited in their liability to such purchase price, their liability could not be extended to cover rentals accruing under the terms of a so-called "lease note" from the purchaser to the seller, or damages for any breach of contract by the purchaser.

5. SALES ⟸340—INCONSISTENT REMEDIES OF SELLER.

The seller having treated the contract of sale of live stock as at an end by taking back the stock after breach by the buyer, his election precluded him from thereafter suing for the purchase price.

6. MORTGAGES ⟸308—LOSS OF RIGHT OF ACTION TO ENFORCE MORTGAGE TAKEN AS SECURITY.

Since, if the seller of live stock elected by taking back the stock to treat the contract of sale as terminated, he could not subsequently sue for the purchase price of the stock, if the liability of mortgagors, who had given the mortgage as security for payment of the purchase price, was limited to payment of the price, seemingly the seller by terminating his contract lost his right to enforce the security of the mortgage.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by J. F. Murphy against the Hellman Commercial Trust & Savings Bank, Samuel F. Randall, and another. From judgment for defendants, plaintiff appeals. Reversed and remanded.

A. D. Laughlin, of Los Angeles, for appellant.

John Dennison and Franklin F. Johnson, both of Los Angeles, for respondents.

NOURSE, J. This is an appeal from a judgment in favor of the defendants in an action to subject certain real property to the payment of an indebtedness. The facts of the case are that on February 25, 1914, one J. F. Goggins executed what has been called by the parties a "lease note," which estimate acknowledged receipt of eight mules, eight horses, harness, etc., received by Goggins from the plaintiff, which he agreed to return within one year, and also contained an agreement on the part of Goggins to pay $3,375 for the use of said stock. It also reserved to Goggins the privilege of purchasing said property within the year for the sum of $3,375, said sum to be paid in monthly payments of $250 or more per month, beginning April 1, 1914. At the same time the defendants Samuel F. Randall and Amanda M. Randall, his wife, executed to the defendant Hellman Commercial Trust & Savings Bank a deed to the real property in controversy in this action. Said deed was an unconditional grant, and stated the consideration to be $10. At the same time the plaintiff executed a bill of sale of the horses and mules in favor of Goggins. All of these instruments were deposited with the Hellman Commercial Trust & Savings Bank in escrow, with instructions from the plaintiff that the title to the real property was to be reconveyed to the defendant Randall, and the deed to the personal property was to be delivered to Goggins only upon the payment by Goggins of the full amount called for by the agreement.

Nothing was paid on the so-called lease note, and on February 25, 1915, the same was extended for one year by indorsement on the back thereof. On the same date the defendants Samuel F. Randall and his wife sent to said bank a letter agreeing to the extension of the note and consenting that the property deeded to the bank should be held as security "until such time as said lease note is paid, together with all accrued interest thereon." This letter also recited that the deed to the bank conveying the property had been made in accordance with the oral understanding of the parties that it was given as collateral security for the payment of the said note. Mr. Goggins never made any payments upon his obligation. He took the stock to San Diego, and rented some of the horses and mules to contractors, and placed the others in pasture, where they were being held for feed bills in July, 1915, when the plaintiff went to San Diego. The extended lease note had not expired at that time, but Goggins, being unable to make any payments upon the same or to pay the feed bills for which the animals were being held, voluntarily surrendered possession to Murphy of the stock which he had, and Murphy paid the feed bills and secured possession of eight of the horses and eight of the mules, two horses and two mules having been lost.

Plaintiff then commenced an action against Goggins to recover the rentals specified and for damages for the breach of the contract, and recovered a judgment by default for $6,521.89, which included the rental value of the stock, the value of the two horses and two mules which were not returned, the amount of the feed bills paid by plaintiff, and the amount of depreciation in the value of the stock returned to him by reason of improper care, feeding, etc. This default judgment was rendered on the 16th day of October, 1915, which was before the time

for payment of the extended lease note had expired. Later, and after such time had expired, the plaintiff began the present action, in which he sought to compel the sale of the property deeded to the bank by Randall and have the proceeds applied to the satisfaction of the judgment against Goggins.

The trial court held that this action was barred by the provisions of section 726, Code of Civil Procedure, which provides that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property. The contention of appellant is that the deed and the trust agreement signed by the Randalls together constitute a deed of trust, and that said deed of trust is not within the provisions of section 726, Code of Civil Procedure. This is not the theory upon which the case was tried. In the trial court the plaintiff sought to have the instrument treated as a mortgage and foreclosed as such, and he alleges in his complaint that the bank "accepted said deed solely as collateral security" for the performance of all the covenants and agreements contained in the contract between Murphy and Goggins. Plaintiff also sets out in his complaint the letter from the defendant Randall in which the purpose of the deed to the bank is set forth, and where it is stated to be collateral security for the payment of the lease note. The prayer of the complaint is for foreclosure, that the usual decree may be made for the sale of said premises, and that all persons may be barred and foreclosed of all right, claim, or equity of redemption in said premises. This relief cannot be asked under the terms of any trust agreement of the parties, but only under the power of the court to foreclose mortgages. In the case of Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490, it is said that wherever the grantee treats a trust deed as a mortgage and goes into a court of equity asking for a foreclosure and sale under its decree, his relation to the trust property is the same as that of a mortgage in the foreclosure of an ordinary mortgage. In the case of Hall v. Arnott, 80 Cal. 348, 22 Pac. 200, § 726, Code of Civil Procedure, was held to apply to the foreclosure of a mortgage which was in form a deed absolute where it was admitted by the pleadings that such deed was given as security for an indebtedness. The decisions are numerous to the effect that a deed absolute on its face may be treated as a mortgage and foreclosed as such if that was the intention of the parties thereto. Hall v. Arnott, supra; Prefumo v. Russell, 148 Cal. 451, 83 Pac. 810.

But it makes little difference whether the deed is treated as a mortgage or as a deed of trust. Treating it in the light most favorable to respondent, that is, as a mortgage, then the question is put squarely in issue whether, the mortgage having been taken as collateral security for the payment of the purchase price specified in the lease note, the plaintiff has lost his right to foreclose because of the judgment against the primary debtor on the contract.

Section 726, Code of Civil Procedure, provides in part:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property."

This section was enacted for the benefit of the principal debtor and to relieve him from a multiplicity of actions. As stated in the opinion of the Supreme Court in Martin v. Becker, 169 Cal. 301, 304, 146 Pac. 665, Ann. Cas. 1916D, 171, the section followed the statutory change in the common-law rule regarding the character of a mortgage, wherein it was provided that a mortgage conveyed no title, but gave security of a lien only upon the property, whereas under the common law the mortgage was a conveyance of the title upon a condition subsequent without right of redemption. The recourse under the common law was a suit in equity for relief against the forfeiture, but the mortgagee might go to law to recover the amount of the debt secured by the mortgage. Thus, under our statute, the mortgage security must first be exhausted before any deficiency judgment can be had against the primary debtor. But the rule is one which was clearly designed for the benefit of the primary debtor, and is therefore one which he can waive. Furthermore, as has been said in the case above cited, at page 305 of 169 Cal., at page 667 of 146 Pac. (Ann. Cas. 1916D, 171):

"The law never contemplated that because a man had taken a mortgage he could not take other independent security for his debt, and, if the contract for such security permitted it, enforce such contract without reference to the mortgage debt."

The court then held that a materialman who took a mortgage from a contractor on his property for the materials sold and used in the construction of a building by the contractor on the property of another did not lose his right to claim and foreclose a mechanic's lien on the property upon which the materials were used.

In Knowles v. Sandercock, 107 Cal. 629, 40 Pac. 1047, the Supreme Court held that an action would lie against the stockholders of a corporation for a liability of the corporation, though the corporate liability was evidenced by its note secured by mortgage. Therein the court say:

"The mortgage only affects the remedy against the mortgagor—the corporation."

In Adams v. Wallace, 119 Cal. 67, 51 Pac. 14, the action was against an independent guarantor of a debt secured by mortgage. The court held that section 726 had no application to such an action because it was on an independent contract to pay the debt upon the default of the principal debtor. To the same effect are Carver v. Steele, 116 Cal. 116, 47 Pac. 1007, 58 Am. St. Rep. 156; Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620. In Commercial Bank of Santa Ana v. Kershner, 120 Cal. 495, 498, 52 Pac. 848, 849, the Supreme Court say:

"A debt may be secured by pledge, mechanic's lien, judgment lien, attachment, or otherwise, and yet the security may be reinforced by a mortgage on the same or other property."

In Schehr v. Berkey, 166 Cal. 157, 135 Pac. 41, the lessor of realty had taken as collateral security for the payment of the lease a chattel mortgage on personal property. Default having been made in the payment of the rents, an action was instituted against the assignee of the lessees in unlawful detainer, and judgment recovered for restitution of the premises and three installments of rent, which the court trebled. Thereafter plaintiffs instituted suit to foreclose the mortgage, and section 726, Code of Civil Procedure, was pleaded in bar. But the Supreme Court held that it was perfectly proper to sue the lessee for rent and thereafter to foreclose the mortgage to obtain the amount of the damage, saying:

"Clearly section 726 of the Code of Civil Procedure cannot be applied to such a case as this. The liability of the lessees was one thing; the liability of their assignee a different and distinct thing."

To the same effect is Ashcroft Estate Co. v. Nelson, 26 Cal. App. 400, 147 Pac. 101. The same interpretation has been given in an action of replevin. Harper v. Gordon, 128 Cal. 489, 61 Pac. 84. There the defense was made that an action in replevin would not lie because, under the provisions of section 726, Code of Civil Procedure, the debt being secured by a mortgage, an action to foreclose the mortgage lien alone could be maintained. In answer to this the Supreme Court say (128 Cal. 491, 61 Pac. 85):

"The action here is clearly not to recover the debt, nor do we think it an action 'for the enforcement of any right secured by mortgage,' in the sense intended by the clause restricting the action, upon a debt secured by mortgage, to foreclosure. The action of replevin determines only the right of possession. * * * The object of foreclosure under section 726 of the Code of Civil Procedure is to enforce the lien by subjecting the property to sale."

[1] In the amended answer of Samuel F. Randall it is alleged that the deed was originally given to the bank, at the request of Goggins, as collateral security for the payment of the purchase price of the lease note of Goggins, and this was found to be the fact by the trial court. Is was then alleged that at the time of the extension of the lease note the plaintiff requested defendants Samuel F. and Amanda M. Randall to extend their security for a like period, and that the written agreement was then executed by said defendants at the special request of the plaintiff. If their liability was based upon the first allegation referred to and the finding of the court, then they were sureties. If their liability was based upon the latter allegation referred to, then they were guarantors. If the defendants' liability was that of sureties, then they might demand that the plaintiff first seek recovery against the principal debtor, Goggins. Section 2845, Civ. Code. If, on the other hand, their liability was that of guarantors, the plaintiff might elect either to sue them first or to sue the principal debtor without going into equity to foreclose the mortgage. If he first sued the principal debtor he was not subsequently barred from bringing suit in foreclosure. Adams v. Wallace, 119 Cal. 67, 70, 51 Pac. 14; Withers v. Bousfield, 183 Pac. 855; Pierce v. Merrill, 128 Cal. 464, 470, 61 Pac. 64, 79 Am. St. Rep. 56; San Francisco Theological Seminary v. Monterey County Gas & Electric Co., 175 Pac. 693. Thus the rule in this state as to section 726 clearly is that this section applies to the primary debtor and was enacted for his benefit; that it does not apply to an individual guarantor or surety, or to a subsequent indorser upon a promissory note, nor in fact to any case where there is no privity of contract existing between the two obligation—that is, where the primary debt and the obligation under the mortgage are separate and distinct obligations. The trial court, therefore, was in error when it gave judgment for defendants upon this special defense.

For the reasons given the judgment must be reversed, and the cause remanded for a new trial. It should not be implied from this, however, as fairly it might be, that plaintiff should have judgment on the issues framed by the pleadings. The complaint alleges that suit was instituted against Goggins and prosecuted to judgment in the sum of $6,521.89, and the amended answer alleges that prior to the institution of said suit Goggins voluntarily surrendered to plaintiff all of the personal property covered by the lease note. The judgment roll in the suit referred to was admitted in evidence without objection, and therefrom it appears that plaintiff sued Goggins for the rentals accruing under the note and for damages arising out of the breach of the contract.

The allegations of the amended answer are that the deed was given as collateral security for the payment of the purchase price of the stock. The written undertaking ex-

ecuted by the defendants recites that the deed is given as collateral security for that certain lease note for $3,375 and accrued interest. The court found that the deed was executed "as security for the payment of the note," and that at the time of its execution the defendants understood that it was to be held as security "for the payment of the purchase price of the personal property purchased by F. J. Goggins."

[2-6] It is elementary that a guarantor cannot be liable beyond the express terms of the contract of guaranty. San Francisco Theological Seminary v. Monterey County Gas & Electric Co., 175 Pac. 693. A surety has all the rights of a guarantor (section 2844, Civ. Code), and cannot be held beyond the express terms of his contract (section 2836, Civ. Code). Thus, whether the Randalls were guarantors or sureties, the limit of their liability, as shown by the findings of the trial court, was the purchase price of the property, and this could not be extended to cover rentals accruing under the terms of the lease or damages for the breach of the contract. In taking back the stock the plaintiff treated the contract of sale at an end. He was then required to make his election as to which remedy he would pursue—to stand upon his contract and sue for the breach, or to treat the contract as ended and sue for the rescission. He could not pursue both remedies. House v. Piercy, 183 Pac. 807. Having elected to treat the contract of sale at an end, he could not thereafter sue for the purchase price of the stock, and, if the liability of the defendants in this case was limited to the payment of the purchase price, it would seem that the plaintiff by terminating his contract has lost his right of action to enforce the security of the mortgage. Though the character of the prior action was properly put in issue, this point was not urged before the trial court, and it is not argued upon this appeal. What is said herein regarding it is said merely by way of suggestion for the assistance of the parties and the trial court upon the retrial of the action, and not as determinative of the rights of the parties upon such new trial.

The judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

43 Cal. App. 516

BOURNE v. BOURNE et al. (Civ. 2920.)

(District Court of Appeal, Second District, Division 2, California. Oct. 10, 1919. Hearing Denied by Supreme Court Dec. 8, 1919.)

1. TRIAL ⟸207—LIMITING EFFECT OF ADMISSIBLE HEARSAY EVIDENCE.

In a wife's action against her husband's father and mother for alienation of husband's affections, hearsay evidence of the wife as to what her husband told her the defendants said and did, while competent and material to show the husband's attitude of mind, was competent for no other purpose, and it was proper to so limit consideration of it by instructions.

2. TRIAL ⟸337 — JURY'S DISREGARD OF INSTRUCTIONS.

In a wife's alienation action against the husband's parents, where there was no direct evidence of defendants' ill will or malign influence and both defendants and the husband denied that there was any such occurrence as related by plaintiff as having been told her by her husband, it is difficult to escape the conviction that the jury was prejudicially influenced by such statements in disregard of instructions to consider them only as evidence of the state of the husband's mind.

3. HUSBAND AND WIFE ⟸325—ALIENATION OF HUSBAND'S AFFECTIONS BY HIS PARENTS.

If the husband's determination to abandon his wife was the result of his own volition and not influenced by any willful or malicious act of his parents, the defendants, they cannot be held responsible in the wife's alienation action because they assisted him in carrying out his purpose by furnishing him money for car fare, since they had a perfect legal right to side with their son in his separation if done in belief of his story of the cause of his leaving and in sympathy for him, and not because of malice or ill will towards the wife.

4. HUSBAND AND WIFE ⟸325—ALIENATION OF HUSBAND'S AFFECTIONS BY HIS PARENTS.

In a wife's action against her husband's parents for alienation of the husband's affections, no presumption of malicious interference arises because the parents side with their child, unless it affirmatively appears that it is done in bad faith and from ill will towards the wife, and, while permitting the husband to abandon the wife without offering her aid or comfort may have been reprehensible, it was not violation of legal duty.

5. TRIAL ⟸337 — DISREGARDING INSTRUCTIONS.

While the jurors are the sole judges of the weight and sufficiency of the evidence, their province in receiving or rejecting evidence, as instructed by the court, is not arbitrary, but is to be exercised with legal discretion and in subordination of the rules of evidence.

6. HUSBAND AND WIFE ⟸333(1) — ALIENATION OF HUSBAND'S AFFECTIONS BY HIS PARENTS; EVIDENCE.

In a wife's action against her husband's father and mother for alienation of affections, she must prove that defendants knowingly and willfully influenced their son to withdraw his affection and companionship from her, and that this was done in a spirit of malice and ill will toward plaintiff, and evidence of defendants' quarrels with and criticism of plaintiff and assistance given to husband after he had announced his abandonment would raise no inference of an effort to alienate his affections from her, but might, if such effort were proved, support a finding of malicious purpose.

7. HUSBAND AND WIFE ⊂333(1)—ALIENATION OF AFFECTIONS; PRESUMPTIONS AS TO ACTS OF PARENTS.

The law places the parents of a married child on a much more favorable basis than that of a stranger to the family relations, in actions for alienation of affections, and all presumptions must be that the parents will act only for the best interests of the child.

8. HUSBAND AND WIFE ⊂333(9) — ALIENATION OF HUSBAND'S AFFECTIONS BY HIS PARENTS; EVIDENCE.

In a wife's action for alienation of her husband's affections brought against his father and mother, evidence *held* insufficient to justify any holding that the father was a joint tort-feasor with the mother.

9. HUSBAND AND WIFE ⊂333(7) — ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS; ADMISSIBILITY OF HEARSAY EVIDENCE OF DEFENDANTS' PROPERTY.

In a wife's action against her husband's parents for alienation of husband's affections, it was error to admit plaintiff's testimony of declarations of her husband as to his father being worth $75,000, it being of no value in proving the state of the husband's feelings, and probably influencing the jury as to amount of damages.

Thomas, J., dissenting.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Marie M. Bourne against Hope Bourne and husband. Judgment for plaintiff, and defendants appeal. Reversed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for appellants.

J. W. McKinley, Nat B. Browne, and A. W. Ashburn, all of Los Angeles, for respondent.

SLOANE, J. The plaintiff, Marie Bourne, brought this action against Harry S. Bourne and Hope Bourne, the parents of her husband, Ralph Bourne, to recover damages for the alleged alienation of her husband's affections. The case was tried before a jury, and there was a verdict and judgment for $12,500 in plaintiff's favor. The defendants appeal, basing their claim for reversal on insufficiency of the evidence to support a verdict, and error of the court in giving and refusing instructions and in the admission of evidence.

The weak point in plaintiff's case is insufficiency of the evidence that the desertion of plaintiff by her husband was caused or influenced by the fault of the defendants or that the conduct of defendants was influenced by malice. Eliminating the hearsay evidence of all that the plaintiff and her witnesses said that the husband, Ralph Bourne, said that his parents said—and there is not a scintilla of evidence worthy of serious consideration that either the father or mother ever by word or deed tried to bring about a separation between the plaintiff and their son—there is no evidence, up to the day that Ralph Bourne deserted the plaintiff and left his home and wife, outside of this hearsay testimony, other than one isolated instance, that the father, Harry S. Bourne, ever displayed in any manner any ill will toward his daughter-in-law, or evinced any disposition that would suggest a desire to alienate from her the affections of her husband. And there are only infrequent expressions of criticism and ill feeling toward her on the part of the mother on which to base any inference of adverse or hostile feeling on the mother's part, and these gain most of their significance when considered against the background of the hearsay testimony referred to.

This hearsay, testimony, as has been indicated, consisted of the testimony of the plaintiff, supplemented by that of some of her witnesses, as to declarations which they claimed the husband, Ralph Bourne, made in their presence, of criticism and unkind remarks, and attempts to influence him against his wife, made by his parents, chiefly his mother. The following excerpts from the transcript of the evidence will serve to illustrate the character of this testimony as to alleged declarations of Ralph Bourne:

"He told me that they spoke to him about coming back, and that he could not possibly get along over in Glendale because he couldn't earn his living; * * * and they said they would do anything he wanted if he would come back to Eagle Rock, and Ralph was very indignant about it, and he told me about it, and said for me not to mind what they said because they could never get him away from me. * * * Well, Ralph was very angry with his folks because he always told me never to mind what his folks said about me, because he didn't believe them; that he would never leave me for any reason in the world; * * * that he would never leave me to go back to his folks. * * * Sometimes he wouldn't tell me all that was said until later. He used to say that he didn't like to tell me everything that they said, because he said it would make me feel bad if I knew that they were talking about me. * * * Well, at first he was very indignant about it; he didn't like to talk about it at all, because he thought it would make me feel bad, and he would always tell me that he cared more for me than anything in the world, and he would usually be very much more affectionate after he had had a talk with his folks about it. And one instance toward the last, about two weeks before he went away, he sort of sided in with his folks; he sort of drifted to their side as the time went on. * * * I told him several times that if they talked to him so much that perhaps he would leave me and go back to them. He said he never would. He said nothing in the world could ever make him leave me. * * * Ralph told me several times that they

had offered him inducements; they told him that they would send him to college and pay all his bills if he would leave me—put him on his feet. * * * They always said he would never get along while he was married to me. * * * Well, at first he was very indignant with his folks, and then toward the last he sort of seemed to be drifting toward them—told me I ought to see things the way they saw them. And that was about the last that we were living together. * * * Mrs. Bourne talked to Ralph and called me every name that she could think of, and told Ralph that I was absolutely no good, and he would be better off if he had never seen me."

[1] There was a good deal more hearsay testimony of this character. It all went in over the objections of defendants' counsel that it was incompetent and hearsay, and under a ruling of the court that it was admitted only for the purpose of showing the state of the husband's feelings during this period; and the court expressly instructed the jury that they were to receive it for no other purpose, and that it was not competent evidence to prove any of the conduct or statements therein attributed to the defendants.

It is probable that the court was correct in its ruling, although there were some of these hearsay narratives attributed to the husband, which gave purported damaging statements of his parents, that were not accompanied by any evidence of his own feelings in the matter. A fair consideration of the rulings on the extent to which such declarations may be used in evidence, in Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520, Humphrey v. Pope, 1 Cal. App. 375, 82 Pac. 223, Barlow v. Barnes, 172 Cal. 98, 155 Pac. 457, and Jameson v. Tully (Sup.) 173 Pac. 577, are in accord with the ruling of the trial court on this question. It is undoubtedly the law that, where testimony is competent and material for any purpose under the issues on trial, it is admissible for that purpose, although it may be inadmissible and prejudicial when applied to other issues to which it is pertinent. 14 R. C. L. 52; Trenton, etc., Ry. Co. v. Cooper, 60 N. J. Law, 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; MacDougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98; Birmingham Trust & Sav. Co. v. Currey, 175 Ala. 373, 57 South. 962, Ann. Cas. 1914D, 81; Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 Pac. 922, 15 L. R. A. (N. S.) 775; Baustian v. Young, 152 Mo. 317, 53 S. W. 921, 75 Am. St. Rep. 462; Illinois, etc., R. R. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205. In this case the court did the best it could in safeguarding the defendants from prejudicial consequences of this testimony by instructing the jury to disregard it for any purpose other than that of showing the state of the husband's feelings.

[2] There was abundant other evidence of Ralph Bourne's affection for and loyalty to his wife during all the period covered by these hearsay declarations; and, indeed, there was no dispute on that point. In view of the seriously prejudicial nature of these statements on the main issue in the case, as to the conduct and motives of defendants, plaintiff's counsel were taking unnecessary chances of error in insisting upon the introduction of these hearsay declarations. The introduction of this testimony presents a feature of the case which at least invites a careful scrutiny of the other evidence directed to this issue, in determining whether the jury was justified in finding the defendants guilty of separating this young married couple. In view of the absence of any direct evidence of ill will or malign influence on the part of defendants, and the testimony of the husband and both the defendants that no such occurrences took place as were referred to in the hearsay declarations, it is difficult to escape the conviction that the jury was prejudicially influenced by considering the hearsay statements in disregard of the instructions of the court. In the argument by their brief on this appeal, respondent's counsel, speaking of these declarations, suggest their force as a determinative influence in the mind of the jury as to the fact of inducements being offered by the defendants to alienate Ralph's affection from his wife. They say:

"The nature of these declarations, and the accompanying manifestations of affection for the wife and indignation against the parents, throw light upon the nature, extent, and force of the inducements or threats which must have been held out or made to Ralph Bourne in order to impel him to treat his wife so cruelly and desert her with an intention never to return."

Again, it is said:

"They point to the degree, amount, and kind of persuasion and inducements that must have been held out to Ralph Bourne in order to induce him to desert his wife."

It is apparent, from the undisputed evidence, that the marriage of this young couple took place with the full consent and approval of the defendants. The plaintiff, before the marriage, was a frequent guest at defendants' home, and sometimes spent the night with them. They were present at the marriage ceremony, and provided a home for the young couple with the declared purpose of ultimately deeding it to them. The mother-in-law spoke in high terms of approval of the new daughter-in-law, stating to one of plaintiff's witnesses that Ralph had married her "because he knew she was a good, pure girl." Both the parents wanted the young couple in their company, and the mother was particularly solicitous to have the companionship and affection of her son's wife. If any criticism can be made of the attitude of the defendants toward their daughter-in-law during the first few months of the marriage, it was for overzealousness and officiousness for

her welfare. They probably were not always wise or discreet, and, according to plaintiff's testimony, were inclined to impose upon the young couple too dictatorial a supervision of their conduct and affairs; but that anything was said or done by these defendants which was not meant in kindness and for the good of both their son and his wife during the first months of their marriage, is not seriously contended.

The plaintiff was 18 years of age and her husband was 21 when they were married in May, 1913. He was the only child of the defendants. There was nothing worthy of serious consideration that occurred in the family to disturb the harmony of any of their relations, particularly as relates to the conduct of defendants, for several months. There had been some criticism, which was neither unkindly nor perhaps unmerited, regarding the plaintiff's disposition to "gad," as the witness termed it; and the plaintiff had, on two or three occasions, been unreasonably resentful of what she considered officious solicitude of her husband's parents in her domestic affairs. But nothing serious occurred until about the first of March, 1914, nearly a year after the marriage. The plaintiff was away fom her home in Eagle Rock on one of her frequent visits to her friends in Glendale, when her husband, who was working for his father in Eagle Rock, met with an automobile accident. The Ford car which he was driving overturned, and he was quite badly strained and bruised. He telephoned his wife, and she, instead of coming home to him, had him come to her friend's home in Glendale, where she was staying to dinner. While he was there, his parents heard of the accident, and were very much concerned, not knowing how badly he was hurt. They telephoned to Glendale, and afterwards met the young couple at the street car when they returned home in the evening. By this time, Ralph, the husband of plaintiff, was suffering a good deal from his injuries, and could walk only with difficulty. The party went together to defendants' home, which was near that of the young people, and there defendants urged them to come in and stay all night, where they had better accommodations, could telephone for a doctor, if needed, and where the parents could assist in caring for their son. This the young people refused to do, and a quarrel ensued. The testimony is very conflicting as to what occurred, as narrated by the plaintiff on the one side, and her husband and defendants on the other. But, accepting plaintiff's version of the event against the three other witnesses, everybody was wrought up and excited. The father insisted on the son remaining, and commanded the daughter-in-law to come along into the house, and, as she claims, caught hold of her wrists and tried to draw her in. She also testified that the mother-in-law called her a snake and a rat, and said that she was not even human. Plaintiff, in turn, used some rough language, and, it is admitted, invited her father-in-law to "go to hell." Plaintiff and her husband eventually went to their own home, and a few days thereafter, influenced by this quarrel, moved from there to Glendale, where the husband obtained employment away from his parents.

This unfortunate episode, which was evidently the result of the nervous strain under which all of them were laboring, and the natural anxiety of the parents over the accident to their son, they not knowing how serious his injuries might be, ought never to have made a breach in the family relations, irrespective of who was the greater offender. That the parents tried to avoid any such result is evident from the fact that they at once commenced to make overtures to the young people, and showed a desire to conciliate them and to heal the breach. This effort continued throughout the several months that plaintiff and her husband remained at Glendale. During all this time plaintiff maintained a hostile attitude toward the defendants, and evidently resented her husband's inclination to a reconciliation. Ultimately, through the repeated advances of the parents, plaintiff and her husband accepted the olive branch, and, after an exchange of visits, an arrangement was agreed on whereby plaintiff and her husband went back to Eagle Rock to live with defendants until their cottage, which had been rented, would be available for their occupancy; the son again taking employment with his father. This was in January, 1915. The parties continued to live together in this way until some time in March, apparently in unusually amicable relations, for two families occupying the same house. About the only criticism plaintiff has to make of the defendants during this period is that the parents were too insistent on being in her company and desiring her society.

Then came the second, and final serious episode in the relations of these two families —the result of an evident misunderstanding, for which the plaintiff was apparently as much to blame as any one else. Mrs. Bourne, the elder, had a woman friend—a Mrs. Visel—who frequently visited at her home, and with whom she was talking one day about her daughter-in-law's skill in sewing. She made a remark about her sewing which all parties agree was perfectly harmless, and more in the nature of praise than of criticism. Mrs. Visel repeated this to plaintiff in a way to leave the impression that the mother-in-law was finding fault. Plaintiff then gave her version of the matter to her husband. He, in turn, repeated it to his father; and the father took his wife to task for having made an unkindly criticism of the daughter-in-law. By the time the story got back to the mother, she received the impression that Mrs. Visel had misrepresented

the incident and was trying to make trouble in the family. Returning to her home, she found Mrs. Visel there, and, in the presence of all the parties to this action, called Mrs. Visel to account, and accused her of misrepresentation and mischief-making. The plaintiff took Mrs. Visel's part, and all the women evidently became much excited, and a good deal of harsh language was indulged in; and the elder Mrs. Bourne ordered Mrs. Visel to leave the house. Plaintiff decided to go with her, and the young husband followed his wife. It is entirely obvious that the conduct of the elder Mrs. Bourne in this matter was influenced by her anxiety to keep on good terms with her daughter-in-law. In fact, throughout this period, while the two families were together, there seemed to be an almost feverish solicitude on the part of the parents to cultivate the good will of the plaintiff; and that it was not entirely on the son's account is shown by the efforts of the mother to have the plaintiff in her company, and to elicit some sentiment of daughterly regard.

This second separation of the families occurred about two years after the marriage of the young people, and about four months before the plaintiff was deserted. During all this time the young husband sided with his wife in whatever differences occurred, and was admittedly deeply in love with her, and, according to the wife's testimony, expressed great indignation at anything like a hostile attitude toward her on the part of his parents. If there had been any attempt on the part of the parents to alienate him from his wife, it had, up to this time, been a signal failure.

After this second episode, the young people again moved into apartments of their own, but the son continued in the employment of his father. Friendly relations were not resumed with the plaintiff, although the parents made overtures in that direction by taking the young people products of their home garden, and inviting them to join in auto trips. The plaintiff repulsed these advances, and displayed a spirit of unrelenting hostility to the husband's parents. She evidently, as her husband testifies, resented any approaches to social intimacy with them on the part of their son, and virtually admitted that she insisted upon his giving up all family relations with them. Reading between the lines of plaintiff's own testimony, it is evident that this matter became one of some tension and bitterness between them, she insisting and he refusing to entirely give up friendly relations with his parents. The following questions and answers from plaintiff's testimony point to these conclusions:

"Q. Haven't you told your husband many times that if he did not side with you and give up his parents you would leave him? A. No, sir; not until about a month before he left. Q. Now, you say that it was not until the last month that you lived together that you did tell your husband that he could take a choice between you and the parents? A. I don't know that I ever used those words to him. Q. Well, what was said during the last month about your leaving him unless he would side with you and give up his parents? A. I think one evening Ralph came home, * * * and I asked him where he had been, and he said that he had worked late; and I asked him if he hadn't been with his folks, and he finally owned up and said that he had; and I told Ralph that I didn't think he was doing the right thing by me to see his folks and not telling me about it; and I told Ralph that I thought he ought to have some consideration for me. I don't think that I said, 'I will leave you if you don't give up your folks for me.' I am sure I didn't, not in those words."

And again:

"Q. When was the first time you told Ralph you thought he ought to give up his folks because they were talking about you? A. During the last month or month and a half that we were together. Q. Do you mean to say that you didn't say that to him long before that? A. We talked it over in a general way. I never used those words; just sort of general talk. Q. Well, now; you supposed, did you not, after this scene in the house with Mrs. Visel present, that he had given up his folks entirely, didn't you? A. Not entirely, because he was going to work there, continue work. Q. And you knew, of course, he was going to continue to work with his father, but you didn't think there was going to be a continuation of the social relations between him and his parents? A. I knew there would be no relations between the four of us."

The testimony of the plaintiff's husband was that there was, during the last three or four months, bitter and repeated quarrels between them because he refused to give up all affectionate relations with his parents; and the above admissions of plaintiff, and other circumstances shown in evidence, tend strongly to corroborate this.

It is quite evident that, for reasons good or bad, the plaintiff had assumed an attitude of implacable enmity toward her parents-in-law. Indeed, it seems to be on this attitude on her part that plaintiff's counsel largely based their inference that the parents sought to alienate her husband from her. She did not like them. She refused to be reconciled with them. Therefore they must have resented it and tried to take her husband from her. That is not a fair legal inference, and it finds no support in the evidence. As has been suggested, there is some evidence of isolated criticisms and unfriendly comment by the mother. Mrs. Visel was the principal witness to these incidents, and, as she and the elder Bournes were not on speaking terms after the final break between the families in March, whatever she may have heard must have occurred prior to that time, and was, as one might say, condoned by the sub-

sequent reconciliation and era of good feeling between the parties. Mrs. Visel testified that at one time the elder Mrs. Bourne said of the plaintiff that she was a snake, and that she was not human. This is the same language that the plaintiff herself testified that her mother-in-law used at the time of the trouble over the automobile accident, and Mrs. Visel locates her conversation at about the same time; so the words used on both occasions probably arose out of the same grievance. Mrs. Visel also testifies that after the quarrel, and while the young folks were living in Glendale, the mother often expressed regret that her son was away from her, and told how unhappy she was; "that it was ridiculous that he was away; that he belonged with them, and that he would come if it wasn't for Marie; that it was her ambition to get him back; that he belonged at home, and that was where she was going to have him if it was the last thing she ever did." She seems to have accomplished this purpose, and succeeded in getting both Ralph and Marie at home, where all of them lived very amicably together for some time; and the means she used to secure the return of her son and his wife were friendliness and conciliation toward both. Mrs. Visel further testified that at the time of the second separation of the families, in the quarrel in which she was involved, the elder Mrs. Bourne accused her of telling lies to cause trouble and accused Marie of telling lies, too, in order to keep her husband's affection, and that Ralph came in during the quarrel "and tried to bring about peace; he tried to quiet his mother down, and also his wife."

Mrs. McDonald, the plaintiff's mother, testified that on one occasion the elder Mrs. Bourne spent the evening with her and talked about Marie all the time. This was in the winter of 1914, evidently while the young people were living at Glendale. She testifies that Mrs. Bourne said that Marie was not a good housekeeper, that it would have been better for Ralph if he had never married her, and that he would never get along. Mrs. McDonald also testified that she saw the defendant Harry Bourne the day after the trouble over the automobile accident, and that he said:

> "Ralph was going with another girl at the same time as with Marie, and that he wished Ralph had married the other girl. He said she was not a good housekeeper, and was extravagant, and that Ralph would have been better off if he had not married her."

There may have been some other statements of like nature; but the foregoing is substantially the sum total of any expression, by act or word, prior to the date of the separation of plaintiff and her husband, tending to show malice or ill will on the part of the defendants toward the plaintiff. This and the two quarrels they had, and the fact that the plaintiff herself had given them little cause to feel kindly toward her, is the sole basis for the inference that the defendants had willfully and maliciously alienated their son's affections from his wife or influenced him to desert her. There is no direct evidence whatever that they ever, by any word or conduct directed to or in the presence of their son, attempted to influence his relations with his wife.

[3] There is only one other circumstance in this unfortunate family tragedy tending to connect the defendants with the separation of their son from his wife. On the 10th of July, 1915, the desertion took place. Ralph Bourne, in the absence of his wife from home on that day, went to their apartment, packed up his belongings and some of the wedding presents he and his wife had received at their marriage, and departed. He took an east-bound train for New York, and did not return to Los Angeles until about the time of this trial. It is admitted that on the 7th or 8th of July he disclosed to his parents his intention to leave, and asked for money for his trip. He and both the defendants testify that the parents objected to his separation from his wife, and urged upon him his duty to his marriage relations. There is no evidence to the contrary, unless such inference may arise from the fact that they assisted him in leaving. As a matter of admitted fact, the father furnished him the money for his railroad fare and expenses, and on the day that he left took him in his automobile to a point near where Ralph and his wife lived and waited there for him to get his belongings from the apartment. The desertion, if the plaintiff's story is true, was cruel and indefensible. Even in the light of the husband's explanation, it was cowardly. But if the determination to abandon his wife was the result of the husband's own volition, and not influenced by any willul or malicious act of the defendants, they cannot be held responsible because they assisted him in carrying out his purpose. They had a perfect legal right to side with their son in this separation, if it was done in belief of his story of the cause of his leaving and in sympathy for him, and not because of malice and ill will toward his wife. The New York Court of Appeals, in the case of Servis v. Servis, 172 N. Y. 438, 65 N. E. 270, says:

> "Of the absolute right of a father to furnish money for the support of a son who has, for reasons good or bad, determined to abandon his wife, there is of course no doubt—a right that he may exercise without being subjected to respond in damages, * * * provided its exercise be not part of a general scheme having for its object the alienation of the husband's affections for his wife, and her abandonment by him."

The plaintiff's cause of action is for alienation of her husband's affections and induc-

ing the desertion. If the state of mind which induced this desertion was caused by the willful and malicious influence of the parents, they would be liable, irrespective of whether or not they assisted him in his plans to go away. If his loss of affection for and determination to leave his wife arose from their own domestic troubles, whether over the wife's implacable purpose to break up his relations with his father and mother or otherwise, and without malicious interference of the defendants, they are not legally responsible, no matter what assistance they gave him in carrying out his purpose; and no presumption of a bad motive arises from the mere fact that they gave him such assistance. Reed v. Reed, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310; Trumbull v. Trumbull, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812; Cripe v. Cripe, supra. The marriage of a child does not terminate the right of the parents to interest themselves in his or her happiness and welfare, and they do not stand on the footing of a stranger to the domestic relations when such a charge as is here involved is brought against them. So long as they, in good faith, act for what they believe is their child's welfare, no matter how mistakenly, and are not moved by malice or ill will toward the partner to the marriage, there is no liability, even where they use their influence to bring about a separation.

[4] The relations of a parent, particularly of a mother to her son, are scarcely less sacred than the relationship between husband and wife, and are usually more unselfish. The home of the parents is the natural sanctuary of the children in cases of marital infelicity. It is not the policy of the law to leave this door open only at the risk of involving the parents in litigation for alienation of affection. No presumption arises of malicious interference because the parents take sides with their child, unless it affirmatively appears that it is done in bad faith and from ill will toward the other party. A mother has a right to fight to retain the affection and society of her boy so long as she does not try to interfere with his duty to his own domestic relations; and any wife who, without serious cause, interposes a barrier to her husband's affectionate regard for his mother, deserves to lose his love. We find no evidence in this case of anything but a spirit of friendliness and a desire to conciliate the regard and affection of this plaintiff on the part of defendants, for the first two years of her marriage with their son, a spirit which, if interrupted, was not broken by the one or two unfortunate quarrels, incidents for which the plaintiff's suspicion and unfriendly attitude toward her parents-in-law were largely responsible. And after the quarrel in March, 1915, some three or four months before the desertion of plaintiff by her husband, there is no reason to believe there was a day when the defendants would not gladly have welcomed a reconciliation with their daughter-in-law. They made every attempt in that direction that self-respect would permit, and their advances were coldly repulsed. It is not unlikely in moments of resentment they said harsh and unkind things about her, but that fact alone does not justify an inference that they violated the laws of God and society by trying to break up the marriage relation of these young people.

[5, 6] It must be remembered that there is no direct evidence that they did try to influence their son in this regard, but, on the other hand, the son and both defendants explicitly deny that any such influence was ever attempted; and each of them testified that the defendants, when told of his intentions, advised him to remain with his wife. The husband's explanation of the estrangement from his wife is that it resulted from constant quarrels over the wife's insistence that he give up all social relations with his father and mother. There is at least no evidence to rebut the statement of the defendants that they were so informed, and so believed, when they finally consented to aid their son in the separation. It is a cruel and reprehensible circumstance that they permitted this thing to happen without offering any aid or comfort to the deserted wife. But, however unjustifiable this may seem, even in view of the plaintiff's hostility toward them, it was the violation of no legal duty, and in itself raises no inference that they instigated his desertion. It is sought to connect the mother with the preparation of the note left by the husband to inform the plaintiff of his desertion. Ralph Bourne and both defendants deny that she had anything to do with it. The only evidence tending to show that the mother had any part in this note is a single word written on its margin, which the plaintiff testified was in the handwriting of her husband's mother. A comparison of this with other exhibits showing the same word in the admitted handwriting of the mother, alone, seems to be a sufficient disproof of this testimony. But, in any event, it is an immaterial circumstance. The note was written after the determination of Ralph Bourne to leave his wife had been formed and declared, and at the most would indicate an acquiescence and co-operation in his avowed purpose, without being of the slightest value in showing that the defendants had influenced his determination in the matter, or in discrediting their testimony that they relied on the representations of their son as to the cause of his separation from his wife. The jury may have been justified in disbelieving the testimony of Ralph Bourne as to the cause of his leaving his wife, but there is no legal ground for rejecting the testimony of the defendants that they believed their son's account of the matter. Their testimony

in this regard is not impeached, either by direct evidence or by any legitimate inference or presumption from the known relations of the parties, or the circumstances of the case. Maupin v. Solomon, 183 Pac. 198. While the jurors are the sole judges of the weight and sufficiency of the evidence, their province in receiving or rejecting evidence, as they were by the court instructed, is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. Two conclusions must be established by plaintiff in this case to support a verdict against the defendants: First, that they knowingly and willfully influenced their son to withdraw his affection and companionship from his wife, the plaintiff; and, second, that this was done in a spirit of malice and ill will toward the plaintiff. The circumstances proved and attempted to be proved, of quarrels with and criticism of the plaintiff, and assistance given to the son after he had announced his plans to abandon his wife, do not prove or even raise an inference of act or effort to alienate his affections from her. It may be conceded that, if this primary fact was proved, these unkindly acts and expressions might be sufficient to support a finding of malicious purpose; but, in the absence of any evidence of the primary fact, there is no foundation upon which any proof of malice or ill will can rest.

[7] Respondent's counsel argue that the acts of the parents disclose a hostile feeling toward their daughter-in-law, that this feeling evidences a motive prompting them to alienate the son's affections, and that therefore the existence of such motive is a circumstance that may justify the inference that the parents did use persuasion and inducement to alienate their son's affection from his young wife. Seeking to draw an analogy between a case such as this and a prosecution for crime, counsel say:

"Men are hung for less evidence than this. * * * Jones has a grudge against Smith, and Smith is found murdered; Jones is shown to have had the opportunity to commit the crime; his gun is found in the vicinity of the murder bearing evidence that one shot had been fired; at the trial he attempts to establish an alibi; the jury convicts him and the court upholds the conviction; and no reasonable man questions the fact that the evidence is sufficient to establish all the elements of the crime."

The analogy is entirely unsubstantial. In the supposititious criminal case instanced by counsel, a crime has been committed, the corpus delicti is established, and the question is: Who did it? Among other circumstances tending to point the accusing finger of suspicion toward the defendant is the fact that he had a motive for committing the crime. If the body of the dead man had been found under circumstances that pointed to suicide, the mere fact that the accused had a motive for the commission of murder would not show that the crime of murder had been committed, or established the corpus delicti. So here, the fact that the parents may have had a grudge against their daughter-in-law, or a motive for alienating their son's affections, would not suffice to prove that his love for his wife waned and flickered out as the result of his parents' conscious and willful influence or persuasion, and not as the result of some innate cause born within his breast unassisted by any acts on the part of his parents, done for the purpose and with the intent of bringing about that condition of heart within him.

Conceding its full probative force to all the evidence in behalf of the plaintiff, and disregarding, as we must, the denials and contrary testimony of the defendants, the evidence is insufficient for this purpose. The evidence here would not justify a verdict against strangers, much less as against parents. The law places the parents of a married child on a much more favorable basis than that of a stranger to the family relations, in actions for alienation of affection. All presumptions in such cases must be that the parents will act only for the best interests of the child. Trumbull v. Trumbull, supra; Oakman v. Belden, 94 Me. 280, 47 Atl. 553, 80 Am. St. Rep. 396; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762, 9 L. R. A. (N. S.) 322, 9 Ann. Cas. 958; Reed v. Reed, supra; Tucker v. Tucker, 74 Miss. 93, 19 South. 955, 32 L. R. A. 623; Hall v. Hall, 174 Cal. 718, 164 Pac. 390. In Hall v. Hall, supra, our Supreme Court states the rule as follows:

"Having in contemplation the natural solicitude of the parent for the child, and the wellnigh universal experience of mankind that parents in their conduct toward their children are actuated by high and disinterested motives, involving the sacrifice of their own interests for the welfare of the child, it is not to be lightly inferred that the language or conduct of such a parent toward a child is prompted by evil and malicious motives. Therefore, to establish such willful and malicious alienation, 'the measure of proof must be extremely high,'" and "every presumption is that the parent acted for the best interest of the child."

There is a striking parallel between the circumstances and relations of the parties as set forth in the opinion in the foregoing case and those of the present case; although the evidence of attempts by the parents of plaintiff's husband, in the case cited, to bring about a separation, was much stronger than that against the defendants here. The court, however, held the evidence insufficient to sustain the verdict for plaintiff. There were other elements entering into the decision in the Hall Case, and in the end it was the wife who left the husband; but the gist of her action was that her husband's affections had been previously alienated by the influence of her husband's parents. The decision in its

entirety remains a convincing authority against the verdict of the jury in this case. The evidence in the case at bar is insufficient to support the conclusion either that any acts or representations of the parents alienated the affection of plaintiff's husband, or that such acts and representations as were shown in evidence were intended to alienate the husband's affections, or were done or made in a spirit of malice toward the plaintiff. It is difficult to escape the conviction that the jury, consciously or unconsciously, was influenced in its verdict by the hearsay declarations.

[8] Appellants further urged as ground for reversal that there is no evidence in this case to justify holding the defendant Harry S. Bourne as a joint tort-feasor with his wife, even if the evidence is sufficient to support a verdict against the latter. We think this point is well taken. As has been pointed out, not one hostile word or act tending to show malice or ill will on the part of the father against his son's wife, or any effort on his part to bring about a separation, appears in the record, excepting the circumstances as testified to by plaintiff's mother; that after the quarrel and removal of the young folks to Glendale, incident to the automobile accident, the father-in-law said that he was sorry his son had not married another girl with whom he had kept company, and that Marie, the plaintiff, was not a good housekeeper. It is true the father-in-law was a party to the quarrel the night of the automobile accident, and is alleged by plaintiff to have caught hold of her hands on that occasion in an attempt to compel her to come into the house. It would appear from his testimony that he was much concerned to get all the parties into the house to terminate a disgraceful scene on the street; but, in any event, this incident was entirely fortuitous and incidental, and it appears from the subsequent actions of all concerned, and particularly of the defendants, that it was fully condoned by subsequent reconciliation and good feeling between the two families. He had no connection whatever with the second quarrel, or with any subsequent events, excepting the assistance he gave his son at the time of his leaving his wife; and, as already pointed out, this was given under protest, and in the light of his son's representations that he had made up his mind to leave, and if his father did not help him he would get away as best he could. There is nothing to indicate that the father was in any way a party to, or countenanced or encouraged, the temperamental and at times apparently hysterical outbreaks of his wife.

[9] We are of the opinion, too, that there was error in the admission by the court, over defendants' objection, of plaintiff's testimony of declarations of her husband as to his father being worth $75,000. This was clearly hearsay, had no legitimate value in proving the state of the husband's feelings, was contrary to the testimony of the defendant parent—who swore that he was not worth over $15,000 or $20,000—and quite probably influenced the comparatively large amount of damages found by the jury.

Judgment reversed.

I concur: FINLAYSON, P. J.

THOMAS, J. (dissenting). I regret most sincerely my inability to secure the approval of my own conscience, which is absolutely necessary in order to agree with my sincere, able, and distinguished Associates in their conclusion as expressed in the foregoing opinion. I therefore dissent.

In view of what appears to me the importance of this case, coupled with the fact that this presents our first disagreement, I submit the case as I see it, rather than, as is customary, to discuss only the points upon which we disagree.

Plaintiff, in her amended complaint, alleges the activity of both defendants—her husband's father and mother—and their maliciousness in bringing about the alienation of affections and resultant desertion. Defendants, by their answer, deny "that they have had anything whatever to do with the depriving of plaintiff of the attention or support or comfort or society or the aid or assistance of her husband in any manner whatever."

The record here discloses, among other matters, the following facts: That plaintiff married Ralph Bourne on May 20, 1913, when she was 18 and Ralph 21 years of age; that Ralph loved her when he married her, and continued to so love her at all times up to a date approximately that of the desertion, to wit, July 10, 1915; and that she was a devoted and loving wife; that on the date last mentioned Ralph told his wife he was going to work, and directed her to go to Los Angeles, borrow enough money from her sister to purchase a pair of shoes and some theater tickets, and meet him at 6:30 p. m. at the Hayward Hotel, in Los Angeles; that plaintiff did as directed; that shortly after plaintiff left home to carry out the plan as above stated Ralph and his father, Harry S. Bourne, drove up in the defendants' automobile to within one block of the apartment house in which Ralph Bourne and his wife were living, stopping in the rear of the apartment house, and Ralph, alighting from the automobile, went into his apartment, carrying a valise which had been furnished for that occasion by his parents; that he there encountered his mother-in-law, to whom he misstated his errand, and then proceeded to change his clothes; that he at that time left for his wife a certain "note," which, in words and figures, is as follows:

"July 10th, 1915. I simple am sick and tired of this life, so am leaving for good. I am taking the silver, and consider this a fair division, as you have your ring, and a couple of hundred dollars' worth of furniture. Ralph. P. S. Don't blame my folks, as they are ignorant of my whereabouts."

On the back of this note appeared the following memorandum: "Silver, blue suit, shoes, collars, razor and strop, tooth brush, brushes, underclothes, jack bowl." The articles last enumerated, and which he took away with him, had been given to Ralph and his wife as wedding presents. Having effected his "fair division," he returned to his waiting automobile, had lunch with his parents, and later in the day left Los Angeles for New York; his parents having furnished him the necessary railroad and Pullman tickets, together with sufficient cash to pay expenses. The plan to thus desert his wife was known by his parents as early, at least, as the 7th or 8th of July; but, notwithstanding this fact, it was kept an absolute secret from the plaintiff and her mother until after the foregoing was consummated. At the appointed time plaintiff was at the Hayward Hotel, carrying out her part of the plan implicitly, as directed by her husband; but he did not meet her. Instead, he was aboard a fast-moving train, traveling away from her as fast as steam could take him. Neither defendants did anything to communicate the fact of his departure to his wife. The defendant Hope Bourne was asked:

"And did you notify her on the next morning after the desertion as to where Ralph had gone or why he had gone?"

To which question she made the following answer:

"Why should I? Why didn't Marie come to see me? I would have been glad to have seen her."

It will be observed that this was not an answer, but an evasion of the question. And again she was asked:

"And you never made any effort to see what was becoming of her after her husband left her in this manner?"

And the following was her answer thereto:

"I guess Marie is capable of taking care of herself."

One hundred and eighty pages of a 260-page opening brief is directed by appellants to the discussion of the insufficiency of the evidence to support the verdict. Many points are urged for a reversal. I shall discuss only those which I deem essential for my present purpose.

The verdict is attacked as unsupported by the evidence. I am satisfied from an examination of the record that there was sufficient evidence—although not as weighty as might be desired—to justify the verdict, and hence to support the judgment; and this even though we disregard the declarations of the husband to his wife, without the presence of the parents. In discussing the sufficiency of the evidence, appellants urge that the court erred in permitting plaintiff to state, over defendants' objection, declarations claimed by Ralph to have been made by his parents to him concerning his wife, etc., in an effort to induce him to leave her, and which declarations were made to the wife out of the presence of the defendants or either of them; the objection being general in its terms, and on the additional ground that it was hearsay as to these defendants. The learned trial judge, in referring to these declarations and in overruling the objection, said:

"Of course, it is undoubtedly the rule that they are incompetent for the purpose of proving the existence of any fact which is included in those declarations, and the jury should be so instructed; but I take it, from the authority quoted by Mr. Ashburn and from consideration, that the general rule that, where the state of mind of the husband of the plaintiff be one of the things in issue, any declarations of his are verbal acts in so far as they tend to show that state of mind, and it is admissible for that purpose, and that purpose only."

Right there and then the court admonished the jury accordingly, and with this view of the trial court I agree. Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520. The same is true as to the evidence of Ralph as to what he told his wife he thought his father was worth. It was offered and received for the limited purpose of showing the state of Ralph's mind. It is the usual rule that, where testimony such as is now under discussion is sought to be introduced, to explain the purpose for which it is offered, and thus make it permissible for a limited purpose only; and, as we have already seen, this was done in the present case, and the trial judge, with great care and skill, and that no confusion might result therefrom, admonished the jury, as we have already seen. "It is a well-established rule that, if evidence is properly admissible upon the issues presented, it cannot be excluded because it may have ulterior or collateral effects detrimental to one of the parties." Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 562, 147 Pac. 238, and cases there cited. In view of the fact that the evidence objected to was competent for the purpose for which it was received, I fail to bring myself to the place where I must conclude that the jury willfully disregarded the court's instructions and admonitions in this respect. If any construction which the jury might have placed upon such evidence, concededly properly received for the stated limited purpose, be inimical to defendants' interests, that fact is not due to the jury or to the court, but to the state of the rules of evidence as they existed at the time of the trial. So believing, I doubt

the power of this court on appeal to disturb the verdict.

I believe the case of Cripe v. Cripe, supra, decisive of this phase of the case, notwithstanding that at first blush it would appear that the case of Barlow v. Barnes, 172 Cal. 98, 155 Pac. 457, a later case, would seem to be in conflict therewith. This, I think, is more apparent than real. Respondent's argument here appeals to me. When considered in all its aspects, I think it not in conflict with the Cripe Case, for a different point is decided. In the Cripe Case it was held that, "in an action for alienating the affections of a husband or wife, the state of the feelings of such husband or wife is material." In the Barnes Case the court held that the guilt of the defendant cannot be proved by declarations of the alienated spouse as to the acts or statements of defendant. From the language of the court, I cannot conclude that it intended to go any further than that or to announce a rule contrary to that applied in the Cripe Case. In the Barnes Case there were two alleged causes of action—one for alienation of the wife's affections and the other for damages for alleged criminal intercourse with the wife. When the letters in that case, objections to the introduction of which were sustained by the court, were sought to be introduced, there was no statement or explanation made to the court that they were offered for any limited purpose; and, so far as that case was concerned, such limited purpose would appear to have been to show a state of mind or feelings on the part of the alleged alienated spouse at the time the said letters were written, and thus to support the first cause of action, and in the absence of such explanation their reception might reasonably have led the jury to consider them in connection with the second alleged cause of action. In my opinion, the ruling of the trial court, under the facts as there presented, was absolutely correct. In the Cripe Case, as in the case at bar, the offer of the letters and the declarations was accompanied by such explanation; the court, in overruling the objections in this case, so stating, and at the same time admonishing the jury as already indicated. Indeed, in the Barnes Case, as one of the several propositions advanced, it was argued to the trial court by counsel for appellant:

"That they [the letters] were material to the issues under both causes alleged is apparent from the language of the letters, showing that her affections were alienated from her husband to and by the defendant beyond all question, and tend to show criminal conversation."

And again:

"We think that they are both competent to show that the poison is there and that the defendant and his wife were parties to the wrong and still burning in their lust."

Under this attitude, the correctness of the court's ruling in that case I think not debatable.

One other point in the Barnes Case needs consideration. The Supreme Court in that case used the following language: "They [the letters] were not admissible under section 1881 of the Code of Civil Procedure"—and cites, among others, the case of Humphrey v. Pope, 1 Cal. App. 374, 82 Pac. 223, decided July 25, 1905, and at a time when that section did not contain its present exception permitting a husband or wife to testify in such a case as the one at bar. The Barnes Case was decided by the Supreme Court on February 10, 1916. The section referred to was amended, as indicated, in 1911. It is apparent therefore that the Cripe decision, as well as the fact that section 1881 of the Code of Civil Procedure had been so amended, was not called to that court's attention, as the court uses the specific language last above quoted, and follows the Humphrey Case. In view therefore of the exact question which was presented to the court in the Barnes Case for its decision, and confronted, as we are, with the array of facts just referred to, there is, I think, no warrant for construing that decision as in conflict with the Cripe Case on the point involved and now under discussion in the case at bar. This construction is in line, in my opinion, not only with the doctrine laid down by our own Supreme Court, but with what seems to me the overwhelming weight of authority of this question.

Certain instructions given by the court to the jury are objected to by appellants here. "If all the instructions taken together, and not being inconsistent with each other or confusing, give to the jury a fair and just notion of the law upon the point to which they are addressed, it is sufficient." Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323; Hamlin v. P. E. Ry. Co., 150 Cal. 776, 89 Pac. 1109; Taylor v. P. E. Ry. Co., 172 Cal. 638, 158 Pac. 119; Parkin v. Grayson-Owen Co., 25 Cal. App. 269, 143 Pac. 257. Speaking generally, I think the instructions given by the court, and particularly including those to which appellants object, ample, and as favorable to appellants as they properly could be on the question presented. Especially is this true when the instructions objected to are considered in connection with and in the light of the other instructions given. For instance, appellants object to the following instruction given by the court to the jury:

"If you should find from the evidence that the defendants, or either of them, willfully and materially enticed or induced the husband to desert and abandon the plaintiff, then you will be justified in allowing damages to plaintiff for the sake of example and by way of punishment of said defendants, or either of them, in addition to her actual damages, as to which you have

already been instructed, provided the total amount shall not exceed the sum of $50,000"

—on the ground that the complaint contains no prayer for punitive damages, and hence, because of absence of any specific mention of exemplary damages in the complaint, was unwarranted. An examination of the record here discloses no evidence that an instruction on punitive damages was requested by the appealing defendants. On the contrary, it affirmatively appears, in my judgment, that the contention which is now urged by appellants is that that species of malice which was defined by the court as malice in law will not warrant an award of exemplary damages. This seems to be the first time and place that this point is raised by them. The record shows that appellants insisted all through the trial that plaintiff could not establish a right to compensatory damages except by proof of the existence on the part of the defendants of a spiteful and rancorous disposition toward the plaintiff, and that no award of punitive damages could be made in any event. No distinction was pointed out between the two. The point urged here, therefore, as is now for the first time obvious, is that the court failed to recognize this distinction. This, I think, is now unavailing to them. The rule is that a party who desires instructions to be more specific, or to incorporate distinctions not contained therein, should request such instructions or be foreclosed from complaining if he fails so to do. Henderson v. Los Angeles Traction Co., 150 Cal. 689, 89 Pac. 976; Liebrandt v. Sorg, 133 Cal. 571. 65 Pac. 1098; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Viera v. Atchison, etc., Ry. Co., 10 Cal. App. 267, 101 Pac. 690; Weaver v. Carter, supra; Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993.

Appellants call attention to the cases of Hall v. Hall, 174 Cal. 718, 164 Pac. 390, and Van Tassell v. Heidt, 33 Cal. App. 234, 164 Pac. 817, both having been decided since the opening brief herein was filed. In my opinion, neither of these is controlling, under the facts disclosed here. In the latter case the following is gathered from the opinion of the court: That the plaintiff brought an action against the parents of a young woman for having alienated from his wife, the plaintiff, her husband's affections. This husband had illicitly sought the regard of the young woman, but there was no sufficient evidence to support the findings and judgment against defendants. In the Hall Case, an examination of the opinion will, I think, disclose that there was in fact no evidence to show an attempt to alienate the husband's affections. Indeed, there is a positive showing that if any such attempts had been made by them, they had wholly failed. Further, the facts disclosed by the record show that the wife in that case was the malefactor, and that was the one who had herself abandoned her husband. She was strong on profession, but mighty short on redemption. She was very much concerned about attending "a meeting of the Young Women's Christian Association," but not much interested in applying to her daily walk and conversation the wonderful principles taught by that great, benevolent, and helpful institution. I think the court had ample basis for its statement when, in referring to the case, said that "its evidentiary foundation is airy nothingness, not even the baseless fabric of a vision."

In the case at bar the conditions, I think, are just as much the other way. The love and affection of the husband for his wife, as disclosed by the record, continued almost, if not quite, to the date of the desertion, and the record, disregarding the statements of the young husband entirely as hearsay, contains evidence of defendants' duplicity—as I read it—the details of which need not be recited here. There is no doubt but that the rule it that the decisions require a much stronger case to be made where the defendants are, as here, the parents of the alleged alienated spouse—as is held in Cripe v. Cripe, supra, and cases there cited. But in the case at bar, in my opinion, this requirement has been fully met.

The point is made that the verdict is excessive. With this view, also, I do not agree. If the defendants wanted the verdict to sever the punitive damages, if any were awarded—as may have been possible under the court's instructions—from the compensatory damages, they should have asked for such severance; but they are now estopped for having failed so to do. Davis v. Hearst, 160 Cal. 143, 116 Pac. 530. I am not able to conclude from the record here that the verdict is "so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury." Hale v. San Bernardino, etc., Co., 156 Cal. 713, 106 Pac. 83; Nolen v. Engstrum Co., 175 Cal. 464, 166 Pac. 346. Damages for alienation of affections in such a case as the one at bar include the loss of aid, support, protection, comfort, and society of the husband, together with compensation for the humiliation and suffering inflicted upon the deserted wife. Sutherland on Damages, § 1285 (4th Ed.). It has been held that the recovery may include such elements as loss of support, and also mental anguish and disgrace. Nevins v. Nevins, 68 Kan. 410, 75 Pac. 493; Dunham v. McMichael, 214 Pa. 485, 63 Atl. 1007; Nichols v. Nichols, 147 Mo. 387, 48 S. W. 947; Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596. On principle, I am unable to see why there is not a much wider field for legitimate expression in such a case as this than in an action for wrongful death of a husband, for the reason (1) that, in a case like the one at bar, the jury has the right to impose punitive damages, and

(2) to make awards by way of solicitation for injured feelings—which concededly cannot be done in case of death—while it does embrace the same elements as in death. Judgments as large, and even larger than the one here involved, have been sustained in cases similar to the case at bar. Gross v. Gross, 70 W. Va. 317, 73 S. E. 961 ($12,500); Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784 ($15,000); Williams v. Williams, 20 Colo. 51, 37 Pac. 614 ($12,500); Hendrick v. Biggar, 151 App. Div. 522, 136 N. Y. Supp. 306 ($30,000); Speck v. Gray, 14 Wash. 589, 45 Pac. 143 ($15,000); Waldron v. Waldron (C. C.) 45 Fed. 317 ($17,500); Williamson v. Osenton, 220 Fed. 653, 136 C. C. A. 261 ($35,000). As a matter of fact, the injuries to a good wife, whose husband, theretofore loving, kind, and faithful has been alienated from her, is, in my opinion, more serious than that of a wife whose husband has been negligently killed. In case of death she has no humiliation, no feeling of disgrace, no injured feelings; while in a case like this, she not only has all these, but in addition thereto is sometimes subjected to suspicion and humiliation in the eyes of her friends, together with the added feeling of shame that her husband has sold her for "a mess of pottage," and has shown himself to be "yellow" through and through; all of which, to a woman who loves her husband, is far worse than to have him removed by death.

Appellants argue that, if this judgment is upheld and they are called upon to pay the same, it means the annihilation of their meager fortune at a time in life when a new start is fraught with unpromising prospects. It is to be regretted that due consideration was not given to this phase of the question by defendants before the perpetration by them of the acts disclosed by the evidence here. It is, indeed, too true that "the way of the transgressor is hard." Helen Bosanquet, in referring to "the family," said:

> "It is greater than love itself, for it includes, ennobles, makes permanent, all that is best in love. The pain of life is hallowed by it, the drudgery sweetened, its pleasures consecrated. It is the great trysting place of the generations, where past and future flash into the reality of the present. It is the great storehouse in which the hardly earned treasures of the past, the inheritance of spirit and character of our ancestors, are guarded and preserved for our descendants. And it is the great discipline through which each generation learns anew the lessons of citizenship, that no man can live for himself alone."

The record here discloses beyond question, I think, that by the saying and doing of those things said and done, these defendants transgressed even that great solicitude which the law entertains in behalf of parents when it requires a stronger case to be made against them than is necessary to be made against a stranger, and rendered highly improbable, if at all possible, the erection, not to say the maintenance, of such a home by the husband and wife here involved.

My Associates refer to the "note" left by Ralph. There was conflict in the evidence on that point. The jury resolved that conflict in favor of the plaintiff. Confronted by this fact, I fail to understand the authority of this court to interfere with the conclusion of the jury.

Reference is also made to the fact that respondent's counsel argues to this court—although not suggested in the court below—that the declarations of the husband of plaintiff to her, without the presence of the elder Mr. and Mrs. Bourne, emphasize their force as a determinative influence in the minds of the jury, etc. I think this argument of counsel unnecessary. If it be a fact, it is not so because of counsel, jury, or judge, as heretofore stated.

If it be a fact that the elder Mr. and Mrs. Bourne did in fact endeavor to get their son away from his wife, then those of us who have had experience in the trial of such cases know how stealthily the disintegrating work is done and what subterfuges are resorted to. It is not the usual thing to have the strongest kind of evidence. It is well known that the sulky mood, the insolent look, the gloomy manner, etc., of the person guilty of such conduct often means as much, and sometimes more, than the overt acts or statements. That such a condition existed in the case at bar is, I think, not an unfair inference from this record. I am not unmindful of the fact that the law is very solicitous for the parents in such a case as this, and that it encourages keeping "the light in the window" for the return of the erring son or daughter. Yet this solicitude does not go so far as to countenance the willful breaking of a lamp burning in another's window that the erring child may see the light in his or her parent's window more clearly. Nor am I unmindful of the fact that sometimes in such cases as the one at bar the plaintiff is an adventuress, pure and simple, seeking, as it were, whomsoever she might devour. In this case I see nothing that even points to such a conclusion. There is, in my opinion, no evidence in this record to impugn plaintiff's motives or good faith.

That the family, as such, is the basis and the unit of society, is, perhaps, no longer questioned; that it is the foundation upon which our civilization rests is no longer debatable. That whatever undermines the integrity of the home will eventually produce the downfall of that social and political institution which we call government is now quite generally conceded. That there is becoming more apparent each year evidences which point unerringly it would seem, to the

growing instability of the family, I think, cannot be denied. That it is challenging the attention and the serious consideration of thinking men and women the world over is no longer a secret. The problem of the family, as I see it, is indeed the problem of the human race. The family is the most important fundamental institution of humanity. It is the great conserving agency in human society, preserving and transmitting from generation to generation both the material and spiritual possessions of the race. And yet our politicians, even our statesmen, so frequently occupied with questions of party interests, it would seem, have failed to proclaim, indeed, perhaps, to notice, the significance of the position. Shall the courts be also weighed in the balance and found wanting? God forbid! Probably no branch of our government comes into closer contact with this sacred institution—the family—than the courts. As such they have never yet failed in protecting the rights of the downtrodden and the oppressed. They insist upon the equal rights of all. They have been called, and they really are, the bulwarks of our liberties. Capital and labor both come to them; and they do not come in vain—unless with unclean hands. They will not fail to protect this greatest of all human institutions.

Marriage, by its nature, establishes social relations; hence, society is regarded as a third party thereto. This is the basis upon which the state erects its authority to define the qualifications of the persons who marry, the terms, rights, and obligations of the marriage contract, and for what causes and in what manner it may be terminated. The interest of corporate society in the institution of marriage increases in proportion as it is realized how deeply the welfare of the social organism is affected by the uniting of individuals in family relations. Whenever the fundamental importance of marriage to society as a whole is adequately recognized, there is no disposition to rail against the increasing tendency of the state to exercise the most careful surveillance over its procedure, and it becomes that our modern social development demands that in the absence of that paternal authority which characterized the colonial period of our history, the state itself should exercise a control as nearly approximating it as possible.

While this is not an action for divorce, still, while discussing the present instability of the family, and in this way supporting my argument here for the faith that I have in my conclusion in the case at bar, will it be out of place to suggest that probably nowhere is this instability so much in evidence as in the divorce courts? If I am correct in this, then whose duty is it to call to the attention of the people generally—whose servants the courts are—the terrible moral cancer gnawing at the vitals of this institution and eventually striking at its very base? Our government, in its 1910 census, disclosed the fact that for every twelve marriages solemnized one was dissolved by the surgery of divorce; while in its report on marriage and divorce for 1916, the ratio was one to nine—an increase of 25 per cent. in six years! According to the report last referred to, it is disclosed that the ratio of divorces to the marriages solemnized was one to every one and one-half for Nevada and one to every two and one-half for Oregon; while it is one for every five and one-half for our own state. For more than 50 years divorces have steadily increased three times as fast as the population. Between the years 1870 and 1916, both years inclusive, according to our own government reports the number of divorces per 100,000 of the population was as follows: 1870, 28; 1880, 39; 1890, 53; 1900, 73; 1906, 84; and for 1916 it had gone to 112. In less, therefore, than 50 years this evidence of the instability of the family and the existence of this moral cancer on the body of society has increased, per 100,000 of our population, from 28 to 112, or exactly 400 per cent. The relation of such facts in connection with a case like this may subject the author to the charge of being sensational; but he answers that the only sensational thing about it is the fact itself. It may subject him to the charge of having had something to do with turning on the light, but, under God, he is not responsible for what that light reveals.

Is not this condition destructive of the family and does it not strike at the very foundation upon which our government stands? Is it not true that the nation, whose family life decays, rots at the core and dries up the springs of all social and civic virtues? Is it not un-American and erroneous to suggest that courts should ignore such facts when considering such cases as the one at bar? Is it not a matter of common knowledge among mature men and women that there is no time in the world when young people should not be interfered with in their domestic affairs like the first two or three years while they are adjusting themselves to each other? If these questions are not impertinent or irrelevant, then it seems to me inevitable that, if there was any competent evidence to support the verdict, it should remain undisturbed, not only because of the interests of the parties directly involved, but also on the ground of public policy. I think there is sufficient evidence to support the verdict.

As I see it, anything that in any way—even though that be an overzealous father or mother, or both—injures, or even tends to injure or undermine the family, is inimical to the institutions of our country and the best traditions of our people. It requires no

"wise men from the East," nor those with prophetic vision, to see that, if persisted in, it is no long road that must be traveled until governments themselves fall and our vaunted civilization passes into history.

When therefore we are confronted with a condition of such vital public importance as disclosed by the statistics referred to, coupled with evidence such as disclosed by the record here, and the fact that awards larger than the one here involved have been sustained in this state for negligent death alone, as evidenced by the following cases, Hale v. San Bernardino, etc., Co., supra, where the award was $12,000, and McGrory v. P. E. Ry. Co., 22 Cal. App. 671, 136 Pac. 303, where the award was $20,000, I do not feel, in the face of the record here, that we should disturb the verdict of the jury or the order denying defendants' motion for a new trial, which was the conclusion of the learned trial judge, who appears to have been extremely careful and who has conducted himself on the trial of this case in such a way as to be worthy of emolument by every trial judge in the land.

I think the appeal from the order denying defendants' motion for a new trial should be dismissed, and the judgment appealed from affirmed.

43 Cal. App. 626

PENCE v. MARTIN et al. (Civ. 2255.)

(District Court of Appeal, Second District, Division 2, California. Oct. 17, 1919.)

1. APPEAL AND ERROR ⟸907(3)—PRESUMPTIONS AS TO FINDINGS ON APPEAL ON JUDGMENT ROLL.

On appeal taken on the judgment roll alone, the findings of the trial court must be presumed to be in accordance with the proof presented on the trial, and are not subject to impeachment for want of evidence.

2. MECHANICS' LIENS ⟸132(9)—NOTICE BY SUBCONTRACTOR NOT FILED IN TIME.

Notice of plaintiff subcontractor's lien, filed several months after expiration of 90 days from time contractor completely abandoned work by reason of his inability to raise funds, was not filed in time, under Code Civ. Proc. § 1187.

3. MECHANICS' LIENS ⟸132(1)—PERMITTING SUBCONTRACTOR TO SLEEP ON HIS RIGHTS DOES NOT WORK ESTOPPEL.

Though there was no privity of contract between plaintiff subcontractor and owner of property, or any of the defendants other than the contractor, defendants would, if they had by act or representation willfully led plaintiff to forego his rights of lien, be estopped from setting up failure to file notice of lien within the statutory time; but merely standing by and permitting plaintiff to sleep upon his rights does not estop defendants.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by James H. Pence against Juliet N. Martin and others. Judgment refusing foreclosure of mechanic's lien, and plaintiff appeals. Affirmed.

C. E. Joslin, of Los Angeles, for appellant.

Milton K. Young, of Los Angeles, and Byron Coleman, of San Francisco, for respondents.

SLOANE, J. The plaintiff brought this action to foreclose a mechanic's lien. The only question on the appeal from judgment in favor of defendants is as to whether or not plaintiff's claim of lien was filed within the time allowed by law. The appeal is taken on the judgment roll alone, and the findings must be presumed to be in accordance with proof presented on the trial.

[1] According to the findings, the defendant Juliet N. Martin, owner of the real property involved, entered into a contract with W. W. Paden, whereby Paden agreed to erect an apartment house on the land of defendant Martin for the agreed price of $43,500, and accepted from said defendant certain mortgages and securities on the premises in question, and on other property of said defendant, for the contract price. From the negotiation and sale of these securities he was to raise the money to build the house and receive his profits. The contract was not recorded. The plaintiff, Pence, entered into an agreement with Paden whereby, as subcontractor, he undertook to furnish the materials and labor for the carpenter work.

The work of construction was begun, and claims on behalf of the plaintiff accrued to the amount of $425. Thereafter Paden, being unable to find a market for his securities, discontinued work under his contract for want of funds, and there was a complete cessation of all work on the building from on or about the 30th of January, 1915. Work was never resumed upon the building by the contractor, Paden, or under this contract. About the middle of October, 1915, Paden, under some sort of a settlement which is not disclosed, returned the securities that had been delivered to him by the defendant Juliet N. Martin, and she thereupon entered into arrangements with the defendants Jones, Title Guarantee & Trust Company, and Fidelity Savings & Loan Association, whereby they furnished her with money to complete the building, and on the 25th of October work was resumed under entirely new and independent contracts. The plaintiff, Pence, was at no time, prior to shortly before the resumption of work, notified that he would not be permitted to carry out his subcontract with Paden; but he knew of the discontinuance of work during all this period, and was informed, between the 4th and 25th of October, that the defendant Mar-

tin had procured funds to complete her building, and that work would be resumed under a new contract, and that he, together with other subcontractors under Paden, would be given first chance to bid for the work under new contracts. The plaintiff did not avail himself of this offer. Within 30 days after the resumption of work on the building under the new contract, namely, the 16th of November, 1915, plaintiff, taking the execution of the new arrangement as a repudiation of his contract, filed his notice of lien. This was some 9 months after cessation of work under the Paden contracts, and after plaintiff's last work as subcontractor. The court declares in its findings that there was not a temporary suspension of the work on January 30, 1915, for the convenience of the owner, as claimed by appellant, but that there was a complete cessation and abandonment of such work, by reason of the fact that the contractor, Paden, was unable to continue the same because of inability to raise funds on his securities; and on this appeal this finding is not subject to impeachment for want of evidence.

[2] Under section 1187 of the Code of Civil Procedure, the plaintiff had 30 days after he had ceased to labor or furnish materials, or 30 days after the completion of the original contract under which he was employed, in which to file his notice of lien. Under the provisions of the same section, cessation from labor for 30 days is deemed equivalent to a completion, for all purposes of the mechanic's lien law. Under the further provision of this section, by reason of the owner not having filed a notice of completion or cessation of labor, the time within which plaintiff's notice of lien might have been filed was extended not to exceed 90 days from the constructive statutory period of completion. Buell v. Brown, 131 Cal. 159, 63 Pac. 167. His claim of lien was not filed for several months after the expiration of the 90 days. There has been no change in the legal effect of the Code provision making 30 days' cessation from labor a constructive completion of the work contracted for, by the various amendments to the mechanic's lien law since 1887; and, so far as has been called to our attention, the courts have held such constructive completion of the contract as conclusive on the rights of laborers and subcontractors as an actual completion of the building. Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 24 Pac. 648; Johnson v. La Grave, 102 Cal. 324, 36 Pac. 651; Robison v. Mitchel, 159 Cal. 581, 114 Pac. 984. The trial court had no alternative to finding that the plaintiff's claim of lien was not filed in time.

[3] There is no foundation in the record for appellant's contention that the plaintiff was misled or "tolled" into a false sense of security by the defendants, or that there was any collusion between Paden and the other defendants to deceive him. Neither the allegations of the complaint nor the findings of the court justify such a conclusion. There was no privity of contract between him and the owner of the property, or any of the defendants, other than Paden. The contract created no liability against the owner of the premises, other than such as might arise under a valid assertion of the lien. Defendants owed appellant no duty to protect his rights. His only claim against the property was his right to a lien, as incident to his employment under the Paden contract, and that was dependent upon his strict compliance with the requirements of the mechanic's lien law. If the defendants had by act or representation willfully and fraudulently led him to forego his rights of lien, they would doubtless be estopped from setting up as a defense his failure to file the notice within the statutory time; but by merely standing by and permitting him to sleep on his rights they are not estopped. It does not, however, appear by the record here that the defendants, or either of them, were even aware of the fact that Paden had not settled in full with his subcontractor.

The findings of the trial court fully support the judgment, and cover all the issues raised by the pleadings which could affect the rights of plaintiff.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

43 Cal. App. 492

TELANDER v. TUJUNGA WATER & POWER CO. (Civ. 2321.)

(District Court of Appeal, Second District, Division 1, California. Oct. 9, 1919.)

1. ALTERATION OF INSTRUMENTS ⊂=24(1)—ERASURES INSUFFICIENT TO MAKE CONTRACT INADMISSIBLE.

Where there was nothing to indicate that erasures of printed lines were made after execution of the contract and the parts stricken were not material to the question in dispute, and the striking out was to make the contract comply with the terms of the preliminary agreement, the contract was admissible under Code Civ. Proc. § 1982.

2. APPEAL AND ERROR ⊂=232(2)—NECESSITY OF SPECIFIC OBJECTION TO EVIDENCE.

Where it is apparent that mistake in deed in referring to maker of contract was one of the scrivener, appellant, who did not point out the real objection to the deed, should not for the first time be heard to complain of the mistake in the court on appeal.

3. WATERS AND WATER COURSES ⊂=253—DEED CONVEYING RIGHT OF GRANTOR TO SERVICES OF WATER COMPANY.

Where water company was originally the owner of both the land and water rights, and conveyed by a proper deed to M., and plaintiff

by deed from M. succeeded to M.'s rights, plaintiff, as owner of the land and water rights, would be entitled to the services which the company had contracted to render M. in the absence of any transfer by the company.

4. WATERS AND WATER COURSES ⊂=153—PURCHASER OF IRRIGATION PLANT TAKES SUBJECT TO GRANTOR'S CONTRACTS.

Defendant water and power company, which purchased water rights of irrigation plant and system, *held* to take the same impressed with the obligation of its grantor to furnish water to plaintiff, though there was no express provision in the grant to defendant as to the assumption of grantor's obligation to deliver water.

5. WATERS AND WATER COURSES ⊂=263—MEASURE OF DAMAGES FOR FAILURE TO FURNISH WATER FOR IRRIGATION.

The measure of damages for loss of crops due to breach of contract for furnishing water is the probable yield and market value of the crop, less the cost of producing and marketing it.

6. WATERS AND WATER COURSES ⊂=263—EVIDENCE OF DAMAGES FROM FAILURE TO FURNISH WATER FOR IRRIGATION.

In action for damages for breach of contract to furnish water for irrigation and domestic use, where the plaintiff's evidence showed the loss of crops and that the value of alfalfa hay in the loose state in the field was $15 a ton, the court was justified in accepting such figure as tending to establish the amount of damage sustained; defendant not having produced, either independently or upon cross-examination, evidence bearing thereon.

7. WATERS AND WATER COURSES ⊂=263—EVIDENCE OF DAMAGES FROM FAILURE TO SUPPLY FOR DOMESTIC USE.

In action for damages for breach of contract to furnish water for domestic use, testimony tending to show that the damage due to loss of water was $500 was sufficient to justify award of $75 on account of damage thus sustained.

8. EVIDENCE ⊂=588—IGNORING TESTIMONY.

Where it appeared from other testimony of witness that during the month when defendant company failed to furnish any water to plaintiff it was supplying water to other lands, contrary to the provisions of contract under which plaintiff was entitled to water, court was justified in ignoring testimony of such witness that a shortage of rainfall was the cause of defendant's failure to supply water.

9. APPEAL AND ERROR ⊂=1078(4) — ERRORS NOT ARGUED WILL NOT BE CONSIDERED.

Where alleged errors are not deemed worthy of argument, and are referred to in brief by number only, the court on appeal is justified in concluding that they are without merit.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by T. M. Telander against the Tujunga Water & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis, of Los Angeles, for appellant.

John Beardsley and A. B. Shaw, Jr., both of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought to recover from defendant damages in the sum of $1,025, alleged to have been sustained on account of defendant's breach of a contract, whereby it is alleged it was obligated to furnish him a supply of water for irrigation and domestic use upon a certain tract of land. The appeal is by defendant from a judgment in favor of plaintiff.

As appears from the record, the material facts are: That a corporation known as Tujunga Company was the owner of a tract of land designated as Hansen Heights, for the irrigation of which, by means of pipe lines and a water system constructed by it, it claimed the right to divert the waters of the Tujunga river. As such owner of said tract of land and the waters of the Tujunga river, it, about February 1, 1910, sold and conveyed to one H. H. Miller lots 23 and 34 of said tract, and at the same time executed a contract to the grantee of said lots, whereby it agreed to sell and deliver to the purchaser thereof a supply of water for irrigation and domestic use thereon, which deed of conveyance and contract were duly recorded; that about October 30, 1910, Miller conveyed said lots 23 and 34 of Hansen Heights, together with all water rights conveyed to him by the Tujunga Company, to the plaintiff herein, and thereafter, to wit, on or about March 9, 1911, the Tujunga Company, by a deed duly executed and recorded, conveyed to the defendant herein, the Tujunga Water & Power Company, all of its water rights, pipe lines, conduits, and irrigation system so constructed by it for the diversion and conveying of water for the irrigation of the lands in the tract known as Hansen Heights, and through and by means of which said grantor had theretofore been supplying water to said plaintiff and his predecessor in interest for use upon said lands; that pursuant to said conveyance defendant took possession of said water system, and delivered a supply of water to plaintiff for use upon said lots 23 and 34 up to the summer of 1912, when during the summer of said year and the summer of 1913, it refused to deliver any water to plaintiff; that by reason of its failure so to do plaintiff was deprived of the use of water for irrigation and domestic use, as a result of which his crops were damaged, and he was compelled to obtain from other sources a supply of water for domestic use.

[1, 2] For the purpose of showing that plaintiff had succeeded to the ownership of the water right described in the contract made by the Tujunga Company with Miller,

a deed from the latter to plaintiff, conveying said land and describing the water right thereby conveyed as that deeded to the property (lots 23 and 34, Hansen Heights), by the "Tujunga *Water* Company," was received in evidence over defendant's objection that it was incompetent, irrelevant, and immaterial. This ruling was followed by another of which defendant complains, admitting in evidence the contract made by the "Tujunga Company" to furnish a supply of water to Miller for use upon the lots. The objection to the competency of the contract as evidence was based upon the fact that certain printed matter therein had been stricken out, and it is now claimed that under the provisions of section 1982, Code of Civil Procedure, it should not have been admitted in evidence. This section provides that—

"The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration"; otherwise the writing cannot be received in evidence.

There is no merit in the contention, for several reasons: First, there was nothing to indicate that the erasures of the printed lines were made after execution of the instrument; second, the parts stricken out were not material to the question in dispute, namely, the conveyance of the water right; and, third, it did appear that the striking out of the matter was to make the contract comply with the terms of a preliminary contract entered into between the parties. The objection now urged for the first time to the deed from Miller to plaintiff is based upon the fact that the contract for the water right was made by the Tujunga Company to Miller, whereas the deed refers to a water right deeded to plaintiff's grantor by the Tujunga Water Company. That in referring to the maker of the contract as the Tujunga Water Company, instead of the Tujunga Company, was a mistake of the scrivener in drawing the deed is apparent, and the failure to explain the error was no doubt due to the fact that defendant at the time raised no objection based thereon. Under these circumstances, where the real ground of objection was not pointed out, appellant should not for the first time in this court be heard to complain thereof.

[3, 4] The Tujunga Company, as shown by the evidence, was originally the owner of both the land and water rights, both of which, by a proper deed, it conveyed to Miller. Plaintiff by the deed from Miller succeeded to his rights, and, in the absence of any transfer by the Tujunga Company, he, as owner of the land and water right, would be entitled to the service which the company had contracted to render to Miller. The defendant herein, in acquiring from the Tujunga Company the water rights, irrigation plant and system of the Tujunga Company, took the same impressed with its obligation to furnish water to Miller and his grantee, as to which obligation of its grantor it had full knowledge of the contract theretofore made, and, notwithstanding the fact that there was no express provision in the grant as to the the assumption of the grantor's obligation to deliver water, it was bound thereby. In 40 Cyc. p. 835, it is said that "a purchaser of the ditch or canal with knowledge of such a previous grant (as here made) will be bound by the grantor's covenants." See, also, Hunt v. Jones, 149 Cal. 297, 86 Pac. 686; Grand Valley Irrigation Co. v. Lesher, 28 Colo. 273, 65 Pac. 44. In 40 Cyc. p. 749, it is said:

"A corporation, whether private or public, purchasing water rights, ditches, and a canal system, takes subject to the duties and burdens of which it has notice. The rights of the grantee are generally available against all successors in the title of the grantor, except it may be bona fide purchasers without notice."

It would be a monstrous proposition to hold, as contended for by appellant, that, after its grantor had sold the entire tract of land, including lots 23 and 34, and conveyed therewith "water rights," together with an agreement to deliver a stipulated amount of water by means of a system of dams, reservoirs, pipe lines, and conduits constructed for the purpose of rendering such service, it might sell its water system to another company which, in the absence of express covenants to assume such obligations, would take it stripped and freed of all rights and obligations of its predecessor in interest, and thus use the plant in the perpetration of a like fraud.

[5, 6] The evidence introduced as to the damage sustained by plaintiff is meager and unsatisfactory. As claimed by appellant, the true measure of damage for loss of crops, due to a breach of contract for furnishing water, is to determine the probable yield and market value of the crop, and deduct therefrom the cost of producing and marketing the same. Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779. In the case at bar plaintiff's evidence shows the loss of crops, to wit, alfalfa hay, and that the value of this hay in a loose state in the field was $15 per ton. Assuming that some expense would have been incurred in producing the hay and cutting it, it was defendant's duty to have produced, either independently or upon cross-examination, evidence bearing thereon. In the absence of so doing, the court acted upon the only evidence before it, and, since it appeared that loose hay in the field which would have been produced was of the value of $15 per ton, the court, in the absence of any further showing, was justified in accepting it as tending to establish the amount of damage sustained.

[7] And likewise as to the complaint made upon the damage sustained by plaintiff for failure to obtain water for domestic use. His testimony tended to show that the damage due to the loss of water for such purpose was $500. It cannot be said that such evidence was insufficient to justify the award of $75 on account of the damage thus sustained.

[8] The water contract whereby the Tujunga Company agreed to furnish Miller with water contained a provision as follows: "Nothing herein contained shall be construed as binding the seller to furnish said water if prevented by earthquake or other natural causes beyond its control." While defendant did not allege that its breach of the contract was due to earthquake or natural causes beyond its control, it did produce Dr. Hansen, the manager of the company, who as a witness testified that the cause of the failure to furnish water to plaintiff was drought and lack of rainfall; but it further appeared from the testimony of this witness that during the months when the company failed to furnish any water to plaintiff it was supplying water to other lands and to other parties for irrigation, domestic use, and other purposes, contrary to the provisions of the contract under which plaintiff was entitled to water. In other words, its duty to plaintiff took precedence over other parties, whose rights under the contract to water were only when there was a surplus and after plaintiff had received his supply of water. Under these circumstances the court was justified in ignoring the testimony of Dr. Hansen that a shortage of rainfall was the cause of the company's failure to supply water to plaintiff.

[9] There are other alleged errors, the only reference to which in appellant's brief is by number as designated in the transcript as exceptions, and which counsel for appellant asserts are well founded. Since not deemed worthy of argument, we feel justified in concluding they are without merit.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

43 Cal. App. 623

PEOPLE v. SCHROEDER. (Cr. 681.)

(District Court of Appeal, Second District, Division 2, California. Oct. 17, 1919. Hearing Denied by Supreme Court Dec. 15, 1919.)

1. EMBEZZLEMENT ⟸26 — INFORMATION SUFFICIENT.

An information, charging that defendant as collector of another came into possession of a sum of money belonging to his employer, that he fraudulently converted, embezzled, and appropriated the same to his own use, etc., sufficiently charged the offense of embezzlement by an agent or trustee, in violation of Pen. Code, § 508.

2. EMBEZZLEMENT ⟸26 — INFORMATION SUFFICIENT.

An information charging embezzlement is sufficient, if it alleges in plain and concise language, as required by Pen. Code, § 959, that defendant was acting in the capacity of an agent that he obtained and held the money in trust capacity, that the money belonged to his principal, and that he converted it in violation of trust.

3. INDICTMENT AND INFORMATION ⟸154 — WAIVER OF INDEFINITENESS BY FAILURE TO DEMUR.

Under Pen. Code, §§ 1012, 1185, failure of defendant to demur waives indefiniteness in the information.

4. EMBEZZLEMENT ⟸44(6) — SUFFICIENCY OF EVIDENCE.

In a prosecution for embezzlement, evidence *held* sufficient to justify finding that defendant appropriated money for a purpose not in the lawful execution of his trust.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

C. L. Schroeder was convicted of embezzlement, and he appeals. Affirmed.

E. B. Coil and Fred W. Heatherly, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, and Arthur Keetch, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SLOANE, J. The appellant was convicted of embezzlement.

[1] The opening brief is devoted largely to a discussion of the alleged insufficiency of the information to state the offense charged. The information, so far as its essential parts are concerned, is as follows:

"The said C. L. Schroeder is accused by the district attorney of and for the county of Los Angeles, state of California, by this information, of the crime of embezzlement, a felony, committed as follows: That the said C. L. Schroeder on or about the 15th day of November, 1917, at and in the county of Los Angeles, state of California, was the agent, collector and trustee of one D. M. Ward, doing business under the name and style of Ward Iron Works, and then and there, by virtue of his said employment and trust as such agent, collector and trustee, came into the care, possession, custody and control of him, the said C. L. Schroeder, the sum of four hundred twenty and 82/100 dollars ($420.82) in gold coin of the United States, and of the personal property of the said D. M. Ward, doing business as aforesaid.

"And he, the said C. L. Schroeder, after the said sum of four hundred twenty and 82/100 dollars ($420.82) had come into his care, possession, custody and control, as aforesaid, did then and there, to wit, on or about the said 15th day of November, 1917, at and in the

county of Los Angeles, state of California, willfully, unlawfully, fraudulently and feloniously convert, embezzle and appropriate the said sum of money to his own use, and to uses and purposes not in the due and lawful execution of his said trust as such agent, collector and trustee, as aforesaid.

"Contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

We think this information substantially meets all the requirements to charge the offense of embezzlement by an agent or trustee, under the provisions of section 508 of the Penal Code.

[2, 3] The four essential allegations for such an information are: (1) That defendant was acting in the capacity of an agent; (2) that he obtained and held the money in this trust capacity; (3) that the money belonged to his principal; and (4) that he converted it to his own use in violation of his trust. People v. Hemple, 4 Cal. App. 120, 87 Pac. 227; Ex parte Hedley, 31 Cal. 109. All that is required is that these essential facts be set forth in ordinary and concise language, in such manner as to enable a person of common understanding to know what is intended. Pen. Code, § 959. There is very little ground to doubt that this defendant was sufficiently informed of all these material elements of the crime charged against him. There might be some room to question that there was a sufficient allegation that he was holding the money for the benefit of his principal at the time of its appropriation by him, if the point had been raised by demurrer. But, at most, the defect in the pleading is one of indefiniteness, which was waived by failure to demur. Pen. Code, §§ 1012, 1185.

Numerous alleged errors in the admission and exclusion of evidence are averred without particular specification, in most instances, of the grounds of the exceptions to the rulings. We will not attempt to review them separately, but have read the entire record in the case, and are satisfied that whatever errors or irregularities, if any, there may have been in the trial, none of these are of such a prejudicial character as to justify the conclusion that there has been a miscarriage of justice.

[4] The evidence clearly shows that the defendant received, for the purposes of collection only, an assignment of a claim against a business concern for an amount of several hundred dollars; that as the agent and representative of the assignor he collected the claim, deposited the money in bank to his own account, or in the name under which he was doing business; and that when called upon by his principal to deliver the money, failed to do so and admitted that he did not have it; and the evidence further disclosed that the amount was no longer to his credit in the bank. It was a trust fund that he had no right to use for any purpose without the consent of his principal. He subsequently repaid a portion of the amount, but some $420 was never paid. The jury was justified in finding that he had appropriated the money for a purpose not in the due and lawful execution of his trust. People v. McMahill, 4 Cal. App. 225, 87 Pac. 404.

It is unimportant to determine whether there had been an embezzlement from time to time of any of the partial payments as they were received by defendant on the collection of this assigned claim. It is sufficient that on and after the date alleged—the 15th of November—when all of the money had been collected and was payable to his principal, defendant had withdrawn it from the bank on his own account, and under circumstances which made the question of his felonious intent one for the jury to determine.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

43 Cal. App. 707

PETERSEN v. BUNTING et al. (Civ. 2818.)

(District Court of Appeal, First District, Division 1, California. Oct. 21, 1919. Rehearing Denied Nov. 20, 1919; Hearing Denied by Supreme Court Dec. 18, 1919.)

1. VENDOR AND PURCHASER ⊂⊃3(4) — CONSTRUCTION OF OPTION CONTRACT AFTER EXTENSION OF TIME.

Where one having the option to purchase land failed to make payment within the time fixed, whereupon on payment of a part of the consideration, the vendor extended the time and indorsed on the option contract the receipt of a part of the consideration, etc., the contract which had been unilateral became bilateral, and the purchaser was bound to consummate the contract.

2. VENDOR AND PURCHASER ⊂⊃335—RECOVERY OF PAYMENTS BY PURCHASER IN DEFAULT.

Where a purchaser, after paying part of the contract, defaulted, he cannot recover from the vendor payments made.

3. EVIDENCE ⊂⊃448—PAROL EVIDENCE RULE.

Parol evidence is inadmissible to aid in the construction of a written instrument, which is entirely plain and unambiguous.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Belle N. Petersen, executrix of the last will and testament of John M. Wright, deceased, against Fleda O. Bunting and others, as executors of the last will and testament of John A. Bunting, deceased. From a judgment for plaintiff, defendants appeal. Reversed.

Thomas C. Huxley, of Oakland, for appellants.

Robert L. Mann, of San Francisco, for respondent.

RICHARDS, J. Plaintiff's testator, John M. Wright, obtained from defendants' testator, John A. Bunting, a writing by which the latter agreed to convey to the former certain real estate upon certain conditions, one of which was a payment of $40,000, to be made upon a specified date. This was signed only by Bunting, and imposed no obligation upon Wright. It contained a provision as follows:

"* * * A failure on your part to make the aforesaid payment of $40,000 on or before the 15th day of March, 1919, shall cancel and make void all and singular the obligations established by this instrument."

When the date arrived for this payment, Wright was unable to make it, but by consent of Bunting paid on account of said first payment $10,000, whereupon Bunting extended the time 30 days to make payment of the balance thereof by signing a notation to that effect upon the face of the instrument, and also indorsing upon the back of it the following words:

"Received on this agreement on this 16th day of March, 1909, the sum of $10,000 as part of the first payment of $40,000 herein named"—and signing his name to both said notation and said indorsement.

Wright failed to pay this sum of $30,000 at the time named, and admitted to Bunting his inability to make further payments, and subsequently, and without having tendered full compliance with the terms of the agreement, demanded of Bunting that he return the $10,000 already paid. The latter refused to comply with this demand, and justifies such refusal upon the ground that under the terms of the writing Wright was in default, and was therefore not entitled to the return of the money so paid.

By the judgment the plaintiff, who is the executrix of the last will and testament of said Wright, was awarded the return of this $10,000, together with interest. The defendants appeal, and the question for decision is the construction of the writing above referred to as affected by the payment thereunder made by Wright.

[1] It is the respondent's contention that, by virtue of the provision of the writing hereinbefore quoted, the failure of Wright to make the payment of $40,000 on or before the 15th day of March, 1909, or on or before the expiration of the 30 days to which the permissible date of said payment was extended, terminated all obligations arising thereunder, and that Wright was entitled to the return of the money paid by him on account of said first payment of $40,000. We think it quite plain, however, that such a construction entirely ignores the change in the situation as it existed by the mere making and delivery of the instrument which was brought about by Wright's payment of $10,000 on account of the first payment of $40,000, and the extension by Bunting of the time in which the balance thereof might be paid. Until the making of this payment the agreement—if it can be so called—was strictly unilateral and constituted a mere option, to be exercised by Wright or not as he chose. Wright had assumed no obligation thereunder. The provision therein that a failure on Wright's part to make the first payment of $40,000 should cancel the obligations of the instrument referred evidently to the obligations of Bunting and was for his benefit. But when Wright paid to Bunting $10,000 and obtained Bunting's consent to wait 30 days for payment of the balance of the $40,000, the amount of the first payment called for by the writing, the situation changed. By said payment, in the absence of an express agreement that said payment should not be construed as having that effect, Wright accepted what was theretofore an offer on the part of Bunting to sell his property, and Bunting's acceptance of such payment bound him to comply with the terms of his offer. Benson v. Shotwell, 87 Cal. 49, 54, 25 Pac. 249, 681; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; Reed v. Hickey, 13 Cal. App. 136, 109 Pac. 38; Karahadian v. Lockett, 33 Cal. App. 413, 165 Pac. 552; Russ v. Tuttle, 158 Cal. 226, 110 Pac. 813; Scott v. Glenn, 98 Cal. 168, 32 Pac. 983; Copple v. Aigeltinger, 167 Cal. 706, 140 Pac. 1073; Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007; McCowen v. Pew, 18 Cal. App. 302, 123 Pac. 191.

[2] This brings us to the question whether Wright, being in default, unexcused, in the payments due under Bunting's offer to sell, and having made no tender of complete performance, and Bunting acknowledging his obligations thereunder and standing upon its terms, the former was entitled to receive back from Bunting the money paid by him. That he was not so entitled is well established by the authorities. Glock v. Howard, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Oursler v. Thacher, 152 Cal. 739, 93 Pac. 1007.

[3] One further question is presented on the appeal. The court admitted evidence offered by plaintiff for the purpose of explaining the construction which the parties themselves placed upon the written instrument. As to the admission of this evidence—which was over the objection of the defendants—two things may be said: First, that the writing was plain and unambiguous and needed no aid in its construction; second, the evidence thus submitted, so far from warranting the construction contended for by the plaintiff and which the court adopted, namely, that the payment of the $10,000 by Wright and its acceptance by Bunting, did not con-

vert what was theretofore an option into an agreement binding upon Bunting, quite conclusively shows that the parties acted on the assumption that it did. Such evidence at most shows that Bunting was willing to give Wright a chance to get back his $10,000, which he was to have, however, only by carrying through another and different transaction. This also Wright failed to accomplish.

From what has been said it follows that the court erred in awarding judgment to the plaintiff.

The judgment is therefore reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

43 Cal. App. 416

HELME v. GREAT WESTERN MILLING CO. (Civ. 2930; L. A. 4877.)

(District Court of Appeal, Second District, Division 2, California. Oct. 3, 1919. Opinion of Supreme Court Denying Hearing, Dec. 1, 1919.)

1. MASTER AND SERVANT ⟸405(4) — WORKMEN'S COMPENSATION ACT; FINDING THAT SERVANT WAS ACTING WITHIN THE SCOPE OF HIS DUTIES SUSTAINED.

In an action under Workmen's Compensation, Insurance & Safety Act 1913, § 12, subd. "b," a finding that a bran packer was acting within the scope of his duties, when he undertook to put a belt on a pulley, *held* sustained by the evidence.

2. MASTER AND SERVANT ⟸394—WORKMEN'S COMPENSATION ACT; REMEDY EXCLUSIVE.

The remedy of compensation extended by Workmen's Compensation, Insurance & Safety Act of 1913 is exclusive of all other statutory or common-law remedies, except as provided by section 12, subd. "b," giving a servant the option of maintaining an action at law in certain cases.

3. MASTER AND SERVANT ⟸401—WORKMEN'S COMPENSATION ACT; PLEADING IN ACTION AT LAW.

In an action by a servant against a corporation under Workmen's Compensation, Insurance & Safety Act 1913, § 12, subd. "b," for injuries by failure to inclose gears, plaintiff must allege and prove that such failure was of itself "gross negligence" or "willful misconduct," that the failure was the personal failure to act on the part of an elective officer of defendant, and that such failure indicates a willful disregard of life, limb, and bodily safety of employés.

4. NEGLIGENCE ⟸13—"GROSS NEGLIGENCE" DEFINED.

"Gross negligence" is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference to the interest and welfare of others.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gross Negligence.]

5. MASTER AND SERVANT ⟸352—WORKMEN'S COMPENSATION ACT; GROSS NEGLIGENCE OF MASTER.

Unless by failing to house gears a corporation employer thereby failed to comply with some order of the Industrial Accident Commission, or with some safety requirement of the act itself, the corporation was not guilty of gross negligence, within Workmen's Compensation, Insurance & Safety Act 1913, § 12, subd. "b."

6. NEGLIGENCE ⟸11 — "WILLFUL MISCONDUCT" DEFINED.

To constitute "willful misconduct," there must be actual knowledge, or that which is the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury; but a mere failure to perform a statutory duty is not alone willful misconduct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful Misconduct.]

7. MASTER AND SERVANT ⟸352—WORKMEN'S COMPENSATION ACT; WILLFUL MISCONDUCT OF MASTER.

It cannot be said that a corporation employer was guilty of willful misconduct, within Workmen's Compensation, Insurance & Safety Act 1913, § 12, subd. "b," merely because it failed to house gears, unless the housing of gears was made a duty by some order of the Industrial Accident Commission, or by the act itself, and some one of the elective officers, with a willful disregard of the safety of employés, having actual knowledge of the peril, or having what is equivalent to such knowledge, consciously failed to house such gears, so as to avert the injury.

8. MASTER AND SERVANT ⟸121(2)—WORKMEN'S COMPENSATION ACT; RECOMMENDATIONS BY ENGINEER FOR GUARDING OF MACHINERY NOT ORDER BY COMMISSION.

Recommendations to house certain gears, made by a safety engineer representing the Industrial Accident Commission, while going through a plant, is not the equivalent of an order entered by the commission and served on the employer, as contemplated by Workmen's Compensation, Insurance & Safety Act 1913, §§ 51, 57–59, 61.

9. MASTER AND SERVANT ⟸121(2)—WORKMEN'S COMPENSATION ACT; SAFEGUARDS REQUIRED FOR MACHINERY IN THE ABSENCE OF ORDERS BY COMMISSION.

In the absence of any order by the Industrial Accident Commission in the manner provided by the Workmen's Compensation, Insurance & Safety Act of 1913, a master's duty under the general requirements of sections 51 and 52 of the act, in regard to dangerous machinery is to use such safeguards as are reasonably adequate to render the place of employment safe, and to have the place of employment as free from

danger as the nature of the employment will reasonably permit.

10. MASTER AND SERVANT ⊂⊃121(2)—CARE AS TO GUARDING MACHINERY.

In an action under Workmen's Compensation, Insurance & Safety Act 1913, § 12, subd. "b," relating to injuries through willful misconduct and gross negligence, by one injured by being caught in unhoused gears, an instruction that, if such gears constituted a source of danger, the defendant owed the duty of providing and maintaining over the gears such safety devices or appliances as would tend to mitigate or prevent the danger to plaintiff from contact therewith, was erroneous, as exacting a higher degree of care than sections 51, 52, require.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Frank Helme against the Great Western Milling Company. Judgment for plaintiff, and defendant appeals. Reversed in the District Court of Appeal, and rehearing denied in Supreme Court.

Albert M. Norton and Haas & Dunnigan, all of Los Angeles, and R. V. Bowden, of Washington, D. C., for appellant.

H. Eugene Wassell and Jas. E. Degnan, both of Los Angeles, for respondent.

FINLAYSON, P. J. In this action for personal injuries, sustained while in defendant's employ, plaintiff, after a trial before a jury and a verdict in his favor, recovered a judgment for $3,500, from which defendant appeals.

The action was brought under subdivision "b" of section 12 of the Workmen's Compensation, Insurance and Safety Act of 1913. Stats. 1913, p. 283. Appellant complains, inter alia, of certain instructions given to the jury.

A few days prior to April 14, 1915, plaintiff was employed by defendant as a bran packer. In operating the bran-packing machine, the bran packer discharges the various kinds of grain into four holes or hoppers in the floor. The grain passes thence to a mixing box in the floor beneath, from which it is discharged into an auger that grinds the whole mass into a mixture that is conveyed by elevator to a machine called the "bran packer," from which it is discharged into sacks. According to plaintiff's testimony, he was instructed to keep the feed going through the mixer, to keep the mixer running, and to keep the machinery going, so that the grain would not clog. On April 14, 1915, while operating the bran-packing machine, plaintiff discovered that the grain was not feeding into the hoppers. Upon going into the basement to discover the cause of the trouble, he found that the screw into which the hoppers fed was clogged, and that that had caused the belt that operates the screw to come off the pulley. In attempting to replace this belt, plaintiff's arm was caught in certain gears, and the injury of which he complains was thus inflicted. The gears which caused the injury were not housed, but were entirely exposed. They were about 5 feet 8 inches above the basement floor, and located within a few inches of the pulley that controls the belt which operates the auger in the mixer. The belt, when in operation, was about 5 feet 4 inches above the floor. The basement was poorly lighted, in consequence of which the presence of the gears could not readily be detected.

[1] Appellant urges that the evidence fails to show that respondent was acting within the scope of his employment when he undertook to replace the belt. Respondent's evidence on this branch of his case is none too satisfactory; but, on the whole case, we think that, in view of the testimony of other witnesses to the effect that it was not unusual for a bran packer to replace the belt when it slipped off, the jury was warranted in concluding that respondent was acting within the scope of his duties when he undertook to put the belt back onto the pulley. The most serious question in the case arises out of certain instructions given to the jury.

[2] The remedy of compensation afforded by the Workmen's Compensation, Insurance and Safety Act is exclusive of all other statutory or common-law remedies, except in the one case provided by subdivision "b" of section 12. By that subdivision it is provided that an injured employé, instead of presenting to the commission his claim for compensation as provided by the act, may, at his option, maintain in the courts an action at law against his employer to recover damages where all the three following elements co-exist: (1) When the injury is caused by the employer's gross negligence or willful misconduct; (2) when the act or failure to act which is the cause of the injury is the personal act or failure to act on the part of the employer himself, or, if the employer be a corporation, on the part of an elective officer or officers thereof; and (3) when the act or failure to act which is the cause of the injury indicates a willful disregard of the life, limb, or bodily safety of the employés.

[3] Here the failure to act, which is charged as the cause of the injury, was the failure to inclose the gears in a housing, or otherwise to keep them from being exposed. Therefore to entitle plaintiff to recover in this action he must allege, and by a preponderance of the evidence prove: (1) That defendant's failure to house the gears was of itself "gross negligence" or "willful misconduct"; (2) that the failure to house the gears was the personal failure to act on the part of an elective officer or officers of

the defendant corporation, as, for example, a director or directors; and (3) that such failure to house the gears indicates a willful disregard of the life, limb, and bodily safety of defendant's employés. Unless, by failing to house the gears, one of the elective officers of defendant thereby failed to comply with a general or special order of the Industrial Accident Commission, or with some safety requirement expressly defined and provided for by the act itself, it cannot successfully be claimed that defendant was guilty of either "gross negligence" or "willful misconduct."

[4] "Gross negligence" is the entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there is an entire indifference to the interest and welfare of others. It is that entire want of care that raises a presumption of conscious indifference to consequences. It implies a total disregard of consequence, without the exertion of effort to avoid it. Redington v. Pacific P. T. C. Co., 107 Cal. 324, 40 Pac. 432, 48 Am. St. Rep. 132; Coit v. Western Union Tel. Co., 130 Cal. 664, 63 Pac. 83, 53 L. R. A. 678, 80 Am. St. Rep. 153; Watermolen v. Fox River, etc., Co., 110 Wis. 153, 85 N. W. 663; Astin v. Chicago, etc., Co., 143 Wis. 477, 128 N. W. 265, 31 L. R. A. (N. S.) 158; 20 R. C. L. 23. While, in a case of gross negligence, various terms have been used to express the mental state of the actor, the idea attempted to be conveyed seems to be that the act done or omitted to be done was done or omitted willfully and intentionally. 20 R. C. L. 23. In Astin v. Chicago, etc., Co., supra, the Wisconsin Supreme Court says that "gross" negligence is not characterized by inadvertence, but "by an absence of any care on the part of a person having a duty to perform to avoid inflicting an injury to the personal or property rights of another, by recklessly or wantonly acting or failing to act to avoid doing such injury, evincing such an utter disregard of consequences as to suggest some degree of intent to cause such injury."

[5] Without undertaking to state the evidence at length or to discuss it at large, let it suffice to say that unless it appears that defendant consciously violated some order of the commission or some particular safety provision of the act itself, it was not guilty of "gross" negligence, simply because it failed to house the gears with which plaintiff brought his arm in contact when attempting to replace the belt. The mere failure to keep the gears in a housing, apart from any willful disregard of some order of the commission, or of some particular safety provision of the act itself, does not evince such an utter disregard of consequences as to suggest some degree of intent to cause the injury, or to justify the belief that there was a conscious indifference to consequences.

[6] "Willful misconduct" means something different from and more than negligence, however gross. The term "serious and willful misconduct" is described by the Supreme Judicial Court of Massachusetts as being something "much more than mere negligence, or even gross or culpable negligence," and as involving "conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." In re Burns, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787. The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. Smith v. Central, etc., Ry. Co., 165 Ala. 407, 51 South. 792.

[7] Measured by the foregoing standard, it cannot be said that defendant was guilty of "willful" misconduct merely because it failed to house the gears, unless the housing of the gears was made a duty by some general or special order of the Industrial Accident Commission, or by the act itself, and some one of the defendant's elective officers, with a willful disregard of the life, limb, or bodily safety of defendant's employés, having actual knowledge of the peril incident to the unhoused gears, or having what in law is equivalent to such actual knowledge, consciously failed to house the gears, so as to avert injury.

Thus, then, we are brought to the question: Did the commission, by general or special order, direct the gears to be housed? Or, if it did not, what was defendant's statutory duty in that regard? The act empowers the commission to make "general" safety orders and "special" safety orders, after a hearing upon notice. Sections 57–59, Stats. 1913, pp. 307–308. A "general" safety order is defined as an order of the commission that applies generally throughout the state to all persons, employments, or places of employment; all other safety orders of the commission are declared to be "special" orders. Subdivision 6, § 51, Stats. 1913, p. 306. The commission, without a hearing on notice, may summarily investigate any place of employment which it has reason to believe is not safe, and, after a hearing, upon such notice as it may prescribe, may enter such order as may be necessary. The order, so made and entered, must be served upon the employer. Section 61, Stats. 1913, p. 308.

[8] The evidence fails to show that any general order was ever made by the commission requiring gears, such as those that caused the injury to respondent, to be hous-

ed. Nor has our attention been called to any evidence in the record showing or tending to show that the commission ever made, entered, or served any special order requiring the gears to be incased. It is true, a safety engineer, representing the commission, went through the plant, in August, 1914, and made certain recommendations, and the same engineer, six months later, again visited the plant and checked up the things that had been done by defendant relative to a compliance with the recommendations he had made on his previous visit, with the result that he found defendant had done about one-half to two-thirds of the things that he had recommended in August, 1914. Such recommendations, however, cannot be deemed the equivalent of an order made and entered by the commission itself and served on the employer, as contemplated by the act. It follows, therefore, that the evidence fails to show that the commission ever made or served any order requiring the gears to be housed or incased, or any other order with which defendant has neglected to comply.

[9] In the absence of any such general or special order by the commission with respect to the gears, defendant's duty must be measured by the general requirements of the act itself. The act requires every employer to furnish a place of employment which shall be "safe," and to furnish "such safety devices and safeguards * * * as are reasonably adequate to render * * * such * * * place of employment safe." Section 52, Stats. 1913, p. 306. It also is provided by the act that the terms "safety devices" and "safe guards" shall "be given a broad interpretation so as to include any practicable method of mitigating or preventing a specific danger." Subdivision 9, § 51, Stats. 1913, p. 306. The terms "safe" and "safety," as applied to any place of employment, are defined to mean "such freedom from danger to the life or safety of employés as the nature of the employment will reasonably permit." Subdivision 8, § 51, Stats. 1913, p. 306. From these provisions and definitions it will be seen that, in the absence of any general or special order given and made by the commission in the mode and manner provided by the act, defendant's statutory duty, under the general requirements of the act itself, was to use such devices and safeguards as are "reasonably adequate" to render the place of employment safe, and to have its place of employment as free from danger to the life or safety of its employés "as the nature of the employment will reasonably permit."

[10] Tested by the foregoing, we are constrained to hold that certain of the court's instructions were erroneous and misleading. For example, the court instructed the jury as follows:

"If you find from a preponderance of the evidence in this case that the plaintiff at the time of the injury was acting in the course of his employment, then, if such gears constituted a source of danger to the life or safety of the plaintiff, the defendant owed to the plaintiff the duty of providing and maintaining over the gears in question such safety devices or appliances as would tend to mitigate or prevent the danger to plaintiff from contact therewith."

This instruction exacted of defendant a greater degree of care than is required by the act. Doubtless it is safe to say that the gears in question were a source of danger, just as all machinery, and, indeed, almost everything with which mankind is daily environed, is, in some degree, a potential source of danger. But the act does not require defendant to provide or maintain a place of employment that does not involve any element of danger whatever. All that is required is that the employer shall furnish a place of employment which is as free from danger to the life or safety of the employés "as the nature of the employment will reasonably permit." Subdivision 8, § 51. Nor does the act require defendant to provide or maintain over the gears "such safety devices or appliances as would tend to mitigate or prevent the danger to plaintiff from contact therewith," irrespective of any other element or consideration. All that the act requires of defendant is that it provide and maintain over the gears such safety devices and appliances as are "reasonably" adequate to render the place of employment safe, and such as provide a "practicable" method of mitigating or preventing danger, and to do what is "reasonably" necessary to protect the life and safety of its employés. Subdivision 9, §§ 51 and 52.

After an examination of the entire cause, including the evidence, we cannot say that this misdirection of the jury did not result in a miscarriage of justice. Indeed, it is more than probable that the instructions, considered in their entirety, influenced the jury to defendant's prejudice. In the main, the instructions are too abstract. Considered as a whole, they were calculated to impress upon the minds of the jurors that, irrespective of reasonableness or practicability, it was defendant's bounden duty to incase the gears in housing, and that its mere failure to do so constituted gross negligence or willful misconduct.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

Opinion of Supreme Court Denying Hearing.

PER CURIAM. In denying a hearing in this court we are not to be understood as intimating an opinion to the effect that there was sufficient evidence to support a conclusion of gross negligence or willful misconduct on the part of defendant, or on the question whether every failure to comply

with a requirement of the Industrial Accident Commission or the statute is necessarily gross negligence or willful misconduct. On these questions we reserve expression of opinion.

The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 2, is denied.

All concur except MELVIN, J., absent, and LAWLOR, J., who concurs in the denial of the hearing.

43 Cal. App. 703

O'BRIEN v. L. E. WHITE LUMBER CO.

(Civ. 2931.)

(District Court of Appeal, First District, Division 1, California. Oct. 21, 1919.)

1. MASTER AND SERVANT ⟸70(1)—CONSENT TO REDUCTION IN SALARY BINDING.

Where plaintiff, on being advised that his employer would have to put him on half time, replied that he was willing to help by going on half time during the financial stringency and thereafter accepted as his monthly salary one-half of prior salary, he could not recover full pay where times never got any better until the company sold out.

2. MASTER AND SERVANT ⟸72½ — EMPLOYÉ NOT ENTITLED TO COMPENSATION FOR USE OF AUTOMOBILE.

Use of automobile by employé in the business of his employer without any intention of making a charge, except to the extent that use might be compensated by the value of gasoline, oil, and tires furnished by employer, cannot be made the basis of a claim for compensation.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by C. F. O'Brien against the L. E. White Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

Metson, Drew & MacKenzie, of San Francisco, and H. L. Preston and Preston & Preston, all of Ukiah (R. G. Hudson, of San Francisco, of counsel), for appellant.

W. D. L. Held, of Ukiah, and J. W. Kingren, of Point Arena, for respondent.

RICHARDS, J. The plaintiff brought this action against the defendant to recover the sum of $2,189 as the reasonable value of work and labor and compensation for the use of his automobile in the service of the defendant, which sum the complaint alleges is the balance due upon an open and current account between the plaintiff and defendant. The latter answered, denying any liability whatever. A trial had before a jury resulted in a verdict in favor of the plaintiff, for $1,875, for which amount judgment was rendered. The defendant appeals, specifying various alleged errors of law and particularly that the verdict is unsupported by the evidence.

The facts giving rise to the dispute may be briefly summarized as follows: The plaintiff was an employé of the defendant, having sustained that relation to it for some 30 years. In the month of October, 1914, he was defendant's superintendent, his duties as such relating to that part of defendant's business carried on in and around Point Arena, and which consisted of lumbering, the manufacture and shipping of railroad ties, the conduct of a mercantile store, and a limited amount of simple farming, and received for his services a salary of $200 per month. On the 29th of that month the president of the company addressed to him a letter, the terms of which are as follows:

"Dear Frank: As ties and everything have gone to the 'bow-wows' we will have to put you for the present on half time, beginning November 1, 1914. I dislike to do this but cannot help it. As soon as things brighten you will be given full time again. Please advise me if this is satisfactory. We have made cuts in salaries all over and are letting off some men.

"Cut Emery's salary to $75.00; cut McCallum to $75.00. If they are not satisfied we will get somebody else who will be because we cannot continue as things are.

"Very truly yours, F. C. Drew."

Testifying to the receipt of this letter, O'Brien said:

"I think I answered on receipt of it, probably the same day or the next day. I cannot remember the exact wording of my letter, but as near as I can remember I told him I had shown this letter to McCallum and Emery and they had accepted the cut, and for myself I was willing to help my employer out by going on half time during the financial stringency. I then went ahead with my work the same as I had been."

Thereafter and until the defendant sold its business nearly two years later, the reduced salary was paid to the two employés named in the letter, and the plaintiff received and accepted as his monthly salary the sum of $100, performing, however, practically the same duties as before, and devoting the same amount of the time to the defendant's business. He had access at all times to his account carried on the books of the defendant, wherein he was credited monthly with the sum of $100 as salary and charged with merchandise purchased by him in the company's store, and with sums of money drawn by him, and was familiar with the contents of this account. From the letter set forth above O'Brien understood "that they (the company) were just short of funds, and that was about all that they could afford to pay at that time until times got better or they sold out, and

that I was to receive half pay until times got better."

He further testified:

"Q. Well, you understood, didn't you, Mr. O'Brien, that you was just to get a hundred dollars a month until times got better? A. Yes, sir.

"Q. For your full time, that's right, isn't it? A. I understood that he was to pay me a hundred dollars a month until times got better, and from the past dealings I had with him he would pay me the balance when times got better or he sold.

"Q. Well, and times never got any better until they sold out, as you say, never got any better, did they? A. No.

"Q. Got worse, didn't they? A. Yes, I think they did, if anything."

In April, 1916, the defendant sold its business and property. Shortly thereafter O'Brien wrote to the president of the company a letter in which he said:

"Having knowledge of your fairness in all my past dealings with you I am asking if you will not pay me full salary for the past 19 months" —meaning, of course, by full salary the sum of $200 per month instead of the $100 per month that had been paid to him.

O'Brien also called on and had some conversation with the president of the defendant in reference to this request, but it was finally refused, and on November 18, 1916, O'Brien rendered a bill to the defendant for the sum of $1,750, being the difference between $100 and $200 per month for the period of 17½ months. This bill the defendant declined to pay; and shortly thereafter O'Brien brought this action for the sum of $2,189, the difference between that amount and the $1,750 previously demanded, being claimed as compensation for the use in defendant's service of plaintiff's automobile. It appears that O'Brien had from a time dating back to about six months before the reduction of his salary owned an automobile which he occasionally used while attending to the business of the defendant, the latter furnishing to O'Brien without charge the gasoline, oil, and tires used in its operation. No previous demand for compensation for this service had ever been made on defendant by O'Brien, not even upon the occasion when in November, 1916, he rendered his bill for back salary.

[1, 2] We think it is quite clear from the foregoing statement of facts that O'Brien had no legal claim upon the defendant either for salary or for the use of his automobile. It is apparent that the letter of the president of the company of November 29, 1914, was understood both by the defendant and O'Brien to mean that from that time forward his salary was to be at the rate of $100 per month without other change in the conditions of his employment, and that he accepted the reduction of salary. There is some evidence in the record to the effect that the expression "half time" refers to the proportion of the day an employé works; but while it may be conceded that such is the literal meaning of the expression, and that it is frequently used in that sense, it is equally true that in the present case it was used by the defendant and understood by O'Brien as referring to the amount of his monthly salary. It is also abundantly clear from the evidence that the use of O'Brien's automobile in the defendant's business was made by O'Brien without any intention of making a charge therefor other than the value of the supplies which he drew from the defendant, and was therefore gratuitously given, except to the extent it might be compensated by the value of such supplies. Such use, therefore, cannot form a legal basis for the plaintiff's demand.

The claim of plaintiff for back pay was one that might well have been addressed to the generosity of the defendant as was done, but we can find no legal foundation for it in the evidence which, we are convinced, affords no basis for the verdict of the jury in the plaintiff's favor.

The judgment is therefore reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

43 Cal. App. 425

WILLIAMS v. REED. (Civ. 2923.)

(District Court of Appeal, Second District, Division 2, California. Oct. 3, 1919.)

1. APPEAL AND ERROR ⟸80(5), 82(1) — APPEALABILITY OF INTERLOCUTORY JUDGMENTS AND ORDERS.

A judgment in an action for an accounting after dissolution of a partnership, authorizing sale of property, *held* a final appealable judgment, making special orders following such judgment also appealable, in view of Code Civ. Proc. § 963.

2. APPEAL AND ERROR ⟸714(4)—CONSIDERATION OF STATEMENT OF ACCOUNT IN REVIEWING DEFAULT JUDGMENT.

On appeal from interlocutory judgment by default taken on the judgment roll alone, a statement of account filed by plaintiff with the judge before judgment was entered cannot be considered in determining whether judgment is authorized though the judgment is in exact accord with the statement.

3. APPEAL AND ERROR ⟸934(1)—PRESUMPTIONS DEFEATING JUDGMENT.

An appellate court will never indulge in presumptions to defeat a judgment.

4. APPEAL AND ERROR ⟸907(3) — PRESUMPTIONS AS TO SUFFICIENCY OF EVIDENCE TO SUPPORT JUDGMENT.

Where an appeal is taken on the judgment roll alone, the court on appeal will presume

that the evidence offered was sufficient to support the judgment.

5. APPEAL AND ERROR ⊂=1011(1)—REVIEW OF QUESTIONS OF FACT.

The conclusion of the trial court will not be disturbed on appeal, when based upon conflicting affidavits involving the decision of a question of fact.

6. APPEAL AND ERROR ⊂=1074(1)—HARMLESS ERROR IN FAILING TO FILE AFFIDAVITS OF MERITS TO SET ASIDE DEFAULT JUDGMENT.

Where an appeal from refusal to vacate default judgment is taken on the judgment roll alone, and it appears that the decision of the court was based on conflicting affidavits, it is immaterial whether or not there was an affidavit of merits complying with the legal requirements.

7. APPEAL AND ERROR ⊂=957(1)—DISCRETION AS TO OPENING DEFAULT JUDGMENT.

A motion under Code Civ. Proc. § 473, to open a default and vacate an interlocutory judgment, being addressed to the discretion of the court, its decision will not be disturbed on appeal, in the absence of a showing of abuse.

8. JUDGMENT ⊂=143(3) — OPENING DEFAULT FOR MISTAKE OR INADVERTENCE OF COURT.

Where summons and complaint have been served upon defendant, who has paid no attention thereto, his default cannot be opened on the ground of inadvertence, mistake, surprise or excusable neglect on the part of the court, within Code Civ. Proc. § 473; such section applying to the mistakes or inadvertence of a party and not of the court.

9. JUDGMENT ⊂=373—POWER OF COURT TO SET ASIDE JUDGMENT FOR FRAUD.

A court has inherent power to set aside a judgment for fraud upon the court, and such right is not derived from Code Civ. Proc. § 473.

10. JUDGMENT ⊂=376 — FRAUD AUTHORIZING VACATION.

That a judgment be irregularly obtained upon a fraudulent claim or false testimony does not authorize the court to set it aside as fraudulent.

11. APPEAL AND ERROR ⊂=821 — SEPARATE CONSIDERATION OF SEPARATE APPEALS PRESENTED BY ONE TRANSCRIPT.

Where a defendant has taken four separate appeals on different grounds, that all such appeals are in the same transcript, and that the record presents the entire transaction by means of which respondent sought to reap an unfair advantage, does not authorize the court to consider all of such steps as presented by the transcript, but each appeal must be separately considered without relation to the others.

12. JUDICIAL SALES ⊂=3—JUDGMENT OF SALE; NECESSITY OF DIRECTIONS TO SHERIFF AS TO SERVICE OF NOTICE.

An interlocutory judgment, in an action for an accounting after a partnership dissolution in ordering a sale of the property, need not direct the sheriff how and where to give the notice of sale provided by Code Civ. Proc. §692; and, where judgment is full, complete, and enforceable without that provision, it will be considered as surplusage.

13. JUDICIAL SALES ⊂=53—EFFECT OF FAILURE TO GIVE NOTICE REQUIRED.

Neglect of an officer making a sale directed by a judgment to give notice required by law does not affect the validity of the sale, but the party aggrieved has his remedy against the officer for any injury sustained by reason of such neglect.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Noah Williams, Jr., against George H. Reed, for an accounting after dissolution of a partnership. Judgment for plaintiff, and defendant appeals. Affirmed.

Valentine & Newby, G. H. P. Shaw, and John H. Foley, all of Los Angeles, for appellant.

Irwin, Smith & Rosecrans and Davis & Rush, all of Los Angeles, for respondent.

THOMAS, J. This is an action for an accounting after dissolution of a partnership. Plaintiff's complaint herein was filed December 31, 1915, and, with the summons thereafter issued, was served on defendant on January 11, 1916. Default of defendant was entered on January 24, 1916. On March 15, 1916, an interlocutory judgment was entered. Appellant contends that the judgment was based upon a statement theretofore filed in said cause by respondent. This contention is opposed by respondent, who argues that, there being no findings of fact, and none of the evidence adduced upon the hearing of the matter being preserved in either a bill of exceptions or a statement of the case, only matters shown by the judgment roll, consisting in this case only of the complaint and judgment, can be considered. On March 28, 1916, an amendment to said interlocutory judgment was made by the court, without any notice to appellant. Appellant appeals from this judgment and the amendment thereto. This will be referred to here as the first appeal.

On April 26, 1916, appellant duly served and filed his motion to open said default and set aside said interlocutory judgment, together with affidavits in support thereof, and his answer to the complaint. On April 28, 1916, and just prior to the hearing of said motion, respondent served on appellant counter affidavits. On April 29, 1916, this motion was denied. From the order denying this motion appellant has appealed. This is the second appeal.

May 2, 1916, respondent served upon appellant a notice of motion to confirm the sale of the property of the partnership made by the sheriff. Objections to the confirmation of said sale were filed by appellant, and,

after hearing evidence both for and against such confirmation, the court, on May 6, 1916, overruled said objections and entered an order confirming the sale. Appellant thereupon applied to the court to fix the amount of the bond to stay execution pending appeal, under sections 943, 945, Code of Civil Procedure. Said application was granted, the court fixing the bond at the sum of $10,000, and such appeal was then taken and the bond given according to law. We shall refer to this as the third appeal.

June 24, 1916, respondent served upon appellant's attorneys a notice of motion, supported by affidavits, to enter final judgment in said cause. Appellant did not appear at this hearing, and, on June 30, 1916, the court granted this motion and entered final judgment accordingly. This is the fourth appeal herein.

By proper stipulation the records in all four appeals have been, for the convenience of court and counsel, included in one transcript. The appeals will be considered in the order presented.

In reference to the first appeal, it may enlighten the matter some if it is understood that the complaint alleges that respondent had "paid into said copartnership business, both as capital and for the conduct and maintenance of said business, the sum of $31,309.42, and has received from and on account of said copartnership the sum of $6,554.83 in money," leaving a net investment, as we gather from the said allegation, of $24,854.60. The statement of the account submitted to the court by respondent, and upon which the interlocutory judgment was rendered, shows the amount invested by respondent to be the sum of $43,151.22, and the amount withdrawn the same as alleged in the complaint, to wit, $6,554.83, leaving his net investment at $36,596.39—or the sum of $11,741.79 more in favor of respondent, apparently, than the allegations of the complaint authorize. Respondent contends that there is no warrant in the record for such conclusion, as already hereinbefore set forth.

[1, 2] We are confronted at the outset with the query as to whether the interlocutory judgment, so called, entered herein is a "final judgment." If it is not, then no appeal from it is legally permissible, and the special orders, entered by the court subsequently to the entry thereof, and before the entry of the so-called judgment, are not appealable orders. Under the authority of Zappettini v. Buckles, 167 Cal. 27, 138 Pac. 696, we hold the judgment now under consideration to be a final judgment; that consequently an appeal lies therefrom, and hence that each of the special orders following said judgment was also appealable. Section 963, Code Civ. Proc.

The transcript discloses, as a part of appellant's bill of exceptions, the following:

"That before interlocutory judgment was entered, the plaintiff filed a statement with the judge of said court, at his request, and represented that it was a correct statement of the copartnership account between plaintiff and defendant, which said statement was and is in words and figures as follows, to wit."

Then follows a copy of the statement. An examination of the interlocutory judgment discloses the fact that it is in exact accord with the said "statement." How can one escape the conclusion, it is asked, that the judgment was based thereon?

[3] It is urged by respondent that on an appeal from a default judgment only matters shown by the judgment roll—consisting in this case only of the complaint and judgment—can be considered. If no other point were urged by appellant than the one now under consideration it might be conceded that respondent's position would be invulnerable. Tomlinson v. Ayres, 117 Cal. 568, 49 Pac. 717; Nevada Bank v. Dresbach, 63 Cal. 324. But other points are urged, and presently we shall see the force of appellant's position here. For our present purpose we call attention to the fact that, limited to the judgment roll, we are confronted with the query: "Was the interlocutory judgment warranted under the allegations of of the complaint?" If not, is it error apparent on the face of the judgment roll? It is true, as was said in Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. 549, that an appellate court will never indulge in presumptions to defeat a judgment. What have we in this case, outside of an assumption based upon no evidence to which our attention has been called, to support appellant's claim that the judgment here was based upon the "statement" referred to? "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue" (Section 580, Code Civ. Proc.), and "a default admits the material allegations of the complaint, and no more." Ellis v. Rademacher, 125 Cal. 556, 58 Pac. 178; Balfour, etc., v. Sawday, 133 Cal. 228, 65 Pac. 400.

It is urged by appellant that the complaint contains no allegation which justifies the following—appearing as a portion of the interlocutory judgment:

"That the sheriff of said county of Imperial, state of California, is hereby appointed to take possession of all said property belonging to said copartnership," etc.

We think this was not in excess of the relief demanded. In other words, the language just quoted simply specifies one of the steps in a series to be taken by the said sheriff in carrying out the terms of the judg-

ment and decree. It is true that in a "matter of purely special or exceptional recovery, * * * the defendant" is "entitled to look solely to the prayer in determining whether he will defend against the relief sought in the action," and that "if such special relief is not therein specifically demanded, it is to be deemed waived." Brooks v. Forington, 117 Cal. 219, 48 Pac. 1073. But the present is, we think, not such a case.

The difficulty with which we are here confronted is not as just indicated, but is centered around the query as to whether on the consideration of this appeal from the interlocutory judgment we can take cognizance of the statement referred to. If we can do so legally, then the contention of appellant may be sustained. Concededly, so far as this first appeal is concerned, it is one on the judgment roll alone. There are no findings. We have wholly failed to find anything "on the face of the record," or contained within the judgment roll, that justifies the assertion that the judgment was based on the said statement. This court cannot take notice of alleged facts which rest solely upon the mere assertion of counsel in their brief, even although where, as in this case, such counsel has the confidence of the court. Horton v. City of Los Angeles, 119 Cal. 602, 51 Pac. 956; Dore v. Southern Pacific Co., 163 Cal. 182, 124 Pac. 817.

[4] The record is entirely silent as to what evidence was introduced or considered at this hearing. This so-called "statement" is not authenticated in any bill of exceptions as such evidence. This court, for the present is mightily concerned, in passing upon the question, with what transpired at the trial; what evidence was there and then introduced, and what portion thereof the court accepted as true; but there is absolutely nothing legally before us that can be considered which will help in arriving at a conclusion as to whether or not the evidence offered was sufficient or insufficient to support the judgment. This being true, we are bound to presume that the evidence offered, whatever it was, was sufficient for such purpose. The following cases, out of a multitude that might be cited, will, we think, support our conclusion. Crane v. Brannan, 3 Cal. 192; Siebe v. Joshua, etc., 86 Cal. 390, 25 Pac. 14; Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092; Johnston v. Callahan, 146 Cal. 212, 79 Pac. 870. It follows, therefore, that the said "statement" cannot be considered on this phase of the case, and that the so-called "interlocutory judgment" must be affirmed.

Now, as to the second appeal—the appeal from the order denying defendant's motion to set aside his default. At the outset we gather from defendant's bill of exceptions, as disclosed in the transcript, that in support of the motion were read plaintiff's complaint herein, the statement heretofore referred to as having been filed by plaintiff before the entry of the said interlocutory judgment, the affidavits of this defendant, John H. Foley, and H. C. Chase. In opposing said motion, plaintiff served upon defendant's attorneys, filed and introduced in evidence the affidavit of himself and one Noah Williams, traversing in detail every averment of plaintiff's said affidavits. Thus, we see that a very sharp and decided conflict as to the questions presented was present.

[5, 6] Under these conditions, we are powerless to interfere with the conclusion of the trial court herein. The rule is, as it has been so frequently stated, both by the Supreme Court as well as by this court, that "in the consideration of an appeal from an order made upon affidavits, etc., involving the decision of a question of fact, this court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be taken as established." Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001; Hyde v. Boyle, 105 Cal. 102, 38 Pac. 643; Bernou v. Bernou, 15 Cal. App. 341, 114 Pac. 1000. Under these circumstances, it is immaterial whether or not there was an affidavit of merits which complied with the legal requirements.

[7] Appellant urges that a motion under section 473 of the Code of Civil Procedure to open a default and vacate an interlocutory judgment is addressed to the discretion of the court, and should be liberally exercised to promote justice and prevent fraud. In this we agree. And the presumption is that, in the absence of satisfactory showing to the contrary, the lower court so exercised its discretion. In this case our attention has not been called to anything which would show an abuse of discretion by the trial court, and since, as before stated, the deciding of the motion was a matter otherwise purely within the discretion of that court, we are now impotent to disturb the conclusion reached.

[8] In the present case, defendant was served with summons and complaint, but paid no attention thereto. Hence the contention cannot successfully be maintained, it would seem, that under these circumstances his default was because of inadvertence, mistake, surprise, or excusable neglect. Section 473, supra, reads:

> "The court may * * * relieve a party * * * from a judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect."

Obviously, it does not say that such relief may be granted because of the court's inadvertence, mistake, surprise, or excusable neglect. In the present case it seems to us

that the error, if any, was "judicial error" which would be remedied only by appeal from the judgment. Byrne v. Hoag, 116 Cal. 1, 47 Pac. 775; Grannis v. Superior Court, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23; Johnston v. Callahan, supra.

[9, 10] It may be observed, in passing, that a court has inherent power to set aside a judgment for fraud upon the court, and the right to so act or grant relief is not derived from section 473, supra, Stierlen v. Stierlen, 18 Cal. App. 609, 124 Pac. 226, 228. However, a fraud that will render such relief available does not include a judgment irregularly obtained upon a fraudulent claim or by false testimony. Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007. Indeed, a judgment may be unjust, inequitable, and erroneous without being fraudulent or subject to be set aside by a court of equity. Davis v. Chalfant, 81 Cal. 627, 22 Pac. 972. By the order appealed from, the court, among other things, found:

"That there was no inadvertence of the court in entering judgment, adjudging that the plaintiff had contributed to the copartnership of Williams & Reed the sum of $18,250.30 in excess of the amount contributed to said copartnership by the defendant; that there was no excusable neglect of the defendant in failing to answer said complaint; that there was no fraud of plaintiff in representing to the court that he had contributed the sum of $18,250.30 to the copartnership in excess of the amount contributed to said copartnership by the defendant."

For these reasons, therefore, it follows that the order denying defendant's motion to open the default and set aside the interlocutory judgment must be, and it is, affirmed.

This brings us to the consideration of the third appeal—the appeal from the order confirming the sale. Appellant urges five reasons for the reversal of this order, viz.: (1) Insufficiency of the notice of sale; (2) gross inadequacy of price; (3) the sale was without right of redemption; (4) because the shares of water stock were sold as personalty, separate and apart from the land, and the real estate was sold separate and apart from the water stock, which was appurtenant thereto; and (5) because the sale imposes upon appellant a gross injustice. These points were urged in the court below as objections to the confirmation of the sale.

[11] Here again we are confronted with a condition almost exactly like the one we have just discussed in connection with the second appeal—that of the matter being presented by both sides on affidavits and other evidence. The evidence being in sharp conflict, and the court having decided that question, we are bound thereby, unless, of course, the evidence before us on its face discloses its insufficiency to support the court's conclusion therein. Appellant urges in his closing brief that, because all these appeals are in the same transcript and the record presents the entire transaction by means of which the respondent seeks to reap an unfair advantage, this court should consider all of the steps taken to accomplish this result, as the transcript presents it, rather than consider each appeal separately without any relation to the others; but our attention is not called to any rule of procedure, or to any law—and this court knows of none—which would authorize it to comply with this suggestion. It may be suggested here, too, that we have looked—and in vain—for something that would authorize us so to do. With the exception of the one question of the insufficiency of the evidence, just suggested in connection with the third appeal, our discussion of the points involved on the second appeal apply here.

[12] Of the five points urged for a reversal of the order appealed from, we are of the opinion that only one need be considered, viz. the first, which relates to the insufficiency of the notice of sale given by the sheriff. Section 692 of the Code of Civil Procedure provides how notice of such sale should be given, while section 693 of the same Code specifies the penalty which attaches to an officer selling without giving the notice as prescribed. In neither of these sections is there any thing that requires the court, or any judge thereof, to direct the giving of the notice. For this reason we think that portion of the interlocutory judgment which directed the sheriff how and when to give the notice referred to unnecessary, and that it therefore may be treated as surplusage. The judgment is full, complete, and enforceable without such provision. Indeed, these two sections, taken together, "enjoin upon the sheriff both the duty and the responsibility of posting and publishing notices of sale as prescribed, which injunction necessarily implies the duty and the responsibility of selecting the places where the notices are to be posted, and the newspapers in which they are to be published, since they are not specified." Northern C. I. Trust Co. v. Cadman, 101 Cal. 200, 35 Pac. 557.

[13] It would seem that "the penalty and responsibility [of the sheriff] are inconsistent with the alleged authority of the plaintiff to dictate the places or papers in which notices are to be published, and consistent only with his duty and power to select the places and newspapers in which to publish the required notices." Northern C. I. Trust Co. v. Cadman, supra. "Questions * * * appertaining to the notice, as well as all others which merely relate to irregularities, are between the officer selling and the parties to the execution." Kelley v. Desmond, 63 Cal. 517. Therefore the portion directing the manner of posting and the places where the notice of sale was to be posted and pub-

lished may be disregarded. "Neglect of the officer making a sale to give the notice required by law did not affect the validity of such sale, but * * * the party aggrieved had his remedy against the officer for any injury sustained by reason of his neglect." Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Harvey v. Fisk, 9 Cal. 94.

It would seem useless to discuss this phase of the question further, for under both of the sections mentioned, as we construe them, and the cases decided by our own Supreme Court, as we understand them, it has been repeatedly held that such a sale as the one under discussion was a valid sale, even when the statute had not been complied with in any way—no notice of any kind having been given. Under these circumstances it becomes apparent that this court is without power or jurisdiction to set aside the order confirming the sale for this or any of the reasons urged as aforesaid.

It follows that the order of the trial court overruling the objections of defendant and confirming the sale must be, and it is affirmed.

From all that has been said hereinbefore, we think it follows that the fourth appeal, the appeal from the final judgment, is not well taken, and that for each of the reasons advanced—while assuming, without so holding, that the judgment in this case is "unjust, inequitable, erroneous or irregularly obtained by false testimony"—under the law, as we have shown above, we are powerless, in the face of the record before us, to do anything but affirm the judgment. The remedy under these circumstances is against the officer, unless, indeed, the defendant has slept upon his rights.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

181 Cal. 571

STONE et al. v. DAILY. (S. F. 8604, 8605.)

(Supreme Court of California. Nov. 24, 1919. Rehearing Denied Dec. 22, 1919.)

1. DEEDS ⟸60—DELIVERY ON CONDITION OF SURVIVORSHIP.

Where deed is handed to a third person instructed to keep it till death of either grantor or grantee, and then to deliver it to the survivor, the delivery is not effectual, not being absolute, but conditional upon grantee's surviving grantor.

2. DEEDS ⟸56(2)—DELIVERY BY HANDING TO GRANTEE DEPENDENT ON INTENT.

Handing of deed by grantor to grantee with statement, "Here is the deed, and now the property is yours," while a valid delivery, if done as a final act and with intent then and there irrevocably to vest in grantee the title, was not a valid delivery if such handing over of the deed was with intent that it should not constitute a final delivery, but that the deed should then be deposited with a bank to be held by it and given, on the death of grantor or grantee, to the survivor; the question being one of intent.

3. DEEDS ⟸194(1) — INFERENCE FROM LATER ACTS AGAINST HANDING OF DEED TO GRANTEE BEING DELIVERY.

From the fact that immediately after grantor handed the deed to grantee with statement, "Now the property is yours," the parties deposited it with a bank to deliver, on the death of one of them, to the survivor, a strong inference arises that such handing to the grantee was not intended as an absolute delivery.

4. DEEDS ⟸194(1)—INFERENCE AS TO DELIVERY FROM ACKNOWLEDGMENT OF RECEIPT.

No inference of absolute delivery of deed arises from fact that the grantee signed an acknowledgment of receipt indorsed on the deed by grantor's attorney, for there would have been no occasion for the indorsement if it had been intended that the deed should remain in the grantee's hands.

5. DEEDS ⟸60 — DELIVERY WITH REQUEST THAT DEED BE NOT RECORDED DURING GRANTOR'S LIFE CONDITIONAL DELIVERY.

If when grantor handed the deed to grantee, with request that it be not recorded during grantor's life, it was the belief of the parties that the deed would not be effective unless recorded, the delivery was not valid, though the parties intended it, at the moment, as the final consummation of the matter; the intention being that delivery should not be absolute, but, upon condition that the deed be not recorded until grantor's death, and in case grantee die first, that it be not recorded or effective at all.

6. DEEDS ⟸56(7) — EFFECT OF RETURN TO GRANTOR FOR SAFE-KEEPING AND KEEPING FROM RECORD.

Where grantor delivered deed to third person for grantees with intention to irrevocably vest title in grantees, the absolute and effective character of the delivery was not affected by the fact that the grantor, in accordance with

her previous intention, immediately retook possession of the deed and kept it, where she definitely understood and intended that her retaking and possession should be merely for purposes of safe-keeping and to insure that the deed be not recorded, and thereby to keep it from her husband's knowledge, and that she had no right or power to recall the instrument or change its character as an immediately effective instrument of conveyance.

In Bank.

Appeal from Superior Court, Lake County; Emmet Seawell, Judge.

Action by Cora L. A. G. Stone and others against George L. Daily. From the judgment both parties appeal. Reversed for new trial on issue of delivery of deed for plaintiffs.

Robert Duncan, of Ukiah, and Ben C. Jones, of Lakeport, for appellants.

C. M. Crawford, of Lakeport, for respondent.

OLNEY, J. This is a suit to quiet title to certain real property formerly belonging to one Mrs. Rebecca J. Daily, now deceased. The defendant is the surviving husband of Mrs. Daily, and claims the property by reason of a deed of gift by her to him which for convenience we may call the Daily deed. The plaintiff, Mrs. Cora L. A. G. Stone, is a daughter of Mrs. Daily by a former husband, and is her only child, and the other plaintiffs are Mrs. Stone's children, Mrs. Daily's grandchildren. The plaintiffs claim under a deed of gift by Mrs. Daily to them, made subsequent to the Daily deed, and which for convenience we may call the Stone deed. The plaintiffs contend that the Daily deed, while signed and acknowledged by Mrs. Daily, was not, in fact, delivered by her so as to become an effective instrument of conveyance. The defendant makes a similar contention with reference to the Stone deed, and the sole questions in the case are as to the respective deliveries of these two deeds. The trial court found that neither deed was delivered, with the result that neither the plaintiffs nor the defendant were the owners of the property, except as they might be the heirs at law of Mrs. Daily, and gave judgment to that effect. From this judgment both sides appeal.

There is little, if any, conflict in the evidence. The dispute turns on the conclusions, both of law and of fact, to be drawn from the facts which appear in evidence. The land in question is a ranch in Lake county, which Mrs. Daily owned at the time of her marriage to Daily, and upon which she lived at that time, and continued to live until her death. The deed to Daily was made in January, 1900, a year after the marriage. Daily was 47 years of age at the time, and his wife some years older. Daily had no property, and, according to his testimony, the deed to him was made because he felt and represented to his wife that he needed some protection in his old age in case his wife should die first. Mrs. Daily thereupon consulted her attorney about making a deed to Daily, reserving a life estate in herself. Her attorney advised her to make a will, saying that if she made a deed she could not take it back, but that if she made a will she could change it. She replied that she did not wish to change it, but wished to give it (presumably the property) to Daily. Her attorney told her to think the matter over, and a short time later she returned and requested him to prepare a deed. He thereupon prepared the deed in question here, purporting to convey the property to Mr. Daily, but reserving to Mrs. Daily the right to use and occupy it during her lifetime. Mr. Daily was called in, and the deed signed and acknowledged by Mrs. Daily. Upon this being done, Mrs. Daily, according to the testimony of the attorney and Daily himself, handed the deed to Daily, saying, "Here, George, is the deed, and now the property is yours." Mrs. Daily requested that the deed be not recorded, and Daily asked the attorney to keep it. The latter did not wish to do so and suggested leaving it with the bank. He prepared an envelope for the purpose of inclosing the deed and indorsed upon it the following:

"We George L. Daily and Rebecca J. Daily, husband and wife, do hereby deposit this sealed envelope and its contents in the Bank of Lake at Lakeport, Cal., and we and each of us do hereby instruct the said Bank of Lake to hold the said envelope and its contents so long as we may live; and during such time not to deliver the same to either of us nor to any other person, nor suffer the seals to be broken; upon the death of either of us to deliver the same to the survivor on demand. Dated January 11, 1900."

This indorsement was signed by both Mrs. Daily and her husband, and the envelope with the deed inclosed was thereupon deposited with the bank designated, where it remained until Mrs. Daily's death, when it was delivered to the defendant. As a part of the transaction, and apparently looking to the deposit of the deed with the bank, the attorney indorsed on the back of the deed, "Received January 11, 1899," and had Daily sign it. The year 1899 was written by mistake instead of 1900, but the difference is immaterial.

[1-3] Upon the foregoing facts it is plain that if the delivery which must be relied on in order to make the deed effective was the final delivery to the bank under the instructions indorsed upon the envelope, there was no such absolute delivery as must exist in order to give the instrument life. The instructions on the envelope determine the character

of the delivery, and make it one conditional upon Daily surviving his wife. If he did not survive her, the deed was to be returned to her, and the purpose for which this provision for a return to the grantor was made was very evidently that the deed should not take effect in the event of the grantee dying before the grantor. Exactly this situation was presented in Kenney v. Parks, 125 Cal. 146, 57 Pac. 772, and it was held that there was no effective delivery, the court saying:

"The all-controlling fact in this case, which defeats plaintiff's claim, is that when the deeds were made and delivered to the cashier of the bank the respective grantors did not absolutely part with all future dominion and control over them, but, upon the contrary, the actual intention and understanding of each grantor was that upon the death of the other the survivor should take back his own deed, and that no title should vest under it."

See, also, Canale v. Copello, 137 Cal. 22, 69 Pac. 698; Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304; Long v. Ryan, 166 Cal. 442, 137 Pac. 29.

Other than the depositing of the instrument with the bank under the instructions mentioned, there is no act appearing in evidence which could be said to constitute a valid delivery of the Daily deed, unless the act of Mrs. Daily in handing the deed to her husband in her lawyer's office just prior to its inclosure in the envelope and deposit with the bank, and saying to him: "Here, George, is the deed, and now the property is yours," constituted such a delivery. A valid delivery might have been so made. If there had been in fact a handing over of the deed by Mrs. Daily to her husband as a final act and with the intent then and there irrevocably to vest in him the title to the property, there was a valid delivery. That afterwards, no matter how shortly afterwards, the parties changed their minds and sought to make another arrangement, as evidenced by the deposit with the bank, would make no difference. The transfer of title would have occurred, would have been a fait accompli, and could be undone only by a retransfer by Daily. The question is, Did Mrs. Daily hand the deed to her husband as a final act, intended irrevocably to vest title in him, regardless of whether he survived her or not?

The trial court by its finding that there was no delivery of the deed impliedly found that this was not done, and in view of the fact that the only evidence upon the point was the testimony of two witnesses at to the details of an occurrence of many years before, the legal effect of which might be changed by a very slight and wholly unintentional inaccuracy of recollection, it would be difficult in any case for us to hold that the testimony was sufficient to overthrow the adverse finding. It is not necessary, however, to put the decision upon this ground. We can assume, what we believe to be the case, that the testimony in question is wholly truthful and at least fairly accurate, and yet it does not show, taken as a whole and in the light of all the circumstances, that the handing over of the deed by Mrs. Daily to Mr. Daily in the lawyer's office was a final and absolute delivery.

The question is one of intent; Was the delivery in the lawyer's office intended to be final and absolute? In the first place, while it is possible to have had such a delivery in spite of the fact that immediately thereafter a very different arrangement was made by depositing the deed with the bank, the inference to the contrary arising from such deposit is very strong. The handing over of the deed to Mr. Daily and the agreeing upon its deposit with the bank were both parts of one continuous occurrence, of which the deposit in the bank is the final result. Such deposit is certainly what the parties finally intended; in fact, Mr. Daily so testifies; and the inference is very strong that anything done previously was merely preliminary and not final. There is no evidence to overcome this inference. In addition is the strongly confirmatory circumstance that the deposit with the bank accords with what the parties intended to do when Mrs. Daily went to her lawyer's office, and the absolute delivery of the deed to Daily does not. Mr. Daily himself testifies that the understanding between him and his wife before the deed was drawn was that the property was to be his only in case his wife died before him. If the deposit with the bank were effective, it would have accomplished just this, while the absolute delivery of the deed to him would not.

[4] We attach no significance favorable to delivery to the indorsement upon the deed signed by Daily acknowledging its receipt, but rather the contrary. There would have been no occasion for the indorsement if the deed were to remain in Daily's hands. The only reason apparent for making it is that the deed was not to remain in his hands, i. e., it was contemplated when the indorsement was made that the deed was to be deposited with the bank as was actually done immediately afterwards. If this be so and the receipt were given as a part of the formality of Mrs. Daily handing over the deed to Daily, it would indicate that at that very time the parties were contemplating the deposit with the bank, and the handing over was but a preliminary to this final result.

[5] In the second place, Mr. Daily testifies that at the time the deed was handed to him Mrs. Daily requested that it be not recorded, and there is a strong inference at least from much that appears in evidence that Daily and his wife both had the not uncommon belief that the deed would not be effective unless

recorded. If this was so, then the delivery to Daily was not valid, even assuming that the parties intended it at the moment as the final consummation of the matter, and the deposit with the bank represents a subsequent change of mind. Under such circumstances the delivery, while final in one sense, was not intended as absolute, but was upon the condition that it was not to be recorded until Mrs. Daily's death, and, in case Daily died first, was not to be recorded or be effective at all. If this were the character of the delivery, and we believe that this is the utmost that can be said for it, it comes directly within the authority of Kenney v. Parks, 137 Cal. 527, 70 Pac. 556. The facts there were that a wife gave her husband a deed under the belief that it would not be valid until recorded and upon her husband's promise that he would not record it unless he survived her. He recorded it nevertheless, and in a suit by the wife to recover the property it was held that there had not been a valid delivery. As we have said, we think that the utmost that can be said for the handing over of the deed by Mrs. Daily to her husband is that it was upon the same understanding as that in Kenney v. Parks. Our conclusion, therefore, is that not merely is there evidence to justify the finding that the Daily deed was not delivered, but it would be very difficult to justify any finding to the contrary.

[6] The Stone deed was made in 1916, some 16 years after the Daily deed, and purported to convey all of the property of the grantor, both real and personal, to Mrs. Stone for life, with remainder over to her children, reserving, however, a life estate to Mrs. Daily. A year or so before Mrs. Daily had arranged to sell a portion of her ranch, and found herself unable to make title because of a declaration of homestead on the property by her husband. She was able to secure his relinquishment of the homestead only upon the payment of $4,000, and she then declared that she had given him all she intended to give, and purposed to give the rest of her property to her daughter and the latter's children. Shortly before executing the deed she called upon a Mr. Neal, a searcher of records and notary public, and who occasionally drew conveyances, and informed him that she wished to leave her property to her daughter and her children. Neal suggested that she make a will, but she rejected the suggestion, and requested him to draw a deed, whereby Mrs. Stone would have the property during her life and her children afterwards. She asked if she could place the deed in her box at the bank when executed to be delivered after her death. Neal informed her that she could not do this, and that the deed must be delivered when executed either to Mrs. Stone or to some one for her. She objected to this, as she was afraid the deed might be recorded, and she did not wish her husband to know of it. She finally concluded that she was willing to make delivery to one Fred Greene, the cashier of the local bank where she had her box, but wished after delivery to retake possession of the paper. Mr. Neal was uncertain as to whether this could be done, and said he would look into it. What occurred between them on her return is so material that we quote Mr. Neal's testimony verbatim:

"And in the meantime I did study the question up, and as a result of my study I told her that if she truly understood it in her own mind it was all right, that when she signed the deed and delivered it to a third person, that if she got possession of it again (the deed) that it was not her property in any respect—she could merely hold it for preservation and safe-keeping—not only that, but she didn't own the land, except what reservations she embodied in the deed, and that could be done."

Mrs. Daily thereupon told Neal to draw the deed, which he did. On her return to his office for the purpose of executing it and immediately prior to its execution, Neal told her that the deed meant an absolute conveyance, and left nothing in herself except what was reserved by it, and repeated what he had previously told her. She then signed the deed, and Neal acknowledged its execution, and he instructed her as to the formality of delivering the instrument and as to what she should say. The two then went to the bank, where Mrs. Daily handed the deed to Mr. Greene, saying in accordance with her instructions from Neal that she delivered it to him for Mrs. Stone and her children, and wished him to give it to Mrs. Stone after her, Mrs. Daily's, death. Mr. Greene received the deed, looked it over briefly, and Mrs. Daily then requested it back to put in her box. It was given her, and placed in the box inclosed in an envelope indorsed: "To be handed to Fred A. Greene on my death. [Signed] Rebecca H. Daily." The box was one which remained in the bank, but was Mrs. Daily's private box, to which she alone had the key. The deed remained in the box until Mrs. Daily's death.

There is no dispute as to the above facts. The position of defendant's counsel, and apparently from the record the view of the trial judge, are that they do not amount to a valid delivery because of the final retention of possession of the instrument by Mrs. Daily, and in this connection it should be noted that such possession was in accord with the intention of Mrs. Daily before and at the time of her handing the deed to Greene. If her retaking the deed had been purely an afterthought, there could be no reasonable question as to the validity of the delivery, but it was not an afterthought, and the matter must be judged with this fact in mind. Neverthe-

less, we think there was unmistakably a final and absolute delivery. It is a question purely of Mrs. Daily's intent.

The final result of the transaction was, of course, the deposit of the deed in her private box in an envelope bearing an indorsement that it was to be handed to Mr. Greene upon her death. If there were nothing more, the conclusion would be irresistible that the instrument was not to become effective in any way until her death, and that there was no real delivery. Furthermore, the inference would be strong that anything which occurred previously in the course of the transaction which had this as its final result was but preliminary and tentative and not final, and the transaction would have to be judged by the final result. In this respect the situation is the same as that presented by the deposit with the bank of the Daily deed. But, as was said in the discussion respecting the Daily deed, it would be possible that there was a previous and absolute delivery intended to be then and there final and vest in the grantees the rights purported to be conveyed to them. In the case of the Daily deed there was no evidence sufficient to show this and overcome the inference to the contrary. But in the case of the Stone deed, the evidence leaves no doubt as to the fact. Mrs. Daily had been told by her adviser most explicitly and carefully that if the deed were to be effective it had to be delivered to Greene as a final and absolute conveyance then and there vesting the property in the grantees subject only to such reservations as the deed itself might make. She proceeded upon this understanding and with the intention of accomplishing it. There can be no doubt as to her intent. This was not controverted at the trial, and the record indicates plainly that the finding of nondelivery by the trial court was not predicated upon any doubt as to the necessary intent on Mrs. Daily's part in making the delivery to Greene, but upon her retaking possession of the deed from him and retaining such possession thereafter, and the conclusion of the trial judge as to the legal effect of her so doing, regardless of the fact that her intent was clear.

But the retaking of possession and subsequent retention of the instrument by Mrs. Daily is not conclusive even though it appear that it was not an afterthought, but contemplated by her from the beginning. It is a very strong circumstance, indicating that she did not intend such delivery as would put the deed beyond her control and power of recall, and would ordinarily be controlling. But the final question always is, What was the intent with which the formality of a delivery was gone through with? And if it appear indubitably that it was gone through with for the purpose of conveying the property then and there, and that the grantor desired thereafter to retain, and did retain, the instrument, not that she might control or suspend its taking effect, but for the purposes of custody and safe-keeping merely, as, for instance, to insure its not being recorded because she did not wish her husband to know of it, any contrary inference as to her intent arising from her continued possession of the instrument is of necessity overcome, and the fact of such continued possession becomes immaterial. Such is the situation here. Mrs. Daily had been told in almost so many words that she could not make a valid conveyance to her daughter and grandchildren and retain possession of the deed unless she were willing to vest the property in them at the time and to have possession of the deed thereafter merely for purposes of safe-keeping. She was willing to do this, and wished to do it, and proceeded with the matter with the intent of doing it.

The case, then, is one where the formality of a delivery is gone through with, with the intent of making an immediately effective conveyance, but after delivery the grantor retains possession of the deed for purposes of safe-keeping. That such a delivery is valid and is not affected by the fact that the instrument subsequently remains in the possession of the grantor is well established. Chancellor Kent, in his Commentaries (vol. 4, pp. 455 and 456), says:

"So, if a deed be duly delivered in the first instance, it will operate though the grantee suffer it to remain in the custody of the grantor. If both parties be present, and the usual formalities of execution take place, and the contract is to all appearance consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor."

In Devlin on Deeds (3d Ed.) § 278a, it is said:

"Where a deed has been duly delivered, the fact that the grantee allows it to remain in the custody of the grantor will not invalidate it. A deed may be returned, after delivery to the grantor, so as to insure that it would not be placed on record without affecting the delivery."

See, also, Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803; King v. Fragley, 19 Cal. App. 735, 127 Pac. 813; Doe v. Knight, 5 Barn. & Cres. 671; Souverbye v. Arden, 1 John. Ch. (N. Y.) 240; Scrugham v. Wood, 15 Wend. (N. Y.) 545, 30 Am. Dec. 75; Rodemeier v. Brown, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176; Munro v. Bowles, 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865; Riegel v. Riegel, 243 Ill. 626, 90 N. E. 1108; Ruckman v. Ruckman, 32 N. J. Eq. 259; Tarbox v. Grant, 56 N. J. Eq. 199, 39 Atl. 378; Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147. In a number of these cases the facts are very similar to those of the case at bar.

Counsel for defendant refer to the language

of a number of cases such as Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, Kenney v. Parks, 125 Cal. 146, 57 Pac. 772, Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304, Moore v. Trott, 162 Cal. 268, 122 Pac. 462, and Long v. Ryan, 166 Cal. 442, 137 Pac. 29, to the effect that—

"The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that when it is placed in the hands of the third party it has passed beyond the control of the grantor for all time."

But an examination of these cases shows at once that when they speak of the necessity of the control of the instrument passing from the grantor for all time, they mean control in the sense of power to recall it, control over it as an effective instrument of conveyance, not control in the sense of having the mere physical custody of it. This is strikingly shown by Moore v. Trott, supra, where, on page 274 of the report (162 Cal.), on page 465 of 122 Pac., it is said:

"It has long, if not always, been the rule that the delivery of an instrument is a question of intent, and that to a complete delivery no precise form of words and no particular character of act is necessary. The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another."

And yet, on the next page, the following quotation from Ruckman v. Ruckman, supra, is made with approval:

"Whenever it appears that the contract or arrangement between the parties has been so far executed or completed that they must have understood that the grantor had divested himself of title, and that the grantee was invested with it, delivery will be considered complete, though the instrument itself still remains in the hands of the grantor."

To sum the discussion up, it appears as to the Stone deed that it was formally delivered by the grantor to a third person for the grantees; that it was the intention of the grantor in making such delivery that the instrument should be immediately effective and vest in the grantees irrevocably the interests purported to be conveyed to them, and that while the grantor intended throughout the transaction to retake possession of the instrument and herself keep it, and this was done, yet she definitely understood and intended that such possession should be merely for purposes of safe-keeping and to insure that the instrument be not recorded and thereby come to the knowledge of her husband, and that she had no right or power to recall the instrument or change its character as an immediately effective instrument of conveyance. It follows, since the full intent to make an absolute and unqualified delivery was present, that such delivery was made, and the finding that the deed was not delivered cannot be sustained.

Judgment reversed for a new trial upon the issue as to the delivery or nondelivery of the Stone deed, the finding as to the nondelivery of the Daily deed to stand.

We concur: SHAW, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.

ANGELLOTTI, C. J. (concurring). I am not satisfied that a finding of the trial court to the effect that the Daily deed was delivered could properly be held to be without sufficient support in the evidence. The finding actually made, however, was that such deed was not delivered, and, as shown in the opinion, this finding has ample support in the evidence. In all respects other that the intimation that a finding to the contrary could not have been sustained by an appellate court, I concur in the opinion and in the judgment.

I concur: WILBUR, J.

(181 Cal. 569)

STONE et al. v. GREENE et al. (DAILY, Intervener). (S. F. 8507.)

(Supreme Court of California. Nov. 24, 1919. Rehearing Denied Dec. 22, 1919.)

GIFTS ⟸18(1)—WRITING WITHOUT DELIVERY OF ARTICLE.

A deed of gift of personalty without delivery of the article is enough to effectuate the gift.

In Bank.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by Cora L. A. G. Stone and others against Fred A. Greene and another, George L. Daily, administrator of Rebecca J. Daily, deceased, intervening. Judgment for plaintiffs, and defendants and intervener appeal. Affirmed.

C. M. Crawford, of Lakeport, for appellants.

Robert Duncan, of Ukiah, for respondents.

OLNEY, J. This is a companion case to Stone v. Daily (S. F. Nos. 8604 and 8605) 185 Pac. 665, this day decided, and the material facts in both cases are there quite fully stated and need not be repeated. The deed designated in the opinion referred to as the Stone deed purported to convey to Mrs. Stone and her children all of her mother's, Mrs. Daily's, estate, both real and personal. Upon Mrs. Daily's death Fred A. Greene and the

Bank of Lake, in whose custody was Mrs. Daily's private box containing the deed and also certain money and other personal property, refused to turn the box with its contents over to Mrs. Stone. Mrs. Stone and her children thereupon brought two suits, one against Mrs. Daily's surviving husband to quiet title to the real property involved, and the other against Greene and the bank to recover the contents of the box. In the latter case, Mr. Daily intervened as a defendant and claimed the personal property involved as administrator of Mrs. Daily's estate.

The plaintiff's right to recover depended in both cases upon the validity of the Stone deed, and in both cases it was claimed by the defendants that the deed was invalid because not delivered. The trial in the suit involving the real property resulted in a finding that the deed had not been delivered and a consequent judgment against the plaintiffs. This judgment was appealed from, and it was this appeal which has just been determined. It was held that the finding that the deed had not been delivered was contrary to the evidence, and the judgment was reversed.

In the suit for recovery of the personal property it was found, contrary to the result in the other case, that the deed had been delivered, and judgment was given for the plaintiffs. The defendants appealed, and it is this appeal which is now under consideration. The sole reason of importance urged for a reversal is that the finding of delivery is not supported by the evidence. The evidence in the present case is practically identical with that in the other as to the question of delivery or nondelivery of the Stone deed, with the exception that in this case it was expressly admitted by defendants' counsel at the trial that Mrs. Daily, when she handed the deed to Greene, intended a complete and effective delivery and a present conveyance of the property, subject only to the reservation contained in the instrument. But regardless of this admission, the evidence clearly shows this to have been the fact. This is fully discussed in the other case, and that discussion need not be repeated here. Such intent determined the character of the delivery, and sustains the finding that the deed was delivered.

Defendants' counsel also urge that the deed, even if delivered, was not effective to transfer the personal property because the gift intended to be made by the deed was not accompanied or followed by a transfer of possession of the property. This contention is completely answered by Burkett v. Doty, 176 Cal. 89, 167 Pac. 518.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; MELVIN, J.; LAWLOR, J.; WILBUR, J.

43 Cal. App. 601

SPENCER et al. v. DEEMS. (Civ. 2978.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1919.)

1. EXCHANGE OF PROPERTY ⟸5—OFFER TO RESTORE ON RESCISSION.

In view of Civ. Code, § 1691, subd. 2, as to restoration or offer to restore by one desiring to rescind contract, claim by defendant, in action for rescission for fraud of exchange of plaintiff's home for the lease of an apartment house, that plaintiff made no tender of the amount of his arrears in rent is unavailing, defendant having made no objection to the form or particulars of the tender, but having absolutely refused to acquiesce in the rescission, besides having known at the time of the exchange, that the apartment house would give no profits for payment of rents, and that plaintiff had no funds.

2. CONTRACTS ⟸265—PLACING IN STATU QUO ON RESCISSION.

Rescission of an executed contract for fraud will not be denied because plaintiff cannot place defendant in statu quo, if equity can still be done between the parties.

3. EXCHANGE OF PROPERTY ⟸5—RESCISSION WITHOUT CONSENT OF THIRD PERSON.

Exchange of plaintiff's home for defendant's lease of an apartment house, accomplished by defendant having his lease canceled and another lease executed to plaintiff, can be rescinded without consent of the lessor; the lease containing no provision against assignment.

4. APPEAL AND ERROR ⟸1071(5) — FINDINGS OUTSIDE ISSUES HARMLESS.

That the court made findings outside the issues is immaterial; the judgment being amply supported by the unobjectionable findings.

5. CONTRACTS ⟸94(1)—RESCISSION FOR SINGLE MATERIAL MISSTATEMENT.

A single material misstatement, knowingly made with intent to influence another to enter into a contract, being believed and relied on by the other, is as much ground for rescission of the contract as if it had been accompanied by a multitude of other false representations.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by James F. Spencer and others against Stephen F. Deems. From an adverse judgment, defendant appeals. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellant.

Percy Hight, of Long Beach, for respondents.

BARDIN, Judge pro tem. The appeal is from the judgment. The record before us for review consists of the judgment roll alone. Plaintiffs had judgment for the cancellation of a deed and a promissory note, together with other equitable relief, upon the alleged fraud of the defendant.

The facts, as they appear in the pleadings and findings, may be stated to be substantially as follows: In November, 1914, James F. Spencer, and his wife, Minnie, were the owners of a residence lot and dwelling thereon situate in the city of Pomona, Cal., of the value of $4,300, which property was subject to a mortgage in the sum of $300. The defendant, at the same time, was in the possession of and conducting an apartment house at Long Beach, Cal., held by him as lessee under a lease running for the term of five years from March 22, 1913, at the rental of $400 per month. The furniture in the apartment house belonged to the defendant, but had been mortgaged to defendant's lessor to secure the payment of rent for the full term of defendant's lease.

Under the condition of ownership stated, an exchange of properties of the respective parties was made, whereby a deed to the Pomona property passed to the defendant, subject to the outstanding mortgage and in addition thereto all of the plaintiffs executed and delivered to defendant their promissory note in the sum of $800 secured to be paid by a second mortgage on the furniture in the apartment house. The defendant caused his landlord to cancel defendant's lease referred to and to execute a new lease of the apartment house for the unexpired term of the lease held by defendant, wherein the plaintiffs Spencer were named as lessees, and which provided for the payment of the same monthly rent that the defendant had been obligated to pay, and which rent was secured to be paid by a first mortgage on the furniture in the apartment house, which furniture had been transferred as a part of the same transaction, to the plaintiffs Spencer.

In the course of a few weeks it was discovered that the plaintiffs Spencer had been induced to part with their property by reason of the fraudulent representations, inducements, and concealments of the defendant and under such circumstances as would warrant the exercise of every power a court of equity possesses to restore to the parties against whom the wrong had been committed, the property that had been taken from them, and to place them as near as may be in statu quo.

The plaintiffs Spencer made timely and expeditious offer of rescission upon discovery of the fraud that had been perpetrated against them, accompanying such offer with a tender of everything of value they had received from defendant.

Among the representations made by the defendant which the court found to be fraudulent and untrue, and made for the purpose of deceiving the plaintiffs and of inducing them to make the exchange of properties and enter into the obligations referred to, was that the monthly income from the apartment house for more than one year immediately preceding the time of the exchange of properties had each month exceeded the sum of $400, and that the defendant had realized a clear profit averaging $185 per month for the preceding year. The defendant knew before the exchange was consummated that he was taking in exchange for his unprofitable apartment house business all the property the plaintiffs Spencer possessed, and that they would be compelled to meet the accruing rents solely from moneys to be derived from the apartment house business they were embarking upon.

At the time the offer of rescission was made, these plaintiffs were in arrears in rent in the sum of $507, which had accrued after the inception of their tenancy and unpaid through no fault of any of the plaintiffs, but solely by reason of the insufficiency of the income from the apartments to produce the necessary funds for the payment of the monthly rent.

[1] The defendant makes the point that the judgment of rescission is not supported by the findings, for the reason that there was not tendered to him this $507 deficit in rent. But such claim is without merit. Not only did the defendant fail to make any objection as to the form or the particulars of the tender, "but absolutely refused to acquiesce in the rescinding of said transaction." Section 1691, Civ. Code, subd. 2. Furthermore, defendant knew, at the time of the exchange of properties, that the apartment house not only would not realize any profit to the Spencers, but on the contrary would be in their hands, as it had been in his, a losing venture. Defendant knew, too, that the old people whom he had so grossly imposed upon would be compelled to pay the monthly rent out of the rentals they were to receive. Had the defendant remained in possession he would have suffered a loss in all probability at least equal to the deficit recited.

[2] While it is true that a court of equity will not, as a general rule, decree a rescission of an executed contract unless the party desirous of effecting such rescission is able to place the defendant in statu quo, yet this rule is not without exception. And where such decree is sought upon the ground of fraud, and, because of peculiar complications or circumstances it would be manifestly unjust and inequitable or impossible to apply such a rule, the court in the exercise of its broad powers of a court of equity, and not having any special solicitude for the party enmeshed in the web he has spun for others, may decree rescission, notwithstanding such party may not be placed exactly in statu quo. 9 C. J. 1210; Richards v. Farmers, etc., Bank, 7 Cal. App. 387, 94 Pac. 393. In the case of Green v. Duvergey, 146 Cal. 379, 389, 80 Pac. 234, 238, the court said:

"It is not an invariable rule that the rescission of a contract obtained by fraud will be

denied merely upon the ground that the parties cannot be placed in statu quo. If equity can still be done between the parties, courts will grant relief to the defrauded party."

[3] There is no merit in the contention that the respondents could not rescind the contract of exchange of properties without the consent of the owner of the apartment house, which consent is not shown in the findings. There is no showing that the lease contained a covenant against assignment. The finding of the court upon this subject is: "And the plaintiff did then and there tender and offer to the defendant, the said lease, together with an assignment thereof, executed by the plaintiffs, James F. Spencer and Minnie Spencer." The assignment of the lease would operate to restore the defendant to the same position, with regard to the use of the premises, he had previously occupied.

[4] Assuming that it is true as claimed by appellant that the court went outside the issues in its findings relative to the execution of the lease referred to from the owner of the apartment house, yet such is of no grave moment as far as the integrity of the resultant judgment is concerned, for we find the judgment to be amply supported by other findings against which such criticism may not be made.

[5] As stated in Davis v. Butler, 154 Cal. 623, 626, 98 Pac. 1047, 1048:

"A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations."

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 498)

NANNIZZI et al. v. CAPRILE et al.

(Civ. 2886.)

(District Court of Appeal, First District, Division 2, California. Oct. 10, 1919. Hearing Denied by Supreme Court Dec. 8, 1919.)

1. CORPORATIONS ⟸30(6) — SUBSCRIPTION FOR CORPORATE STOCK PRIOR TO PERMIT TO INCORPORATE INVALID.

Under the Investment Companies Act prior to the permit of commissioner of corporations, no valid subscription for corporate stock can be made, so that, regardless of incorporators' attempt to subscribe for stock in excess of the original qualifying shares, there could be no subscription for corporate stock prior to the commissioner's permit.

2. CORPORATIONS ⟸30(6) — AGREEMENT BY PARTNERSHIPS TO INCORPORATE VALID PROMOTERS' AGREEMENT.

An agreement between various partnerships to merge their companies in a corporation, the members to receive corporate stock in proportion to their interests, was valid as a promoters' agreement, binding upon them, and good as an offer to the corporation, to become binding on the corporation upon its lawful acceptance of benefits.

3. CONTRACTS ⟸309(1)—CORPORATIONS ⟸30(6)—VALIDITY OF CONTRACT FOR DISSOLUTION OF PARTNERSHIPS AND FOR FORMING CORPORATION.

An agreement of partners for dissolution, and for the transmutation and distribution of assets, in contemplation of formation of a corporation, was valid, notwithstanding the corporation commissioner might never issue the permit and corporation might never be formed; for a contract, valid in its inception, may become voidable or impossible of performance by a subsequent contingency, yet, if the contingency is one that may happen, the parties are bound until it can be determined that it cannot be enforced.

4. PARTNERSHIP ⟸311(3) — AGREEMENT FOR DISSOLUTION AND FORMING OF CORPORATION; DECREE ENFORCING CONTRACT.

Partners cannot have the benefit of agreement for dissolution and formation of a corporation and evade those contract provisions by which their respective rights in the partnership assets are determined.

5. APPEAL AND ERROR ⟸1169(8)—REVERSAL WILL NOT BE DECREED BECAUSE CONTINGENCY MAY MAKE JUDGMENT UNENFORCEABLE.

Judgment holding valid a contract for dissolution of partnership and formation of a corporation and determining proportion of stock respective partners should receive, although informal and rendered before permit to form corporation had been granted by commissioner of corporations, will not be reversed because refusal of permit may render judgment unenforceable as to allotment of stock.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Suit by Dante Nannizzi and others against Natale Caprile and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

James M. Thomas, of San Francisco, for appellants.

I. F. Chapman, of San Francisco, for respondents.

BRITTAIN, J. In a suit for partnership accounting, dissolution, sale, and distribution of the assets, it was adjudged there had been full accounting and dissolution. The appellants are satisfied with that portion of the judgment. Upon findings, supported by evidence, that the plaintiff partners had agreed

with the defendant partners that the partnership should be dissolved and its property merged with that of other partnerships engaged in the same line of business, in a consolidation under a corporation to be formed, and that the partners should receive respectively stock in the corporation at par, equivalent to their respective interests in the partnership, the members of each partnership as a group to receive such stock of equivalent value to the respective partnership contributions of property to the corporation assets, and the further finding that application had been made in good faith to the commissioner of corporations for permission to issue the stock in accordance with this agreement, though the permit had not been granted at the time of the judgment, the court determined that, if the permit should be granted, the appellants would be entitled to their respective portions of the corporation stock. This part of the judgment only is attacked by the plaintiffs on this appeal.

[1, 2] On behalf of the appellants it is argued that, under the Investment Companies Act (St. 1913, p. 715), prior to the permit from the commissioner of corporations no valid subscription for the corporate stock can be made. This is true. It follows that, regardless of any attempt on the part of the incorporators to subscribe for stock in excess of the original qualifying shares, there was no subscription for stock of the corporation. The agreement between the various partnerships was a valid one. It was a promoters' agreement, binding upon them and good as an offer to the corporation, to become binding on the corporation upon its lawful acceptance of its benefits. Scadden Flat G. M. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440; Garretson v. Pacific, etc., Co., 146 Cal. 184, 79 Pac. 838.

[3] The agreement of the partners for dissolution and for the transmutation and distribution of its assets was also valid. The fact that the commissioner of corporations might never grant his permission to the issuance of the corporate stock had no more effect upon the validity of the partnership agreement for dissolution than would the subsequent failure of the other promoters to organize the corporation. A contract valid in its inception may become voidable or impossible of performance by the failure of a subsequent contingency; but, if the contingency is one which may happen, the parties are bound by their contract until it can be determined it cannot be enforced. There are many familiar applications of this rule, one of the most common being where parties contract for a sale of real estate, contingent upon an attorney's approval of title. Such a contract is enforceable by either party until it is shown that the attorney will not or cannot approve title. Neither party may evade the obligations of the contract merely by showing that the attorney may refuse to approve the title. No showing of impossibility is made in this case, nor is there any showing which would have justified the court in this suit in disregarding the agreement of the partners concerning what they should have in lieu of their respective partnership interests.

[4, 5] The portion of the judgment appealed from simply determines that the plaintiffs shall receive stock in the corporation if the commissioner of corporations issues his permit. This was exactly what the appellants agreed they should have. It is contended that the judgment is informal in that it fails to determine what the appellants shall have in the event the commissioner of corporations shall refuse to issue the permit. There is no question in regard to the validity of the organization of the corporation. It cannot be presumed that the incorporators have been guilty of an overvaluation of the partnership assets transferred to the corporation, or of a violation of the law in any other respect. If they have obeyed the law, they will be entitled to the permit from the commissioner of corporations, and in that event the appellants will receive under the judgment what they agreed with their partners they should receive. Under these circumstances, the judgment, while informal, may be sustained upon either of two theories: First, that in a suit to decree the dissolution of a partnership, in the absence of its inherent invalidity or facts which might enable one of the contracting partners to rescind it, the court cannot disregard the agreement for dissolution, but by its decree must enforce it; and, secondly, that in such a suit none of the partners can have the benefit of the agreement for dissolution and evade those of its provisions by which their respective rights in the partnership assets are determined. If this decree in a suit in equity shall become impossible of enforcement by reason of the refusal of the commissioner of corporations to permit the carrying into effect the original agreement of the parties, there is no reason why their respective rights as they then exist may not be determined; but, until it shall be made to appear that the appellants have been injured by the judgment from which the appeal is taken, it will not be reversed. On this appeal, since the judgment simply bound them to their prior agreement, in contemplation of law, they cannot be aggrieved by it.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

(43 Cal. App. 662)

SIMPSON v. MALTER. (Civ. 2907.)

(District Court of Appeal, First District, Division 2, California. Oct. 20, 1919. Hearing Denied by Supreme Court Dec. 18, 1919.)

1. APPEAL AND ERROR ⟸1002—FINDINGS ON CONFLICTING EVIDENCE NOT REVIEWABLE.

The appellate court may not review conflicting evidence.

2. TRIAL ⟸404(1)—FINDING IMPLYING VALID AGREEMENT TO PURCHASE.

In a wine broker's action for commission on a sale, a finding that the purchaser procured agreed to accept the wine and to make payment therefor implied a valid and binding agreement, eliminating any question of limitation on the authority of the agent for the purchaser.

3. APPEAL AND ERROR ⟸931(3) — PRESUMPTION OF FINDINGS BY INFERENCE.

Whenever, from the facts found by the trial court, other facts may be inferred which will support the judgment, the inference will be deemed to have been made by the trial court, and on an appeal from the judgment an appellate court will not draw from the facts any inference contrary to that which may have been drawn by the trial court for the purpose of rendering its judgment.

4. CORPORATIONS ⟸400—EFFECT OF LIMITATION ON GENERAL AUTHORITY OF MANAGER.

The general limitation in the resolution of the directors of a company that the powers of its general manager should be exercised under the direction of its president is not to be construed to mean that the president's sanction to every detail of every transaction, such as purchase of wine made in the course of the company's business, is a condition precedent to the manager's authority to contract.

5. APPEAL AND ERROR ⟸931(1) — PRESUMPTION IN FAVOR OF TRIAL COURT AS TO EVIDENCE.

The Appellate Court must indulge every presumption with regard to the evidence which will support the findings of the trial court on which the judgment is based.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by W. J. Simpson against George H. Malter. Judgment for plaintiff, and defendant appeals. Affirmed.

Short & Sutherland, of Fresno, for appellant.

Lewis H. Smith and Iener W. Nielsen, both of Fresno, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action to recover for services in securing a purchaser for certain wines owned by the defendant under an alleged contract with the defendant whereby he was to receive as his remuneration for such services any amount in excess of 30 cents per gallon for which he should sell said wine. With relation to the contract between the plaintiff and the defendant, and its fulfillment, the court found: That the parties had entered into a contract the terms of which were as alleged by the plaintiff, and that thereafter, while said contract was in full force and effect, the plaintiff obtained a purchaser who was ready, able, and willing to purchase 60,000 gallons of wine at a price of 35 cents per gallon and upon the terms contained in the contract between the plaintiff and defendant, and said plaintiff immediately notified said defendant thereof and of the name of said purchaser and brought said defendant and said purchaser together at the city of Fresno, and that the defendant thereupon agreed to make said sale and deliver said wine on said terms to said purchaser; that said purchaser agreed to accept said wine and to pay for the same in cash, but that said defendant, thereafter, and without any cause or reason, and without any fault on the part of the plaintiff, or upon the part of the purchaser, declined to consummate the sale and declined to make delivery.

[1] In accordance with the rule recognized by the appellant, we may not review the conflicting evidence on the question of the making of the contract, its terms, etc.; nor the finding that the defendant agreed with the purchaser for the sale of his wine in accordance with the terms of this contract made by said defendant with the plaintiff. For the same reason we may not review the evidence upon which is based the further finding of the court that the time which elapsed between the making of the agreement and the performance of the same by the plaintiff was not an unreasonable time. The last finding is based upon logical deductions from numerous matters which appear in evidence, such as the conduct of the parties during the interval, the apparent understanding of the parties as evidenced by the negotiations when the purchaser was produced, etc. After a reading of the evidence, we think this finding also may not be disturbed by us.

This leaves for our consideration the further objection made by the appellant that the plaintiff is not entitled to recover because Mr. Baker, purporting to act for the Jesse Moore Hunt Company, the purchaser, was without authority to consummate the sale in accordance with the terms of the contract between the plaintiff and the defendant, and that the defendant could not have enforced said agreement against the said Jesse Moore Hunt Company, for whom Baker was acting if he had so desired, and therefore he was not liable to the plaintiff for commissions. This contention arises under the following facts in evidence: It is conceded that Mr. Baker was the general manager of the Jesse Moore Hunt Company. He testified that he

had bought and sold large quantities of wine for said company while acting as its manager. Appellant relies upon an alleged limitation upon the said manager's general authority to contract, by reason of the adoption of a resolution by the board of directors of said company, which resolution was in effect at the time of the transactions out of which this action grew. This resolution appointed Mr. Baker "manager of the company, to have charge of the handling of the business under the direction of the president." Mr. Baker testified that the plaintiff Simpson was present at a conversation between Baker and the president of said company, at which time it was stated that Mr. Simpson had offered to sell to said company 60,000 gallons of wine at 35 cents per gallon, less 4 per cent. for cash, and that the president of said company had told Baker that it was all right and he might go ahead and make the purchase and might go to Fresno to complete the transaction. Baker testified that he went to Fresno and was met by the plaintiff, who told him at that time that he was uncertain about the allowance of 4 per cent. discount for cash; that Baker thereafter discussed the matter with the defendant, telling said defendant that the wine had been sold to him by Simpson at 35 cents per gallon, less 4 per cent., but that Malter, the defendant, refused to allow the discount. Baker then stated to Malter that, nevertheless, he would take the wine at 35 cents per gallon and would pay cash for it if desired. Appellant argues that, by virtue of the resolution of the board of directors above referred to, the president of the company had the authority to direct the business activities of the manager in all particulars; that the president's consent to the purchase was based upon his understanding of the contract as one to purchase at 35 cents per gallon, less 4 per cent.; that his consent was given on such terms alone; and that Baker had no broader authority. Appellant argues that, if the Jesse Moore Hunt Company had sought to repudiate the contract sought to be made by Baker, the defendant would have been unable to enforce the same, because Baker's authority was limited and was not sufficient to make the contract attempted to be made. And it is pointed out that such limitation upon Baker's authority was known to Simpson who was present during the conversation with the president, and Simpson acted as the agent of Malter, and his knowledge was the knowledge of his principal.

[2-4] If the manager's authority was so limited that it was necessary for him to have express authority from the president in each instance before making a purchase of wine, the question of how little or how much he might vary from his instructions without releasing his company would become pertinent. But we think no such question confronts us here, because there is an implied finding of the trial court that there was no such limitation upon the authority of the agent as the appellant maintains. The court has found that the said purchaser agreed to and with said defendant to accept the wine and make payment therefor to the defendant at 35 cents per gallon in cash. The purchaser who agreed to this was the company. It is not contended that Baker acted or purported to act in his individual capacity. To find that the purchaser agreed to accept the wine and to make payment therefor implies a valid and binding agreement. If it was a binding and valid agreement by the company to so purchase the wine, it could only be such by reason of the fact that the agent was authorized to contract for the company as he did contract. Whenever from the facts found by the trial court, other facts may be inferred which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment an appellate court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering its judgment. Breeze v. Brooks, 97 Cal. 77, 31 Pac. 742, 22 L. R. A. 257. Such inferential finding of the trial court that the agent's authority was sufficient to enter into a valid and binding contract on behalf of the company we believe is warranted by the evidence. As stated, the manager testified that he had previously bought and sold large quantities of wine for his company; such power would be within the usual powers of a manager of a company engaged in the business of the Jesse Moore Hunt Company. The general limitation in the resolution of the directors that the powers of the manager should be exercised "under the direction of the president" is not to be construed to mean that the sanction of the president to every detail of every transaction is a condition precedent to the authority of the manager to contract. Stevens v. Selma Fruit Co., Inc., 18 Cal. App. 242, 252, 123 Pac. 212; Medbury v. N. Y. & Erie R. R. Co., 26 Barb. (N. Y.) 564, 567; Cotton States Life Ins. Co. v. Mallard, 57 Ga. 65. Furthermore, it appears from the evidence that the president did authorize Mr. Baker to make this particular purchase, and there is nothing in the record to show that he restricted the price at which the purchase was to be made. The price appears from the evidence to have been a reasonable price and, indeed, an advantageous one to the company.

[5] Upon appeal, we cannot but indulge in every presumption with regard to the evidence which will support the findings of the trial court upon which the judgment is based. Breeze v. Brooks, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257; Pac. States Corp. v. Arnold, 23 Cal. App. 672, 139 Pac. 239.

In the present case that course leads us to affirm the judgment.

We concur: NOURSE, J.; BRITTAIN, J.

43 Cal. App. 630

SHEPARD v. HUNT. (Civ. 2991.)

(District Court of Appeal, First District, Division 1, California. Oct. 18, 1919. Hearing Denied by Supreme Court Dec. 5, 1919.)

1. BILLS AND NOTES ⟸518(1) — EVIDENCE SHOWING FAILURE OF CONSIDERATION.

In an action on a note brought by one whom plaintiff claims was not a bona fide holder, evidence *held* to warrant a finding of failure of consideration.

2. EVIDENCE ⟸432—PAROL EVIDENCE ADMISSIBLE TO SHOW CONSIDERATION DIFFERENT FROM THAT STATED.

In an action on a note executed pursuant to a contract where plaintiff claimed there was failure of consideration, it was necessary for the court, not only to look to all of the provisions of the contract in order to ascertain the intent of the parties, but under Code Civ. Proc. § 1962, subd. 2, it was proper for the court to look beyond the instrument.

3. APPEAL AND ERROR ⟸994(3)—REVIEW OF CREDIBILITY OF WITNESSES.

In an action tried without a jury, the court is the exclusive judge of the credibility of the witnesses, and is not bound to accept as true testimony of plaintiff merely because it was direct and was not directly contradictory.

4. BILLS AND NOTES ⟸525—EVIDENCE INSUFFICIENT TO SHOW PLAINTIFF BONA FIDE PURCHASER.

In an action on a note where the maker claimed failure of consideration and that plaintiff was not a bona fide purchaser, evidence *held* to warrant a finding that plaintiff was not such a purchaser.

5. BILLS AND NOTES ⟸493(3), 497(2)—BURDEN OF PROVING BONA FIDER PURCHASE.

Where the holder of a note establishes a prima facie case, the burden is upon the defendant maker to show failure of consideration, and, where such proof is adduced, the holder has the burden of showing that he was a bona fide purchaser.

Appeal from Superior Court, Los Angeles County; L. P. Price, Judge.

Action by Elgin R. Shepard against Laura S. Hunt. From a judgment for defendant, plaintiff appeals. Affirmed.

Fred M. Arnoldy, of Los Angeles, for appellant.

C. F. Holland and Charles E. Dow, both of Los Angeles, for respondent.

BARDIN, Judge pro tem. Plaintiff sued to recover on a promissory note executed by Laura S. Hunt, in the state of Minnesota, on June 3, 1913, for $2,583, payable to Sereen L. Webb, on or before one year after date, and which plaintiff claims was indorsed and delivered to him prior to maturity, in due course of trade, and for a valuable consideration.

The action was dismissed as to Sereen L. Webb. The judgment was against the plaintiff, from which he prosecutes this appeal.

Responsive to the issues raised by the answer of defendant Hunt, hereinafter referred to as the defendant, the court found, among other facts, that on or about March 21, 1914, Sereen L. Webb, the payee named in the note, indorsed and delivered said note to plaintiff, and that said plaintiff gave for said note the sum of $50 in money, and his own promissory note in the principal sum of $2,500, payable one year after date to Sereen L. Webb, without interest; that no part of the principal or interest of the note sued upon has been paid; that said note was given in payment of a certain written contract, presently to be referred to, entered into between defendant and Domestic Utilities Manufacturing Company, a corporation, of which Sereen L. Webb was an agent, which contract was of no value whatever; and that there was no consideration for said note. The court also found that the plaintiff did not purchase said note in ordinary course of business, nor in good faith; that on or about June 3, 1914, Sereen L. Webb waived presentment, demand, and notice of protest of said note, at which time plaintiff knew that said note had been made without consideration and that defendant, prior to the maturity of said note, notified plaintiff that said note was without consideration and void and that she would not pay the same; and that said plaintiff had at said time paid but $50 in money for said note, and nothing on his own promissory note payable to Sereen L. Webb.

The principal grounds urged for the reversal of the judgment, and the only ones meriting discussion, are these: That the evidence does not sustain the findings of the court (1) that there was no consideration for the note sued upon; and (2) that plaintiff did not purchase the note in the ordinary course of business and in good faith.

[1, 2] Directing our attention to the evidence adduced at the trial on the question of the alleged lack of consideration for the execution of the notes sued upon, we believe that there is sufficient evidence to sustain the finding of the court on that subject. The execution of the note grew out of a transaction wherein Sereen L. Webb, as the agent of Domestic Utilities Company, for the consideration of $5,000, sold to defendant 1,667 clothes washers (subsequently delivered) together with certain so-called rights relating to prospective sales of additional washers and of the prospective sales also of other like contracts when and if willing purchasers might be found, and which sales of clothes washers and contracts would, if consummated, yield remunerative return in commissions and profits to the defendant.

At the time the contract was entered into,

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Sereen L. Webb delivered to the defendant a receipt in the words and figures following:

"Minneapolis, Minn., June 3, 1913.

"Received of Mrs. Laura S. Hunt five hundred dollars cash on account of contract of Domestic Utilities Company, same to be used on account of 1,667 washers, also note for $1,167 for same purpose, also note for $2,583, also note for seven hundred fifty ($750) dollars in all, making $5,000.00 for said contract.

"[Signed] Sereen L. Webb."

The defendant claimed below, and she now claims, that the note sued upon was intended as payment for a contract which proved to be valueless, for reasons existing at the time the agreement was entered into, and also because of conditions that arose after that time. It is contended in plaintiff's behalf that the defendant is precluded from making any inquiry as to what the note sued upon was in fact given for, because of a recital in the contract between the defendant and the Domestic Utilities Manufacturing Company as follows:

"Now, therefore, to whom it may concern, be it known that for and in consideration of five thousand dollars ($5,000) this day paid to the 'company,' the receipt of which is hereby acknowledged, the said 'company' has sold unto the 'agent' 1,667 vacuum clothes washers."

Perusal of the entire contract discloses that it was not intended that the $5,000 payment referred to should be limited to the purchase price of 1,667 vacuum clothes washers. On the contrary, it very plainly appears that defendant was purchasing certain presumed rights and privileges separate and distinct from and beyond the 1,667 washers, and which she was led to believe might prove to be very valuable. These rights, in part, consisted of the power conferred upon the defendant to reserve territory in which to exploit the wares of the company, and to sell such wares in unreserved territory; the authority to appoint subagents, the right to sell wholesale lots of washers under prescribed conditions; and also the right to sell washers in lots of 1,667, and rights and privileges identical in terms with those sold to the defendant.

Not only was it necessary for the trial court to look to the other provisions of the contract in order to ascertain the true intent of the parties as expressed in the terms of their contract, but it was proper to look beyond the instrument itself in order to determine the real consideration for the payment made by the defendant (section 1962, subd. 2, Code Civ. Proc.; Field v. Austin, 131 Cal. 379, 63 Pac. 692), even though a consideration different than that stated in the written agreement might thereby be discovered. And for the same reason it was proper to determine the consideration paid for the 1,667 washers, found by the court to be $1,667, and represented by $500 in cash and a note for $1,167. It follows, then, that the promissory note sued upon was given as part payment for a contract which the court found to be without value, and the evidence supports such finding.

There was testimony to the effect that it was impossible to effect sales of the washers under the terms prescribed in the agreement. Also, the company engaged in the manufacture of these goods and their sale under the unusual plan shown by the contract referred to, was compelled, for reasons not clearly appearing in the record, to cease to operate under its contract with the defendant, several months before the maturity of the note in suit. Thus the defendant was prevented from reaping any part of the golden harvest purporting to be provided for her in the "contract."

We pass now to the consideration of the question of whether the record discloses sufficient evidence to sustain the finding of the court that the plaintiff did not purchase the note in suit in course of ordinary business or in good faith.

[3, 4] The circumstances surrounding the transfer of the promissory note from Sereen L. Webb to plaintiff, which took place in the state of Minnesota, are substantially as follows: A day or two before March 21, 1914, the plaintiff, while dining at the home of Mrs. Webb in Minneapolis, was requested by his hostess to purchase this note. At that time he had been acquainted with her for several years. They had formerly been coworkers in attempting the resuscitation of a certain mining company which had met with serious difficulties of a financial nature. The plaintiff at the time in March referred to above was conducting a photographic business in Minneapolis. He testified that he could not recall ever before purchasing a promissory note. At the time referred to he was already indebted to Mrs. Webb in the sum of $3,000 for borrowed money evidenced by his promissory note to her dated February 28, 1914. He knew that Mrs. Webb had been interested in the Domestic Utilities Manufacturing Company and had been selling its "contracts" during the summer of 1913. At the time of the indorsement and delivery of the note in suit, he was not acquainted with the defendant, but was informed that she was a resident of Los Angeles, California. He made no inquiries concerning defendant's financial standing, contenting himself upon that subject with Mrs. Webb's statement that the note sued upon was good and that she would become an indorser thereon (which in fact she did), so that the plaintiff would not take any risk whatever in the matter.

The plaintiff further testified that he had not the slightest information as to what the note was given for, and made no inquiries in

that respect; that Mrs. Webb had stated to him that the reason she requested the plaintiff to purchase the note was that it had been made by a friend who would ask for an extension of time for payment of the note. Plaintiff knew at the time that Mrs Webb was not desirous of selling the note because of need of money. He testified that he had read law to some extent and knew at the time of transfer "that a negotiable instrument in the hands of an innocent purchaser for value could be enforced, even though in fact not founded upon a consideration, provided the purchaser did not know it."

It may be here added that, subsequent to the maturity of the note sued upon, the plaintiff was informed by Mrs. Webb that she had negotiated the note so as to get it into the hands of an innocent purchaser that a fancied defect in the note might thereby be corrected.

In consideration of the transfer of the note in suit to the plaintiff, he paid to Mrs. Webb $50 in cash, apparently belonging to his wife, but furnished to him for the occasion, and handed Mrs. Webb his own unsecured promissory note for $2,500 payable one year after date without interest.

About the 15th of May, 1914, the plaintiff wrote to defendant that he would expect payment of the $2,583 note when due, to which letter Mrs. Hunt replied in effect that she would not pay the note and that it grew out of a fraudulent transaction. On May 31, 1914, the plaintiff answered defendant's communication, including in his reply the following sentence:

"Am also surprised to learn that if you bought into that Domestic Utilities scheme and lost thereby that you should ever complain of any result therefrom for of all the wild-cat schemes I ever investigated that beats them all."

And also the following:

"You have no legal defense to your note, which is a simple promissory note, when the same passes into the hands of an innocent purchaser for a valuable consideration."

About June 6, 1914, the plaintiff called upon Mrs. Webb, at which time he claims he learned for the first time the full details of the execution of the note sued upon. There was then exhibited to him a letter previously sent to Mrs. Webb by the defendant, dated March 15, 1914, wherein the defendant disclaimed responsibility under the note sued upon, basing her denial of liability upon grounds which went to the integrity of the note in its inception. Mrs. Webb continued to hold the $2,500 note given her by plaintiff and which was apparently paid on March 15, 1915, by transferring to her certain lots of land. The present action was begun in April, 1915, and at the trial plaintiff's action was dismissed as to Mrs. Webb.

We believe that the foregoing rather extended summarization of the evidence serves to show that the findings of the trial court, to the effect that the plaintiff did not purchase the note sued upon in good faith and in the ordinary course of business, finds ample support in the evidence. It is not for us to determine where the preponderance of the proof is; we need not look further into the record than to discover evidence of a substantial nature which, to a rational mind, may be deemed to support the findings in the behalf stated.

The trial court was the exclusive judge of the credibility of the witnesses at the trial of the action. While the plaintiff disclaimed any knowledge impeaching the integrity of the note in suit at the time it was indorsed and delivered to him, and his testimony was corroborated by the indorser of the note, yet the trial court was under no legal compulsion to accept such testimony as true and thus to exclude all inferences logically to be drawn from other admitted or proven facts. The question of the good faith of the plaintiff and the nature of the transfer as to whether it was made in the usual course of business were questions entirely within the province of the court for determination. We believe we would not be justified in holding, as a matter of law, that the evidence is insufficient to support the particular findings referred to. The court was not bound, under the circumstances shown by the evidence, to accept as true the testimony of the plaintiff merely because it was direct and was not directly contradicted. The trial court was duty-bound to consider both the direct and indirect evidence bearing upon the nature of the transfer and what was in the plaintiff's mind at the time, and we are satisfied that it was not amiss in the discharge of that duty. For us to say that the transactions such as passed between Mrs. Webb and the plaintiff must be accepted as related by the parties principal, because not contradicted by direct evidence, would be to put a premium upon perjury and to take from our trial courts means for the discovery of truth, now regarded as trustworthy and essential.

[5] After the plaintiff had established a prima facie case, the burden was cast upon the defendant to show that the note in suit was not founded upon a sufficient consideration. Such proof having been adduced by the defendant, the burden of showing that he was an innocent holder passed to the plaintiff. The California cases bearing upon this particular subject hold that a party situated as was the plaintiff may show that he is an innocent holder by proof that he purchased the note before maturity for value and in the usual course of business, unless the evidence shows that the note was taken under circumstances creating the presumption that he knew or should have known the facts

impeaching its validity. Blochman Commercial, etc., Bank v. Moretti, 177 Cal. 256, 170 Pac. 419.

In the case at bar the plaintiff claims that he met the requirements of the law by showing that he had purchased the note before maturity and in the usual course of business, paying an adequate consideration therefor. The issue as to whether he had purchased the note in good faith and in the usual course of business was decided against him, and it is our conclusion that such finding is supported by the evidence.

The claim is made that, because of the state of the pleadings, the court committed error in receiving in evidence the printed reports of certain decisions of the Supreme Court of the state of Minnesota, in which state it will be recalled that the note in suit and its transfer was made to plaintiff. In view of the fact that it is our belief that the judgment should be affirmed under the laws of either of the states referred to, this objection becomes of no importance.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 651)

DREW v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.

(Civ. 2047.)

(District Court of Appeal, Third District, California. Oct. 18, 1919. Hearing Denied by Supreme Court Dec. 15, 1919.)

1. PROHIBITION ⟸17—TO PREVENT PROCEEDING IN CONTEMPT; ON OBJECTIONS TO JURISDICTION NOT RAISED BELOW.

Where after execution against a corporation of which petitioner was president had been returned unsatisfied, petitioner failed in response to order to appear and testify concerning property of the corporation, and superior court on a sufficient affidavit made order to show cause, the appellate court will not grant writ to prevent superior court from proceeding with contempt proceeding on the ground that there is an error in plaintiff's name in the first-mentioned order, and that the original judgment is void for matters dehors the record; matters which were not, but which should have been, called to the attention of the superior court.

2. PROHIBITION ⟸10(1)—GOES ONLY TO JURISDICTION.

The writ of prohibition goes only to the jurisdiction of the lower court.

3. CONTEMPT ⟸34 — SUPERIOR COURT HAS GENERAL JURISDICTION.

The superior court has general jurisdiction to initiate and decide contempt matters.

4. CONTEMPT ⟸54(4)—SUFFICIENCY OF PRELIMINARY AFFIDAVIT.

Affidavit, asking for order requiring petitioner to show cause why he should not be punished for contempt in disobeying order to submit to examination and make discovery concerning property of defendant corporation against which execution had been returned unsatisfied, *held* sufficient to authorize order to show cause.

5. PROHIBITION ⟸17—FAILURE TO SEEK RELIEF IN COURT BELOW.

Where there has been no effort made to obtain relief in the court which it is sought to prohibit, the superior courts will refuse to exercise their jurisdiction by prohibition.

6. PROHIBITION ⟸17—FAILURE TO SEEK RELIEF IN COURT BELOW.

Unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction, prohibition will not issue.

7. PROHIBITION ⟸11—WILL NOT LIE TO CORRECT ERRORS AND IRREGULARITIES.

Prohibition will not lie to correct errors and irregularities occurring in the progress of the cause in the inferior court.

Application by F. C. Drew for a writ of prohibition, prayed to be directed against the Superior Court of the State of California in and for the County of Mendocino and J. Q. White, judge thereof. Alternative writ discharged.

See, also, 182 Pac. 417.

Metson, Drew & Mackenzie, of San Francisco, for petitioner.

Robert Duncan, of Ukiah, for respondents.

ELLISON, Presiding Judge pro tem. Petition for a writ of prohibition, asking that the superior court of Mendocino county be prevented from hearing or deciding a proceeding instituted in said court against said petitioner for an alleged contempt of court.

The record herein shows that on the 28th day of October, 1918, in an action pending in said superior court, wherein Phil Lobree was plaintiff and L. E. White Company, a corporation, and Goodyear Redwood Company, a corporation, were defendants, the plaintiff recovered a judgment against the defendants for the sum of $7,150.00, interest and costs.

On the 4th day of August, 1919, Robert Duncan, attorney for the plaintiff in said action, made and filed and presented to the judge of said court his affidavit, wherein he stated, in substance the fact of the rendition of said judgment; the issuance of execution thereon, and its return wholly unsatisfied; that F. C. Drew was then and at all times since the beginning of said action had been the president and general manager of said L. E. White Company; that said company owned property and had it in its possession or under its control, which it unjustly refused to apply to the satisfaction of said judgment, and that said Drew, as president and

general manager, had property of said corporation in his possession or under his control, which he unjustly refuses to apply to the satisfaction of said judgment; that the corporation had books of account in the possession or under the control of said F. C. Drew, showing properties belonging to said corporation, and particularly of the receipt of money from the sale of its properties to the Goodyear Redwood Company and the amounts and disbursements thereof—and prayed that a referee be appointed in San Francisco, and that an order be made, directing said L. E. White Lumber Company, by its president and its general manager and other officers, to appear before said referee at a time and place to be named, and answer concerning the property of said corporation, and produce its books showing the property and moneys belonging to it.

Upon the presentation of this affidavit said court made an order appointing Casper A. Ornbaum referee, and directed and ordered said L. E. White Lumber Company, by its president and general manager, F. C. Drew, and F. C. Drew, to appear before said Ornbaum at a place designated, on the 14th day of August, 1919, at 2 o'clock p. m., and submit to examination and make discovery under oath concerning the property of said corporation and to bring its books, etc.

The amdavit of Mr. Duncan above referred to was entitled, "Phil Lobree v. L. E. White Lumber Co. et al." The order of the court above referred to was entitled, "Paul Lobree v. L. E. White Lumber Co. et al." To said affidavit and order was attached a certificate of the county clerk of Mendocino county, stating: "I have compared the foregoing copy of an order and affidavit in case of Phil Lobree v. L. E. White Lumber Co. et al., and the indorsements thereon, with the original records of the same in my office, and that same are correct transcripts thereof and of the whole of said original records."

The affidavit, order and certificate, attached together, were duly served upon F. C. Drew, petitioner herein. On the 16th day of August, 1919, Robert Duncan made and filed affidavit in said court in which he set forth the facts stated in his affidavit of August 4th, and the fact of the making of the order by the court therein on that day of the service of said affidavit, order, and clerk's certificate upon said defendant and said F. C. Drew, and that on the day named in said order neither said defendant corporation nor F. C. Drew appeared before said referee either in person or by attorney.

Upon the filing of this affidavit said court made an order, in due form, directing said L. E. White Lumber Company and said F. C. Drew to appear before said court on August 25, 1919, at 10 o'clock a. m., and show cause, if any they have, why they and each of them should not be punished for contempt of court in disobeying said order of August 4, 1919, commanding them to appear before said referee. On the 23d day of August, 1919, said F. C. Drew applied to this court for a writ prohibiting said superior court from hearing or deciding said contempt matter.

[1] The petitioner claims that the superior court of Mendocino county was without jurisdiction to cite him to appear and show cause why he should not be punished for contempt in disobeying the order, directing him to appear and submit to an examination, and is without jurisdiction to hear and decide said alleged contempt matter, because: (1) The order made by the court for him to so appear and testify was entitled Paul Lobree instead of Phil Lobree, and there had been no judgment rendered in favor of Paul Lobree against the defendant; (2) because, as claimed, the judgment in the case of Paul Lobree against the L. E. White Lumber Company was void. It is claimed it was void because before the suit was begun the charter of the defendant corporation had been forfeited for nonpayment of its franchise tax.

[2-4] The writ of prohibition goes only to the jurisdiction of the court. The court has general jurisdiction to initiate and decide contempt matters. The affidavit filed, asking for the order to show cause, was sufficient in form and substance to justify the court in making the order. No objection is made to the sufficiency of the order, and it was duly served upon the petitioner. The judgment roll in the original action is before us, and an inspection of it shows a judgment valid on the face of the record.

It does not appear that the error in the name of the plaintiff in the order for examination has ever been called to the attention of the superior court of Mendocino county, nor does it appear that the claimed forfeiture of the franchise of the defendant corporation was ever referred to, either by pleading or evidence, in the original action, nor that it, at any time since, has been called to the attention of said court.

The petitioner's position, in fact, is that he has two good defenses to the order to show cause, one, the error in the name of the plaintiff in an order filed heretofore in the case, and the other that the original judgment is void for matters dehors the record.

It is the opinion of the court that the existence of these claimed defenses do not oust the superior court of jurisdiction to hear the contempt proceedings. If they are valid defenses (as to which we deem it unnecessary to express any opinion, and do not) it is to be assumed that the superior court will so hold. Under the facts appearing in this record it is held that these matters should be

presented to the superior court for consideration and decision.

[5] "Where there has been no effort made to obtain relief in the court which it is sought to prohibit, the superior courts will refuse to exercise their jurisdiction by this extraordinary remedy." High on Extraordinary Legal Remedies, § 733.

[6] "It has been repeatedly held here, however, that prohibition (a writ in the nature of a prerogative writ) will not go from this court unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction." S. P. R. R., Co. v. Superior Court, 59 Cal. 475.

[7] "Nor will the court in which relief is sought consider any error or irregularities occurring in the progress of the cause in the inferior court, since the writ of prohibition is not an appropriate remedy for the correction of errors." High on Extraordinary Legal Remedies, § 767b.

The alternative writ of prohibition is discharged.

We concur: BURNETT, J.; HART, J.

43 Cal. App. 711

ISRAEL v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY, DEPARTMENT 4, et al. (Civ. 3087.)

(District Court of Appeal, Second District, Division 1, California. Oct. 21, 1919.)

1. PLEADING ⟸339—PERMITTING WITHDRAWAL OF ANSWER IN DISCRETION OF COURT.

The superior court in the exercise of its discretion and acting within its jurisdiction may permit an answer to be withdrawn and to grant defendant time, not exceeding 30 days in addition to that allowed by Code Civ. Proc. § 1054, within which to file an answer.

2. PARTIES ⟸58—JURISDICTION TO SUBSTITUTE PARTIES DEFENDANT AFTER WITHDRAWAL OF ANSWER.

Where court permitted defendant to withdraw answer and at the same time granted leave to file another within five days, the court within such time had jurisdiction to grant a motion of defendant taken pursuant to Code Civ. Proc. § 386, under which defendant deposited money in controversy in court and asked the substitution of other parties as defendants.

3. MANDAMUS ⟸3(12)—REFUSED ON EXISTENCE OF REMEDY BY CERTIORARI.

Assuming that superior court exceeded its jurisdiction in allowing defendant to withdraw his answer and to deposit money in controversy in court and substitute other parties as defendants, plaintiff's remedy was a proceeding by certiorari wherein the original status of both parties would have been restored, and not by mandamus to compel the court to render judgment against the original defendant as though he were in default.

4. MANDAMUS ⟸187(3)—FAILURE TO RENDER JUDGMENT AGAINST THIRD PERSON HARMLESS.

In mandamus proceedings to render a certain judgment in an action to recover a fund, wherein the court rendered judgment that the plaintiff take nothing, plaintiff cannot complain that the court should have determined the right of defendants to the fund; such question not being of any concern to plaintiff.

Application by F. Israel for writ of mandate to compel the Superior Court of the State of California in and for the County of San Diego, Department 4 thereof, and to C. N. Andrews, Judge, to render a judgment in favor of applicant. Alternative writ discharged, and proceeding dismissed.

E. J. Henning and W. H. Wylie, both of San Diego, for petitioner.

Eugene Daney and Heskett & Sample, all of San Diego, for respondents.

SHAW, J. This is an original application for writ of mandate to compel the superior court of San Diego county to render a judgment for $3,000 in favor of petitioner in a certain action wherein she was plaintiff and Solon Bryan was defendant.

The controversy grows out of the following facts: On the 11th day of February, 1918, petitioner deposited with Solon Bryan, who was a justice of the peace, the sum of $3,000 to secure the appearance of F. M. Couden at a preliminary hearing upon a criminal charge. As a result of the hearing, held on February 21, 1918, Couden was discharged from custody and his bail released. On the same day, and after dismissal of the criminal complaint filed against him and prior to the return of said bail money so deposited with said justice of the peace, there was served upon him, the said Solon Bryan, by the sheriff of the county of San Diego, a writ of execution issued out of the superior court upon a judgment theretofore rendered against F. M. Couden in a certain action wherein the First National Bank was plaintiff and the former was defendant. Thereupon Bryan, upon demand made by petitioner for the return of the $3,000 so deposited by her as bail for the appearance of said Couden, refused to pay the same to petitioner, who, on April 8, 1918, brought suit against Bryan to recover the money in question. Within due time Bryan answered the complaint; whereupon petitioner as plaintiff in said action made a motion for judgment on the pleadings, which was heard on May 20, 1918, and an order made denying the same. Thereupon Solon Bryan, as defendant in said action, applied to the court for permission to withdraw the answer so filed and file another answer to the complaint. This application was grant-

ed and Bryan allowed five days to file another answer. Within the five days allowed for filing such answer Bryan filed an affidavit and notice of motion, under section 386 of the Code of Civil Procedure, to substitute the sheriff of San Diego county and the First National Bank in his place and stead as defendants in said action, which motion was heard on May 24, 1918, and an order made granting the same, pursuant to which Bryan deposited in court the $3,000, which action was followed by an order releasing him from further liability, and at the same time the sheriff and First National Bank, as substituted defendants, filed their answer. No further proceedings of any kind or character were had in said matter until a year thereafter, to wit, on May 31, 1919, at which time the case was tried upon the complaint and the answer of the substituted defendants, when findings were made upon which judgment was rendered by the court that petitioner as plaintiff in said action take nothing and the defendants recover $——— costs. Thereafter, on June 11, 1919, pursuant to notice served, and in the absence of any order made setting aside or otherwise affecting the judgment so rendered, petitioner moved the court to enter judgment in said action for the plaintiff therein and against Solon Bryan, upon the ground that said Bryan, having by leave of court withdrawn the answer filed, was in default, and hence plaintiff was entitled to judgment. The motion was denied. The contention of petitioner is that the order granting Bryan five days from May 20, 1918, to file an answer, was void, as were likewise the orders made releasing him from further liability upon depositing the said $3,000 in court and substituting as defendants in said action the sheriff and First National Bank.

[1, 2] That the court, in permitting the defendant Bryan to withdraw his answer was acting within its jurisdiction, is not, and, in our opinion cannot be, questioned in this proceeding. Miles et al. v. Danforth, 37 Ill. 157; Rowan v. Kirkpatrick, 14 Ill. 1; Bash v. Evans, 40 Ind. 256. The order permitting the withdrawal of the answer and granting leave to file another was made at the same time; hence the answer on file protected defendant from default to a time when the order granting five days within which to file another answer became operative and in effect, prior to the expiration of which time the fund was deposited in court and the order made releasing Bryan from liability. In effect the situation was the same as though defendant, instead of filing the answer so withdrawn, had asked and obtained from the court an extension of time, not exceeding 30 days, within which to answer, as provided in section 1054, Code of Civil Procedure. Hence we are of the opinion that the court in the exercise of its discretion, and acting within its jurisdiction, had power to permit the answer to be withdrawn and to grant defendant time, not exceeding 30 days in addition to that allowed by the Code (section 1054, supra), within which to file an answer. This being true, it must follow that the proceedings had and taken pursuant to the provisions of section 386, Code of Civil Procedure, under which Bryan deposited the fund in controversy in court and the substitution of the parties defendant was made, were within the power of the court.

[3] Conceding, however, the court in making the orders complained of acted in excess of jurisdiction, its action should have been annulled in a proceeding by certiorari, wherein the original status of both parties would have been restored and their rights protected. Upon the facts presented, this status and protection cannot be secured by a writ of mandate. Indeed, its issuance in this proceeding would not only lead to confusion but work a gross injustice to one of the parties. In Board of Education v. Common Council, 128 Cal. 369, 60 Pac. 976, it is said:

"The writ of mandate will not issue where it will work injustice, or introduce confusion and disorder, or operate harshly, or where it will not promote substantial justice."

And in Neto v. Conselho Amor, etc., 18 Cal. App. 234, 122 Pac. 973. the court, in discussing the right to such writ, says:

"It is not issued on mere technical grounds. Its design is to do substantial justice and prevent substantial injustice."

In the case at bar it appears that after the expiration of more than a year from the making of the order releasing Bryan from liability and under and pursuant to which he parted with the fund in controversy, and without any action on the part of petitioner to set aside the order under which he acted, and after substitution of defendants, who filed an answer putting in issue the allegations of the complaint in said action, a trial thereof was had, in which trial the court found that plaintiff was not entitled to the fund, and rendered judgment based upon said findings that plaintiff take nothing by her action. In thus rendering judgment the court was acting within its jurisdiction; and, conceding that it may have committed error, the judgment stands as a final determination until set aside in some proper proceeding for its review. Under the circumstances shown, to issue a writ requiring the court to render judgment against Bryan would not only lead to confusion and disorder, but it would operate harshly in that it would work an injustice upon Bryan, who, as stated, has as required by the order of the court, parted with and surrendered the

fund to another depositary. Had petitioner as plaintiff in said action, the trial of which she entered upon without protest or objection here reviewable, been successful therein, she would have accepted the result.

[4] In this application we are not concerned with the alleged errors of the court in the trial of the case. It may be, as claimed by petitioner, that the findings made by the court are not supported by the evidence, or that the court failed to make findings upon material issues. However this may be, it appears that the court rendered judgment that plaintiff take nothing, and, conceding that the court should have determined the right of defendants to said fund, such question is one for the concern of defendants, and not the plaintiff, who the court adjudged should take nothing in the action.

The alternative writ heretofore issued is discharged, and the proceeding dismissed.

We concur: CONREY, P. J.; JAMES, J.

43 Cal. App. 732

MOULTON IRRIGATED LANDS CO. v. JONES et al. (Civ. 1853.)

(District Court of Appeal, Third District, California. Oct. 22, 1919.)

WATERS AND WATER COURSES ⟸242—AGREEMENT RESPECTING RIGHT OF WAY BETWEEN IRRIGATION COMPANY AND LANDOWNER.

An agreement between a landowner and the assignor of plaintiff irrigation company, whereby the landowner granted a right of way for a canal over his premises, to the irrigation company, *held* not to contemplate that the irrigation company should elevate waters so as to irrigate the high part of the landowner's property, and hence, in an action for compensation for water furnished, the landowner is not entitled to deduct the expense of pumping water to that part of his property which was above the level of the canal.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by the Moulton Irrigated Lands Company against M. T. Jones and J. P. Boggs. From a judgment for plaintiff, defendants appeal. Affirmed.

Brown & Albery, of Colusa, for appellants.
Thomas Rutledge, of Colusa, for respondent.

BURNETT, J. The action was brought to recover the sum of $1,472.50 for water furnished by plaintiff to defendants for irrigation, and plaintiff had judgment as prayed for, from which the defendants have appealed. The contract, which is the basis of the action, was executed on December 17, 1912, by defendant Jones and one Wm. K. Brown, the assignor of plaintiff. By the terms of said contract Jones granted to Brown a right of way through lands of the former in and along a certain slough, known as Drumhiller slough, for the purpose of constructing and maintaining a canal for irrigation purposes and for storing and conveying water therein over and across said land belonging to Jones, which was specifically described in said contract. A right of way was also conveyed for two certain canals connecting with said slough. One of the considerations moving from Brown was the covenant binding him and his successors or assigns to construct and maintain across said Drumhiller slough upon the land of Jones, as he might thereafter designate, two bridges at least 18 feet wide, each capable of sustaining a burden of not less than five tons in weight, and also to construct and maintain on each side of said canals suitable means of crossing the same and of sufficient strength to safely carry a combined harvester and kindred machinery. It was further covenanted and agreed that Jones should have "a free water right for the water necessary for the irrigation of his lands (described in said contract) as long as said proposed irrigation system should be used in any part thereof for such purposes, such water right to be appurtenant to said land." It was further provided:

"For the water actually used by the party of the first part (Jones) for irrigation in and upon said lands aforesaid, he shall pay therefor at the same rate and be subject to the same rules, terms, and conditions as all other water users along said proposed system, but shall only be required to pay each year for such water for irrigation purposes as shall apply only to such of his lands as are actually irrigated."

Said contract contains certain other important provisions, but they need not be quoted, as the foregoing involves the only question at issue in the present case. Appellant admits that—

There is "virtually but one question in this case: Was the defendant Jones justified, as a matter of law, in incurring the expense for pumping water from the canal or slough and charging that expense as an offset to the water rates?"

In explanation of this it may be said that no controversy appears to have arisen between the parties until the year 1915. It is also admitted that during the years 1915 and 1916, covering the entire period in controversy, water was used from said slough to irrigate the lands of defendant Jones. It is further conceded that the rate for said irrigation was established at $5 per acre, and that, applying said rate to the number of acres irrigated by said water, the amount

would be the sum claimed by plaintiff. It appears, however, that about 75 or 80 acres of Jones' land was at such a level that, in order to distribute the water over it, it was necessary to use pumps or other mechanical contrivance to raise the water above the level of said slough. It appears further that a demand was made by Jones upon plaintiff to so raise the water that it might by the force of gravity be distributed over said land. Plaintiff neglected and refused to comply with this demand, and thereupon Jones put in the necessary pumps for said purpose, and thereby incurred an expense of something over $1,000, and it is for this expense that he claims an offset against the claim of plaintiff. The question, therefore, involves the proper construction of said provision of the contract of December, 1912. It is to be observed that there is nothing in the express terms of the contract that required plaintiff to incur any additional expense besides the construction of said canal and bridges and crossings and the pumping of the water out of Sacramento river into said slough. There was no promise or agreement to distribute the water over the land of Jones or to raise it by any artificial means above the level of the water in said slough. The easy and natural construction of the language used leads us to the conclusion that for the right of way granted by Jones the water from the river would be pumped into said slough, and that he should have a right to divert what was necessary of said water for the irrigation of his land, paying therefor the amount that was charged to other parties using the same, and being subject to the same rules, terms, and conditions. The claim of appellant, however is based upon the fact that in 1915 and 1916 respondent introduced water wheels for the purpose of irrigating some high land belonging to itself and to some others, which it had sold to said parties under special agreement to distribute the water over said lands. We are satisfied, however, that the contract made by the parties did not contemplate that plaintiff's assignor or his successors in interest should be bound to incur this additional expense for the purpose of irrigating the lands of Jones. The expression, "rules, terms and conditions," was doubtless intended to include the rate, and the rules and regulations which might thereafter be adopted for the use of water, such as the hours for its distribution, or the order or proportion in which various property owners should use it at certain seasons of the year, or the distribution of it according to the quantity of water that might be available. The very expression used, "subject to," would indicate a burden to be imposed upon appellant rather than an additional privilege to be enjoyed by him. The contention of appellant really amounts to the claim that respondent is bound to distribute the water over his land. With equal propriety he might claim that respondent is under obligation to grade his land, to construct checks, and to do whatever else is necessary to properly and evenly distribute the water over it. The unreasonableness of appellant's claim is aptly illustrated in the instance before us. The expense of raising the water by pumping for the 75 or 80 acres in controversy was, as we have seen, something over $1,000. The charge for water used in said irrigation at $5 per acre could not be over $400; therefore, according to the theory of appellant, respondent must pay him $600 for the privilege of furnishing him water for the purpose of irrigating his land. Such construction, we think, was never contemplated by the parties, and is not within the fair import of the terms used in the contract. We are satisfied that the judgment of the lower court was eminently sound. It is therefore affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

43 Cal. App. 735

BLAKLEY v. BRYSON et al. (Civ. 3082.)

(District Court of Appeal, First District, Division 1, California. Oct. 23, 1919.)

MORTGAGES ⊂=32(2) — WHETHER DEED AS MORTGAGE DEPENDENT ON INTENTION OF PARTIES.

Where maker gave holder of overdue note a deed, under agreement that, if note was not paid within certain time, holder could sell property and credit the proceeds on the note, *held*, in action on note, that deed was not in effect a mortgage, requiring foreclosure action under Code Civ. Proc. § 726, instead of action on note; there being no evidence that the parties intended it to have such effect.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by William T. Blakley against H. W. Bryson and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. L. Abrahams and W. I. Gilbert, both of Los Angeles, for appellants.

Wm. T. Blakely, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action to recover upon a promissory note executed by the defendants and passing by mesne transfers to the plaintiff. Several amendments were made to the original complaint, which are not material to the points presented upon this appeal. The defendants'

answer pleaded as a special defense that, while one D. B. Brunson was the owner and holder of the note sued upon, the defendant Bryson had made, executed, and delivered to said Brunson a grant deed to certain real estate, which was intended to be and was received by said Brunson as security for the payment of said note.

Upon the trial of the cause the defendants offered and there was received in evidence said alleged deed, and also an agreement between said Bryson and Brunson, of even date with said deed, wherein it was recited that Bryson was indebted to Brunson in the amount evidenced by said promissory note, and that said note was past due and unpaid, and that said Bryson desired Brunson to refrain from taking legal proceedings for the collection of the amount due upon said note, and that therefore and as a consideration therefor the said Bryson was causing said deed to be executed to said Brunson upon the understanding and agreement that, if his said indebtedness to said Brunson was not paid within five days thereafter, the said Brunson was authorized to sell the property covered by said deed at either public or private sale without notice, and credit the amount received therefor upon said indebtedness. No other explanation appears to have been offered at the trial as to the understanding of the parties to said deed and agreement beyond that contained in the latter instrument itself, and the trial court, in deciding the case, found that the consideration for said deed was that the grantee therein would refrain from suing upon said note for the period of five days from the date of said conveyance, and further found that the said deed was not given as, nor intended to be, a mortgage or other security for the payment of said note. The evidence in the case further showed, and the court found, that the lands described in the said deed had been sold pursuant to the terms of said agreement, and the amount received therefor credited upon said note. The judgment of the court was in the plaintiff's favor for the balance found to be due upon the note.

The sole contention made by the appellants upon this appeal is that the conveyance above referred to was given as security for the payment of the note in question, and was in effect a mortgage, and hence that the plaintiff was not entitled to maintain this action, but should have brought an action under the terms of section 726 of the Code of Civil Procedure for the foreclosure of said mortgage.

There is not the slightest merit in this contention, since there was no evidence before the trial court showing any intent upon the part of those giving and receiving said deed that it should have any such effect; but, on the other hand, the written agreement between said parties expresses its purpose, and negatives such an intent.

Judgment affirmed.

We concur: BEASLEY, Judge pro tem.; KERRIGAN, J.

43 Cal. App. 696

PEOPLE v. SHWARTZ. (Cr. 677.)

(District Court of Appeal, Second District, Division 2, California. Oct. 20, 1919. Hearing Denied by Supreme Court Dec. 18, 1919.)

1. FALSE PRETENSES ⊂=1—LARCENY ⊂=1—LARCENY AND FALSE PRETENSE DISTINGUISHED.

The distinction between "larceny" and "false pretenses" is that in larceny the owner of a thing has no intention to part with his property to the person taking it, although he may intend to part with possession, while in false pretenses the owner does intend to part with the property but it is obtained from him by fraud.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretense; Larceny.]

2. LARCENY ⊂=14(1)—LARCENY BY TRICK OR DEVICE.

Obtaining from complainants money wherewith to bribe a public official to issue a license for bath and massage parlors under a pretense that defendant could obtain such license, with intent to fraudulently appropriate the money title to which remained in complainants, *held* to constitute larceny.

3. LARCENY ⊂=70(2)—INSTRUCTION AS TO DISTINCTION BETWEEN LARCENY AND FALSE PRETENSE.

In a prosecution for larceny committed by tricking complaining witness into giving defendant money wherewith to obtain a municipal license, other counts charging defendant with obtaining money by false representations having been dismissed, an instruction pointing out the distinction between larceny and obtaining money by false pretenses *held* not erroneous as constituting an invitation to the jurors to convict defendant of the crime of larceny if they believe him guilty of obtaining money by false pretenses.

4. LARCENY ⊂=55—SUFFICIENCY OF EVIDENCE.

In a prosecution for larceny committed by tricking complaining witness into giving defendant money wherewith to obtain a license to operate a bath and massage parlor, evidence *held* insufficient to sustain a verdict of conviction.

5. CRIMINAL LAW ⊂=878(1), 984—SEPARATE JUDGMENT AND VERDICT ON SEPARATE COUNTS.

Where a defendant is charged with larceny in several counts, it is proper procedure and a sufficient compliance with Pen. Code, § 954, as amended by St. 1915, p. 744, providing that every offense upon which a defendant is convicted must be stated in the verdict, to return

a separate verdict on each of the counts and to enter judgment on each of them.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Edward Shwartz was convicted of grand larceny, a new trial was denied, and he appeals. Affirmed except as to one count.

Warren L. Williams, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn and Arthur Keetch, Deputy Attys. Gen., and Jerry H. Powell, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant, who was convicted of the crime of grand larceny, appeals from the judgment and from an order denying a new trial.

The grand jury of Los Angeles county returned an indictment against defendant containing twenty-eight counts. In fourteen counts defendant is charged with the crime of grand larceny; in the remaining counts he is charged with the crime of obtaining money by false representations and pretenses. Before the submission of the cause to the jury, the court, for insufficiency of the evidence, withdrew from the jury's consideration all the counts wherein defendant is charged with the crime of obtaining money by false representations and pretenses, and, for the same reason, withdrew from the jury's consideration four of the counts wherein larceny is charged. Defendant was convicted of grand larceny, as charged in each of the remaining ten counts.

In each of the counts upon which defendant was convicted it is charged that he willfully, unlawfully, and feloniously took, stole, and carried away a certain sum of money; the amount being specifically stated in each instance. There was a number of complaining witnesses. The theory of the prosecution was that each complaining witness was engaged in the business of conducting a bath and massage parlor in the city of Los Angeles, for the conduct of which a license from the city's police commission is required by law (a license that must be renewed every six months); that prior to obtaining each license or its renewal, defendant visited each complaining witness and falsely represented to her that he had influence with the police commission, and, for a certain designated sum of money, he could and would obtain the desired license or its renewal; and that, in each instance, the complaining witness, believing such false representation, delivered the stipulated sum of money to defendant, who thereupon unlawfully and feloniously converted it to his own use. In short, the theory of the prosecution was that defendant was guilty of grand larceny in that he obtained possession of the sums of money by fraud and trickery.

[1] It is claimed by appellant that, if the evidence shows him to be guilty of any crime, it is that of obtaining money by false pretenses, and not grand larceny—the crime of which he was convicted. In support of this claim it is contended that the evidence shows indubitably that each of the complaining witnesses intended to part with the title to her money as well as its possession. The distinction between larceny and false pretenses is substantially this: In larceny the owner of a thing has no intention to part with his property therein to the person taking it, although he may intend to part with possession. In false pretenses the owner does intend to part with his property in the money or chattel, but it is obtained from him by fraud. People v. Delbos, 146 Cal. 734, 81 Pac. 131. There would be merit in appellant's contention if, when the complaining witnesses delivered the several sums to him, they had intended that the moneys should then and there become his property. So far from such being the case, it appears from the evidence that each complaining witness, at the time when she delivered her money to appellant, intended that it should be received by him for the purpose of carrying it and paying it to some person, unknown to the witness, whom, however, she supposed to be an actually existing person, but who, as a matter of fact, was a spurious and mythical individual, invented by appellant for the fraudulent purpose of tricking the witness into parting with the possession of her money. Thus, in support of the first count, Marie Savage—from whom appellant was charged in count 1 with taking, stealing and carrying away $130—testified as follows:

"I told him I would like to get a place, and he asked me if I had any money, and I told him yes, I had, and he asked me how much, and I told him I thought I had enough; that I understood it would be $100 to get the license; and I gave him $100 to get me a license. * * * He told me that he could fix it all right. * * * He told me I was to give him $100 and after I got the license I was to give him $25. * * * He told me he could not get it unless I did give him the money. Q. Well, was it to fix somebody? A. Understood to be. * * * Q. Did he say at any time that he would use that money for the police commission to get you a permit? A. Yes, sir. * * * Q. That money, as far as you were concerned, was for the intention or purpose of corruptly bribing a public official, was it? A. Well, I suppose so. * * * Q. You understood this money, did you not, was to be given to some public official? A. Yes, but I didn't know who."

[2] Had the money been used by defendant, as Marie Savage supposed it would, when she delivered it to him for the purpose of being paid to an unidentified but supposedly existing corrupt public official, it would have remained her property until its final delivery to that person. She did not intend to part with the title to the money until it should be delivered to the public officer whom she supposed defendant had or would corruptly influence to issue or procure the issuance of the license. Defendant, as the complaining witness understood the transaction, was her agent to carry her money to the supposedly perfidious official. The title thus remaining in Marie Savage, it was subject to larceny as her property, and the fraudulent appropriation of it by the defendant to his own use, he having had the intention from the beginning to obtain possession of it for that purpose, constituted, in law, the crime of larceny. People v. Delbos, supra.

With one exception, presently to be noticed, what has just been said with respect to count 1 applies with equal force to each of the other counts upon which defendant was convicted. The evidence, in every instance where money was paid to defendant, justified the inference that, with the exception of certain smaller sums agreed to be paid to him as a reward for his nefarious services in his assumed character as a corrupter of men, defendant received the sums delivered to him for the purpose of carrying and delivering them to some supposedly corrupt public official, who, as the evidence shows, did not exist.

[3] It is further contended by appellant that the court erred in that it gave an instruction which, according to appellant, misled the jury to his prejudice. It seems that, notwithstanding it had dismissed every count that charged defendant with obtaining money by fraudulent representations and pretenses, the court, nevertheless, gave an instruction wherein it pointed out the distinction between larceny and the crime of obtaining money by false pretenses. Appellant, conceding that the instruction itself embodies a correct statement of the law, argues that it prejudiced his case in that it was an invitation to the jurors to convict him of the crime of larceny if they believed him guilty of obtaining the moneys by false pretenses. We fail to see any force in the objection. Where, as here, possession of money is obtained by fraud, trick, or device, the question whether the crime, if any there be, was larceny or false pretenses, often depends upon the nice analysis of facts and legal principles. For this reason it is allowable, in such a case, to give an instruction pointing out the distinction between these two classes of crime, in order that, if the jurors believe the money was obtained by fraud or trickery, they may acquit the defendant of the charge of larceny if they also believe that the complaining witness intended parting with the title to defendant. It was proper therefore for the court to explain to the jury what constitutes larceny by trick or device, and the difference between such larceny and the crime of obtaining money by false and fraudulent pretenses. It is, indeed, the duty of the court "in charging the jury," to state therein "all matters of law necessary for their information." Section 1127, Pen. Code.

[4] The thirteenth count—one of the counts upon which appellant was convicted—charges that defendant, on or about November 1, 1917, feloniously took, stole, and carried away $150, the personal property of one Lyllian Hoffman. It is contended, and, as we think, correctly, that the verdict of conviction on this count is contrary to the evidence. The thirteenth count was based upon an alleged payment of $150 to defendant by Lyllian Hoffman to secure the renewal of her license on November 1, 1917. On direct examination, when asked if she had paid defendant any money to get this renewal, the Hoffman woman replied: "If I did I gave him $150 when I got it [the renewal license] for myself." On cross-examination, in reply to a question asking her if she gave defendant any money for the renewal, she said: "I do not know whether it was in November then or—no; I did not pay for that; no, sir." This evidence directly negatives any claim that defendant ever received any part of the $150 which, in the thirteenth count, he is charged with having stolen. Our attention has not been called to any other evidence tending to show that defendant was ever paid any money to procure this particular renewal of Lyllian Hoffman's license, and our own independent search of the record has failed to disclose any evidence to support defendant's conviction upon this count of the indictment.

[5] The jury brought in a separate verdict on each of the ten counts upon which defendant was convicted. This was doubtless a sufficient compliance with section 954 of the Penal Code, as amended in 1915 (St. 1915, p. 744), whereby it is provided that "each offense upon which the defendant is convicted must be stated in the verdict." Upon each of the ten verdicts of conviction the court, at the time appointed for sentence, pronounced, and the clerk entered, a separate judgment; each judgment being in the form of an indeterminate sentence as provided by the indeterminate sentence law. Section 1168, Pen. Code, as added March 18, 1917 (St. 1917, p. 665). Appellant makes no objection to the form of the judgment, nor to the fact that, in form, there was a separate judgment upon each of the ten verdicts of conviction; and, under the circum-

stances, we see no impropriety in the procedure thus adopted by the trial court. As we have said, appellant makes no point respecting the form of the judgment, or that, in form, it appears to consist of ten separate judgments, each based upon a separate verdict of conviction, and we advert to the matter solely because of the form that our judgment must take, owing to the situation presented to us by the record here.

A careful examination of the entire record convinces us that, with the single exception that the evidence fails to support the verdict of conviction of the crime charged against him in the thirteenth count, defendant had a fair and impartial trial, free from any prejudicial error.

The judgment wherein it is recited that defendant was found guilty of the crime of grand larceny as charged in count 13 of the indictment and adjudging that he be punished for the crime so charged in said count by imprisonment for an indeterminate period, and likewise so much of the order denying defendant's motion for a new trial as denies him a new trial of the issues presented by the thirteenth count, are reversed. In all other respects the judgment or judgments and the order or orders appealed from are affirmed.

We concur: SLOANE, J.; THOMAS, J.

43 Cal. App. 673

YOSHIZUMI v. PLATT PRODUCE CO.

(Civ. 2020.)

(District Court of Appeal, Third District, California. Oct. 20, 1919.)

1. CUSTOMS AND USAGES ⟸15(1, 2)—ADMISSIBILITY OF EVIDENCE OF CUSTOM IN CONTRACT FOR DELIVERY OF POTATOES "F. O. B. BOAT."

In an action for breach of contract to buy potatoes to be delivered f. o. b. boat at a certain camp, evidence showing that it was customary for the purchaser of potatoes along a certain river to provide boats for the transportation of potatoes bought, and that delivery was ordinarily made by bringing the potatoes to the banks of the river, *held* admissible to show on whom the burden of providing boats was imposed, and to show that "f. o. b. boat" meant on the wharf ready for the boat.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series f. o. b.]

2. EVIDENCE ⟸99—RELEVANCY.

In an action for damages for breach of contract to purchase potatoes to be delivered f. o. b. boat at a certain camp, where plaintiff testified that the captain of the boat refused to accept the shipment, orders from his employer to the captain were incompetent to prove what the captain said or did at the landing.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by H. Yoshizumi against the Platt Produce Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Snyder & Snyder, of San Andreas, for appellant.

Shelton & Levy, of San Francisco, for respondent.

ELLISON, Presiding Judge, pro tem. The complaint alleges that on August 11, 1917, plaintiff and defendant entered into a contract in writing, whereby plaintiff agreed to sell and defendant agreed to buy 540 sacks of potatoes, at the agreed price of $3 per sack, of 116 pounds each, and that said product should be delivered, starting at the last of the ensuing week, f. o. b. boat, at McDowell Camp, No. 23½, San Joaquin county.

It was further agreed that delivery of said product on board of boat would constitute full and complete acceptance thereof; that plaintiff duly performed all the conditions of said contract and started to deliver said product on the last of the ensuing week, and on August 27, 1917, 540 sacks of said product were on the river bank at said camp, ready for inspection and transportation by the defendant by means of water craft; that it is the definite, well-known, and uniform custom and usage of the purchasers of potatoes in the vicinity of Stockton and on points located on the San Joaquin river and its tributaries to inspect the product while on the bank, and to send water craft to such point to take delivery thereof; that plaintiff notified defendant on August 27, 1917, that said product was on the bank, and defendant thereupon, and again on August 31, 1917, assured plaintiff it would send a barge to obtain delivery thereof; that defendant failed to do so prior to September 3, 1917, and on that day plaintiff demanded that defendant take delivery of said produce, and notified defendant that in default thereof plaintiff would sell the same to defendant's account to the best advantage; that on September 3, 1917, a barge belonging to one R. H. Vehmeyer called at said camp, and the agent thereof took possession of said product, loaded it on said barge, and transported it to a warehouse at Stockton; that said Vehmeyer thereupon notified defendant thereof, and defendant instructed him not to enter said product in said warehouse in its name; that thereupon plaintiff sold said product for $1.90 per sack, or for the sum of $1,026, to his damage in the sum of $594, for which amount he prayed judgment.

The court found that plaintiff had performed all of the conditions of said contract on his part to be performed, and started to deliver said product at the last of the ensuing

week, as therein provided, and on August 22, 1917, said 540 sacks of potatoes were on the river bank at said camp, ready for transportation by the defendant.

The court also found that—

"It is the definite, well-known, and uniform custom and usage of the purchasers of potatoes in the vicinity of Stockton and on points on the San Joaquin river and its tributaries to send water craft to points on said river bank to take delivery of such product," and, "in previous transactions with plaintiff, defendant had sent such means of transportation, and in respect of the transaction here in controversy made an effort to procure the same."

Judgment was rendered for the plaintiff for the amount stated in the prayer of the complaint. The defendant appeals.

[1] Over the objection of the defendant evidence was introduced to support the allegations as to the custom and usage in the matter of getting boats to move produce, and it is appellant's contention that such evidence was inadmissible and that it tended to vary the terms of a written contract, one in no wise uncertain. The decisions seem to be quite uniform to the effect that proof of custom and usage is admissible to determine upon whom, in a case like this, the burden was imposed of providing a boat upon which the produce could be loaded, and admissible to prove that f. o. b. means on the wharf, ready for the boat. It is to be observed that the contract is silent concerning who was to provide the boat. In this particular it is uncertain and indefinite. In Meyer v. Sullivan, 181 Pac. 847, it is said:

"In order to determine whether or not delivery was to be made on the deck of the Kosmos steamer, as contended for by defendants, or merely on the Arlington dock, in Seattle, as claimed by plaintiffs, the trial court admitted evidence of the nature of the transaction, and the usages and custom of the trade in such matters. Appellants vigorously attacked the findings and conclusions of the court, and particularly its action in admitting testimony in proof of the custom of the trade.

"We are satisfied of the correctness of the trial court's findings in these matters. The fact that the parties to this action have come to such a vigorous disagreement over the meaning of the terms of the contracts is some indication that the court might be compelled to look to other sources of information than the contracts themselves in order to arrive at a proper interpretation of the disputed point. That the evidence of usage and custom was properly considered by the trial court in determining the place of delivery of the wheat contemplated by the parties under the f. o. b. clauses of the contracts is borne out by the authorities. Cowas-Jee v. Thompson, 5 Moore P. C. 165; 13 Eng. Reps. 454; Stock v. Inglis, 5 Asp. M. C. 294; George v. Glass, 14 U. Can. Q. B. 514; Marshall v. Jamieson, 42 U. Can. Q. B. 115.

"The admitted evidence fully supports the court's finding that it was and is a general custom, among buyers, sellers, and shippers of wheat in the city of Seattle, and in the city of San Francisco, and generally, in Pacific Coast ports, 'under contracts for the sale of wheat f. o. b. steamer, or f. o. b. designated steamer, for the seller to deliver and for the buyer to receive and accept the wheat upon the dock alongside of ship's tackle.' " 181 Pac. 849.

In Consolidated Coal Co. v. Schneider, 163 Ill. 393, 397, 45 N. E. 126, 128, the court said:

"The fact that appellees were required by the contract to deliver the coal free on board of the cars at the mine can have no bearing on the question in regard to whose duty it was to furnish cars. The furnishing cars at the mine, to be filled with coal, was an independent matter, in no manner connected with the duty of filling the cars. When the cars were furnished, then it devolved on appellees to fill them free of any expense to appellant; but, until the cars were furnished, they were required to do nothing, except to have the coal ready. It being the duty of appellant to furnish the cars, under the contract, its failure to discharge this duty was a clear breach of the contract, for which appellees, who were ready and willing to furnish the coal, were entitled to recover."

See, also, Evanston, etc., Co. v. Castner (C. C.) 133 Fed. 409.

[2] There was no error in admitting this testimony.

The plaintiff testified that barge No. 11 was at Camp McDowell after the potatoes had been placed on the landing; that he asked the captain to take them on the barge, and he refused, saying he had no orders to do so. The captain, in rebuttal, testified he did not remember whether he made the statement or not. He was then asked if he did not have orders on each trip to bring in all potatoes for the Platt Produce Company that were ready to be loaded. An objection to this and similar questions was sustained, and the ruling is assigned as error. When the witness Lenning was testifying, the defendant, as part of the examination, offered in evidence the order made by the transportation company and given by it to Mr. Lenning, the captain of the barge, directing him where to go on the trip and what products to load. An objection to the evidence was sustained, the court remarking that the witness could use the order that he took with him to refresh his memory. This ruling of the court is assigned as error. The witness, following the remark of the court, stated: "Here is my logbook; just exactly what I did at the landing." The defendant, instead of acting upon the suggestion of the court that the witness might use the order he had with him to refresh his memory, and instead of taking advantage of the statement of the witness that his logbook showed exactly what he did, and asking him what he did at

the landing, reverted to his original question of what his orders were. The court correctly ruled that his orders from a third party were not competent to prove either what he said or did at the landing. For the purpose for which the orders were offered they were neither relevant nor competent. People v. Mitchell, 94 Cal. 550, 29 Pac. 1106; Butler v. Estrella Raisin Co., 124 Cal. 239, 56 Pac. 1040.

We find no error in the record, and the judgment is affirmed.

We concur: BURNETT, J.; HART, J.

43 Cal. App. 597

AMBROSE v. HAMMOND LUMBER CO.

(Civ. 2990.)

(District Court of Appeal, First District, Division 1, California. Oct. 17, 1919. Hearing Denied by Supreme Court Dec. 16, 1919.)

1. SALES ⟸413—NECESSITY OF PLEADING FRAUD IN NOTE AS DEFENSE.

In an action against a lumber company for its refusal to deliver lumber to which plaintiff claimed to be entitled by virtue of an assignment of a credit for lumber given to plaintiff's assignor, who had indorsed over to the lumber company a note received by the assignor from a third person, the defense of fraud in the inception of note, etc., is not available where not pleaded.

2. BILLS AND NOTES ⟸171—INDORSEMENT WITHOUT RECOURSE HELD NOT TO AFFECT NEGOTIABILITY.

That a note negotiable in form is indorsed without recourse does not destroy its negotiability.

3. BILLS AND NOTES ⟸170—NEGOTIABILITY NOT DESTROYED BY GUARANTY OF PAYMENT.

The negotiability of a note is not impaired because the payee and indorser on transferring the same guarantees payment.

4. ASSIGNMENTS ⟸103 — ASSIGNMENT OF AGREEMENT TO DELIVER LUMBER; ESTOPPEL OF PARTY FURNISHING LUMBER.

Where a corporation induced a third person to execute a note to plaintiff's assignor, the corporation giving the maker its own notes and plaintiff's assignor indorsed over the note to the defendant lumber company in consideration of its agreement to furnish him with lumber, *held*, that the contracts were supported by sufficient consideration, and, where the credit in favor of plaintiff's assignor was assigned to plaintiff, the lumber company could not justify its refusal to furnish plaintiff with the lumber on the ground that the consideration for the original note which had been assigned to the lumber company remained executory.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by W. V. Ambrose against the Hammond Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. L. Horton and Gurney E. Newlin, both of Los Angeles (A. W. Ashburn, of Los Angeles, of counsel), for appellant.

Scarborough & Bowen, of Los Angeles, for respondent.

BARDIN, Judge pro tem. This is an appeal from the judgment in favor of the plaintiff. The action was brought to recover damages because of the refusal of the defendant to furnish to plaintiff a quantity of lumber which plaintiff claims he was entitled to receive.

The controversy between plaintiff and defendant is the outgrowth of the execution and delivery of a promissory note of one Henry E. Bothin to Southern California Utilities Company, for $5,000, dated December 3, 1913, payable one year after date. Simultaneously with the delivery of this note there was executed in favor of and delivered to Mr. Bothin, five $1,000 notes of said company. Pursuant to the resolution of Southern California Utilities Company, the Bothin note was indorsed without recourse and placed in the hands of one Franklin Helm, the promoter of the Southern Utilities Development Company, for negotiation. It was the understanding of Mr. Bothin at the time he executed this note that it would be negotiated in order to raise funds to be disbursed in the development of an irrigation project, which, if consummated, would result in his own financial gain. Helm employed one Vigus, a broker, to sell the note, and a sale thereof was made to Hammond Lumber Company, a corporation, the defendant herein, by the terms of which, as found by the court, it was agreed by the defendant to pay to said Helm the sum of $4,500, which was to be credited upon defendant's books in the name of Franklin Helm, and that the same would be paid by the defendant in lumber at market prices whenever demanded by Helm. Such credit was accordingly entered upon the books of the defendant in favor of said Helm. For his services as broker, Vigus received a like credit for $500. Previous to the delivery of the Bothin note to the defendant, and in addition to the indorsement already stated, the following was written upon it:

"I hereby guarantee payment of this note, waiving protest, notice of nonpayment and demand. Franklin Helm."

The manager of the defendant testified that but for this guaranty of the payment of the note by Helm the defendant would not have purchased the note.

During the month of December, 1913, Helm applied to plaintiff for a loan of $3,250, offering as security the said "credit memo-

randum" for $4,500, payable in lumber, standing on the books of defendant. Before making the loan to Helm, the plaintiff, with Helm and the broker, Vigus, went to the office of the defendant and, as Ambrose testified, "asked the bookkeeper if they owed Franklin Helm $4,500 which was to be paid in lumber, and he turned to his ledger sheet, and said 'Yes, he has a credit here of $4,500 on the book.' Mr. Helm says, 'Transfer this to Mr. Ambrose name,' which was done in the presence of Mr. Helm, Mr. Vigus, and myself. I saw that transfer made to my name on the books of the Hammond Lumber Company in my presence."

Following the transaction at the office of defendant, the plaintiff loaned Helm the sum of $3,250, taking the note of Helm payable in three months. Upon nonpayment of Helm's note at maturity, Ambrose and Helm made a supplemental oral agreement, the effect of which was that the credit standing upon the books of defendant was to be considered the property of plaintiff without condition and Helm's indebtedness to Ambrose to be deemed paid.

Deliveries of lumber aggregating in amount and value $1,004.95 were made to plaintiff as requested, until August 10, 1914, when defendant refused to deliver any more lumber on the credit referred to, basing its refusal so to do in effect upon the ground that the Bothin note had been issued without consideration.

On December 16, 1914, Mr. Bothin entered into an agreement with the defendant indemnifying it against any loss that might be sustained by it, because of nondelivery of any additional lumber under the aforesaid credit standing on its books, and the defendant, in consideration of such agreement to save it harmless, agreed to furnish no additional lumber upon said credit.

The present action was instituted on June 12, 1915, to recover as damages the balance claimed to be unpaid upon the credit referred to, with interest.

[1] It is the contention of the defendant:

"That plaintiff was the owner of a nonnegotiable instrument subject to all equities and defenses existing against his assignor, Helm; that the Bothin note was valueless, and subject to many infirmities in the hands of the defendant due to the fact that defendant gave only an executory consideration for the same. * * *"

It is also claimed in the briefs of the appellant that the Bothin note is valueless and subject to infirmities in the hands of defendant because of fraud alleged to have been committed by Helm at the inception of the note, and stated to consist of fraudulent representations going to the intended use of the proceeds of the note when negotiated. But the pleadings do not tender such an issue. Fraud not having been pleaded, we do not see how such a defense is available to the defendant (San Francisco Mercantile Union v. Muller, 18 Cal. App. 174, 122 Pac. 828), even though there were no other legal obstacles in the way of the consideration of such defense.

[2-4] The Bothin note is in form a negotiable note. It was made expressly to be negotiated. It was indorsed without recourse by the original payee, which did not destroy its negotiability. 8 C. J. 370. And neither did the fact that Helm guaranteed its payment affect its negotiability. It seems to have been purchased by defendant in good faith in due course of business, before maturity and, in view of all the circumstances of the case, for a valuable consideration. We cannot agree with counsel for the appellant that the consideration for the Bothin note continued to be executory after the transfer of the credit in lumber to the plaintiff. Such transfer, under the circumstances already noted, operated as the creation of a new contract which the defendant should not be permitted to disregard. The promise of the defendant to make deliveries of lumber to plaintiff was supported as to consideration, by the detriment suffered by the plaintiff in loaning $3,250, which would not have otherwise been made, and which loan was never repaid. The delivery of the five promisory notes of the Southern California Utilities Development Company to Bothin was, of itself, sufficient consideration for the support of the Bothin note. 8 C. J. 227.

At the time of the refusal of the defendant to deliver lumber to the plaintiff, the Bothin note had not matured. How could the defendant then know that it could not realize upon Helm's guarantee of the payment of that note at maturity?

Counsel for the respective parties have been very industrious in the preparation of their respective briefs, and have favored the court with every assistance at hand for the proper solution of the controversy. After a careful consideration of all the arguments pro and con, we perceive no reason why the judgment in favor of the plaintiff should not be affirmed. If Mr. Bothin executed his note because of fraudulent representations of Southern California Utilities Company, or of its agent, or if he is entitled to redress of some nature, he must seek it in some proper action. The defendant may not adjudicate those matters for him in this action.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(43 Cal. App. 718)

PASQUALETTI v. HILSON et al.
(Civ. 2967.)

(District Court of Appeal, First District, Division 1, California. Oct. 22, 1919. Hearing Denied by Supreme Court Dec. 18, 1919.)

1. MECHANICS' LIENS ⊜78—STRICT COMPLIANCE WITH PROVISIONS FOR NOTICE OF NONLIABILITY NECESSARY.

Code Civ. Proc. § 1192, as amended by St. 1911, p. 1313, providing that the owner of premises may relieve himself from liability for work, labor, or materials furnished upon the same by posting notice in writing to that effect in a conspicuous place on the property and filing a verified copy in the office of the county clerk, must be strictly complied with to relieve an owner from responsibility for labor done or materials furnished, etc.

2. MECHANICS' LIENS ⊜78—ACKNOWLEDGMENT OF COPY OF NOTICE OF NONLIABILITY NOT EQUIVALENT TO VERIFICATION.

Where the owner of premises posted a written notice that he would not be liable for work, labor, or materials furnished thereon, and filed for record a copy of such notice containing his acknowledgment thereof before a notary public, there was not a sufficient compliance with Code Civ. Proc. § 1192, as amended by St. 1911, p. 1313, requiring copy of such notice to be verified, to free the owner from liability, for an acknowledgment before a notary is not equivalent to a verification.

3. MECHANICS' LIENS ⊜78—LIABILITY NOTWITHSTANDING KNOWLEDGE THAT OWNER HAD POSTED NOTICE OF NONRESPONSIBILITY.

Where the owner of premises had posted a written notice in compliance with Code Civ. Proc. § 1192, as amended by St. 1911, p. 1313, that he would not be responsible for work, labor, or materials furnished upon the premises, but failed to comply with the exact requirements of the section, as to recording of verified copy of such notice, he is liable to persons furnishing labor and materials at the request of lessees of the premises, though such persons had actual knowledge of the posting of the notice of nonliability.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Joseph Pasqualetti against Abraham Hilson, Gee Wo Company, and another, to foreclose a mechanic's lien. From a judgment denying foreclosure against the first-named defendant, the owner of the premises, plaintiff appeals. Reversed.

N. A. Dorn, and C. D. Dorn, both of San Francisco, for appellant.

Jos. E. Bien, Abram M. Marks, and Roche & Ibos, all of San Francisco, for respondents.

RICHARDS, J. This is an appeal by plaintiff from a judgment in favor of the defendants in an action brought by plaintiff to foreclose a mechanic's lien for labor and material alleged to have been supplied upon certain premises of which the defendant Abraham Hilson was the owner, and Gee Wo Company and Won Hink were lessees.

The labor was performed and the material supplied in pursuance of a written contract between plaintiff and the said lessees of the property. Upon the trial of the cause the court rendered its judgment in favor of the plaintiff as against said lessees, but adjudged that as against the defendant Abraham Hilson the plaintiff was entitled to take nothing, and judgment was accordingly rendered in Hilson's favor.

The sole question presented on this appeal is as to whether the said defendant and respondent Hilson had given such notice of nonliability under the provisions of section 1192 of the Code of Civil Procedure as to be relieved of responsibility for the labor and materials furnished by the plaintiff upon his premises.

[1, 2] It appears from the findings of the court that the respondent Hilson posted notice of nonliability upon the premises in question, and also that he undertook to file for record a copy of such posted notice in attempted compliance with the requirements of said section of the Code. The language of the Code which prescribes that the owner of the premises may relieve himself from liability for work, labor, or materials furnished upon his premises, requires that—

He "give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also * * * file for record a verified copy of said notice in the office of the county recorder of the said county in which said property * * * is situated."

It is a conceded fact in the record before us that the copy of the notice of nonliability which the respondent Hilson attempted to file, and did in fact file for record under the provisions of this section of the Code, contained his acknowledgment thereof before a notary public in conformity to the general form of acknowledgments provided by law, but that it did not contain any other or further verification than said acknowledgment. It is the contention of the appellant herein that such acknowledgment of said notice did not amount to a sufficient compliance with the requirements of the section of the Code above quoted, and did not constitute a verification of said notice within the meaning of said section so as to relieve the said respondent from responsibility to the appellant herein.

We are constrained to agree with the contention of the appellant in this regard. Section 1192 of the Code of Civil Procedure, as the same was amended in 1911 (St. 1911, p.

1313), was evidently intended to require a strict compliance with its provisions on the part of owners of property upon which work or labor was to be done or materials furnished in order to relieve themselves from responsibility for the value of the same under the provisions of chapter 2 of title 4 of the Code of Civil Procedure relating to the liens of mechanics, materialmen, and laborers. The language of said section of the Code requires the filing for record of "a verified copy of said notice in the office of the county recorder." The term "verified," wherever used in the Code of Civil Procedure of this state, requires the oath or affidavit of the party executing the instrument in order to amount to a sufficient verification thereof; and we are entirely satisfied that the use of the term "verified" in the particular section of the Code under review carried this meaning. This view is strengthened by the further and concluding clauses of said section which, after providing what the notice in question should contain, expressly requires that the copy thereof to be recorded shall be "verified by any one having knowedge of the facts." It would seem to be quite clear that a mere acknowledgment of the execution of such a notice by the person signing the same would not amount to a verification thereof and would not suffice to satisfy the requirements of these clauses of the section of the Code in question in that regard. And it follows necessarily that the copy of the notice of nonresponsibility which was filed for record by said respondent Hilson was insufficient to constitute a compliance with said section of the Code so as to relieve him from responsibility to the plaintiff.

[3] It is, however, contended by said respondent that since the notice in question was posted upon the property upon which the plaintiff performed his labor and furnished his supplies, and the court found as a fact that the plaintiff had actual notice of the respondent's claim of nonliability, the failure of the respondent to file said notice in the form required by the statute becomes thereby immaterial. In support of such contention the respondent directs our attention to the case of Street v. Hazard, 27 Cal. App. 263, 149 Pac. 770, which seems to sustain said contention. An examination of that case, however, discloses that the notice which was therein held sufficient was given prior to the date of the amendment to said section of the Code requiring the recordation of a copy of the posted notice of nonliability on the part of the owner of premises, and hence the ruling of the court in said case is not pertinent to the case at bar.

The respondent further contends that the claim of lien filed by the plaintiff herein was insufficient in form, and for that reason he was not entitled to recover in this action as against the respondent Hilson. This contention we find to be without merit, since an examination of the plaintiff's claim of lien discloses that it contains all of the statutory requirements for such an instrument, and that there is no variance between the form and contents of said claim of lien and the averments of the plaintiff's amended complaint; nor is there any material variance between the contents of said claim and the proofs proffered by the plaintiff upon the trial of the cause.

It follows that the trial court was in error in its conclusions of law and judgment that the plaintiff was entitled to take nothing as against the respondent Hilson.

Judgment reversed.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

43 Cal. App. 606

FIGONE et ux. v. GUISTI. (Civ. 2904.)

(District Court of Appeal, First District, Division 2, California. Oct. 17, 1919. Hearing Denied by Supreme Court Dec. 15, 1919.)

1. INTOXICATING LIQUORS ⊜144 — EMPLOYMENT OF INFANT IN SALOON ILLEGAL.

A saloon keeper violated Pen. Code, § 273f, providing that a parent or employer shall not send a minor to any saloon, when he sent his minor son into the saloon conducted by him to assist in work there.

2. NEGLIGENCE ⊜6—VIOLATION OF STATUTE NEGLIGENCE PER SE.

Where a defendant violates the express provisions of a statute, that violation itself, when proven, establishes his negligence per se, but it is negligence per se only in favor of one sought to be benefited by the violated statute.

3. INTOXICATING LIQUORS ⊜315—VIOLATION OF STATUTE NOT NEGLIGENCE PER SE.

A saloon keeper who violated Pen. Code, § 273f, by permitting his son, a minor, to work in his saloon, was not guilty of negligence per se as to a third person killed in the saloon by the boy; the statute being passed only for the protection and benefit of minor employés.

4. MASTER AND SERVANT ⊜302(1)—SCOPE OF EMPLOYMENT OF SERVANT COMMITTING TORT.

A master is responsible for the torts of his servant only when they are committed within the scope of the employment.

5. MASTER AND SERVANT ⊜300—MASTER'S LIABILITY FOR DEATH BY REVOLVER IN HANDS OF MINOR SERVANT.

A saloon keeper was not liable in damages for the death of a patron of the saloon, who was killed by a minor employed to work in the saloon with a revolver kept in the saloon, on the ground that the revolver was a dangerous instrumentality, and that it was by reason of his employment that the minor was enabled to get possession of the weapon.

6. MASTER AND SERVANT ⟸302(6)—MASTER'S LIABILITY FOR ACTS OF SERVANT IN PRIVATE QUARREL.

Where an employé working in a saloon killed a patron thereof with a revolver kept in the saloon by his master, the difficulty arising out of a private quarrel, and having nothing to do with keeping order in the saloon or furthering the master's business, employer was not responsible in damages.

7. PARENT AND CHILD ⟸13(1)—PARENT'S LIABILITY FOR INJURY FROM PISTOL.

A father is not responsible in damages for the death of one killed by his minor son, even though he negligently, carelessly, and willfully countenanced his child in having a loaded pistol.

8. TRIAL ⟸139(1)—DISMISSAL FOR INSUFFICIENCY OF EVIDENCE SUSTAINED.

A court is justified in granting defendant's motion for nonsuit after the evidence on both sides has been heard in the case, where, if the motion had been denied and a verdict found for plaintiff, it would have been set aside as not supported by the evidence.

Brittain, J., dissenting.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Luigi Figone and Maria Figone, his wife, against Grisostomo Guisti. Judgment for defendant, and plaintiffs appeal. Affirmed.

Devoto, Richardson & Devoto, of San Francisco, for appellants.

Harry I. Stafford and W. F. Stafford, both of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against them, entered upon the granting of defendant's motion for a nonsuit. The action was one brought by the parents of John Figone, a minor, to recover damages for the death of said John Figone, who was shot by the minor son of the defendant, while said minor son (George Guisti) was in the employ of the defendant. On March 14, 1917, the defendant owned and conducted a saloon and restaurant business at 218 Washington street, San Francisco. He employed a regular barkeeper, and his son George assisted him in the restaurant and also at the bar when the rush of business made his help necessary. Defendant had a loaded revolver in the drawer under the bar counter which was placed there as a protection against robbers. On March 14, 1917, John Figone entered the saloon. No one was present at this time except the two boys. What happened thereafter appears only from the testimony of George Guisti, who testified that the deceased threatened to "shanghai" him, and he, without being aware of the meaning of this language—and with a general impression that it meant something offensive—pulled out the revolver from the drawer and shot deceased.

[1-3] It is clear that the action of the boy which caused the death of plaintiffs' son was not within the course of the employment, but arose out of the personal quarrel of George Guisti with deceased. However, it is contended that the defendant, in employing in his saloon a boy who was a minor, violated the provisions of section 273f of the Penal Code; that under the decisions of our Supreme Court such violation of a penal statute constitutes negligence per se, and that the only other question remaining to be determined is whether or not such violation was the proximate cause of the injury sustained by the plaintiffs. Section 273f, Penal Code, provides:

"Any person, whether as parent, guardian, employer or otherwise * * * who * * * shall send, direct, or cause to be sent or directed to any saloon, gambling house, house of prostitution, or other immoral place, any minor under the age of eighteen years, is guilty of a misdemeanor."

Plainly, the defendant was violating the foregoing section when he sent his minor son into the saloon conducted by him to assist in any work there. It has been held by the Supreme Court of this state that where a defendant violates the express provisions of a statute, that violation itself, when proven, establishes his negligence per se. Williams v. S. P. Co., 173 Cal. 525, 540, 160 Pac. 660; Siemers v. Eisen, 54 Cal. 418; McKune v. Santa Clara V. M. &. L. Co., 110 Cal. 480, 485, 42 Pac. 980; Stein v. United R. R., 159 Cal. 368, 372, 113 Pac. 663; Driscoll v. Cable Ry. Co., 97 Cal. 553, 565, 32 Pac. 591, 33 Am. St. Rep. 203; Bresee v. Los Angeles Traction Co., 149 Cal. 131, 139, 85 Pac. 152, 5 L. R. A. (N. S.) 1059; Fenn v. Clark, 11 Cal. App. 79, 81, 103 Pac. 944. In all of the foregoing cases, however, and in all others which we have been able to find, the violation of a statute has been held to establish negligence per se only in favor of one sought to be benefited by the violated statute. In other words, under the statute, a duty is owing to the persons coming within its protection, and as to such persons a violation thereof is negligence per se. The statute being considered here is plainly for the protection and benefit of the minor employé. It is a statute similar to those prohibiting the employment of children in certain dangerous occupations or for more than a stated number of hours each day. Such laws are enacted in the exercise of the police power for the protection and well-being of minors. Williams v. S. P. Co., supra, 173 Cal. at page 538, 160 Pac. 660. "It is a well-established principle that the violation of a statutory duty is the foundation of an

action in favor of such persons only as belong to the class intended by the Legislature to be protected by such statute." Lepard v. Michigan Central R. Co., 166 Mich. 373, 130 N. W. 668, 40 L. R. A. (N. S.) 1105. In the case of Platt v. Southern Photo Material Co., 4 Ga. App. 159, 164, 60 S. E. 1068, 1071, the court said:

"In determining whether the violation of a statute is negligence so as to support an alleged cause of action, the court is called upon to examine the law in respect to its objects; for, if it appears that notwithstanding the violation none of the consequences contemplated and sought to be guarded against have ensued, or that the plaintiff is not the person or does not belong to the class to whose benefit or for whose protection the statute was enacted, the court cannot declare that there is a case of negligence per se as to that cause of action or that plaintiff."

It may be said that there is practically no dissent from the proposition that the violation of a statute or municipal ordinance is actionable negligence only as to a person for whose benefit or protection it was enacted, and that where the plaintiff does not belong to the class that the law was designed to protect, it follows that it will not avail to supply the element of duty owing. Indiana, etc., Coal Co. v. Neal, 166 Ind. 458, 77 N. E. 850, 9 Ann. Cas. 424, and note. "In an action based upon a neglect of duty it is not enough for the plaintiff to show that the defendant neglected to perform a duty imposed by statute for the benefit of a third person, and that he would not have been injured if the duty had been performed; he must show that the duty was imposed for his benefit, or was one which the defendant owed to him for his protection." Kelly v. Henry Muhs Co., 71 N. J. Law, 358, 59 Atl. 23. See, also, note to Gilson v. Delaware Canal Co., 36 Am. St. Rep. 802, at page 817; Louisville & N. R. Co. v. Holland, 164 Ala. 73, 51 South. 365, 366, 137 Am. St. Rep. 25; Southern Coal, etc., Co. v. Hopp, 133 Ill. App. 239; Menut v. Boston, etc., R. Co., 207 Mass. 12, 92 N. E. 1032, 30 L. R. A. (N. S.) 1196, 20 Ann. Cas. 1213; Racine v. Morris, 201 N. Y. 240, 94 N. E. 864, 866; Everett v. Great Northern R. Co., 100 Minn. 309, 111 N. W. 281, 9 L. R. A. (N. S.) 703, 10 Ann. Cas. 294, 297.

[4-6] It appears, therefore, that the violation of the statute was a violation of a duty owing to the boy employed, but was not a violation of any duty owing to the plaintiffs, and therefore does not furnish a basis for a recovery in this action. Hence plaintiffs' rights must be examined in the light of very well-settled legal principles. There are two theories which are urged by appellants—one involves a liability by reason of the relationship of principal and agent; and the other a liability by reason of the relationship of father and son. The rule is entirely beyond question that a master is responsible for the torts of his servant only when they are committed within the scope of the employment. The fact, emphasized by the appellants, that the injury to plaintiffs involved the use of a revolver, which is a dangerous instrumentality, and that it was by reason of his employment that George Guisti was enabled to get possession of this weapon, does not alter the rule, in this state, at least. For it has been held in the case of of Stephenson v. Southern Pac. Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223, that where a servant of the railroad company prevents the appliances of the company to wanton and malicious purposes to the injury of others, the company is not liable. In that case the servant was in charge of a steam engine (which has also been held to be a dangerous instrumentality), and he willfully and wantonly backed it toward a street car which was crossing the railroad tracks, with the intent to frighten the passengers in the street car without colliding therewith, and, as a result, some of the passengers became frightened and jumped from the street car and were injured. The evidence is clear in the present case, as we have stated before, that the shooting was entirely outside of the employment. It arose out of a private quarrel, and had nothing to do with keeping order in the saloon or furthering the master's business. Upon the theory of responsibility growing out of the relation of master and servant, we think the nonsuit was proper.

[7] The second theory of appellants is that the father is liable for the tort of his son because he negligently placed him within reach of a loaded revolver which the son used to the injury of the plaintiffs. It is true there are several authorities in other states which might indicate that, in such states, such liability exists, and that the question of negligence is one for the jury. We are able to find but one authority in this state upon the question involved here, but as that case stands unmodified and uncontradicted, we are bound by such authority, and must decide this case in harmony therewith. That case is the case of Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 5 Am. Rep. 101, in which the complaint alleged that the father negligently, carelessly, and willfully countenanced his child in having a loaded pistol, which pistol the boy so carelessly used as to shoot the infant child of the plaintiff. A demurrer was interposed and sustained. The Supreme Court upheld the action of the trial court, stating in the opinion that the rule therein announced was in accordance with the common law. In view of this case, the second theory of the appellants is also without merit.

In considering the admission made by the pleadings upon which appellants rely, we

meet the first objection of appellants that the trial court erred in allowing an amendment to the answer after the nonsuit order had been made. We may concede this point to the appellants, and we shall discuss the pleadings as they were at the time of the granting of the nonsuit and before the amendment to the answer. They then contained an admission that on an occasion previous to the shooting, out of which this action arose, the boy, George Guisti, had drawn a revolver on a person having occasion to enter the saloon, and that such fact was known to the father—the defendant. We call attention to the fact that the allegation of the amended complaint is that George Guisti drew the revolver in November without cause or provocation upon a person having occasion to enter the saloon. The answer, while admitting the drawing of the revolver at that time, denies that it was drawn without cause or provocation, and alleges that it was drawn with just cause and provocation, and denies that the father was aware that the boy would draw the revolver or discharge the same willfully, carelessly, and unnecessarily during his employment. These controverted allegations of the amended complaint are unsustained by the evidence. The only evidence offered upon the question of whether or not the defendant had reason to believe the boy would "draw the revolver or discharge the same willfully, carelessly, and unnecessarily during his employment" was the testimony of Robert Gotelli, as follows:

"Q. Did you see any pistol in George Guisti's hand some time before that [the time of the killing]? A. Yes. Q. How long before? A. I could not tell you. About four or five months. Q. Where did you see the pistol in his hands, in the saloon? A. He was right there. He was only fooling around with another fellow. Q. Did you see the pistol in his hands? Where did he get that pistol? A. I could not tell you. I was eating lunch. I just spotted it, that is all, and I went out. I did not stay there very much. * * * Q. Did you see where George Guisti got the pistol from? A. I saw him when he was fooling around there but I could not tell you where he got it from. Q. Where did he have the pistol? A. He had it in his hand. Q. I wish you would state how he held the pistol? A. He held it in his hand and showed it to the other fellow. I just spotted it there, and I went out. I know they are always fooling around there. I don't know where he put it or whether he pointed it at the other fellow. Q. What did the son say when he had the pistol in his hand? A. He said, 'Look out.' That is all I heard, and I went out. Q. Is that all he said, 'Look out'? A. Yes. Q. Where was Mr. Guisti at that time? Was he in the restaurant or in the saloon? A. He was right there, serving the people; he was over there by the free lunch counter, because I never saw him alone in there."

[8] There is nothing in this evidence to show that young Guisti showed any inclination to injure any one. We do not think the incident was such that a reasonable mind could say that because of it the employer had reason to believe the boy a dangerous person to have around the saloon, or that the employer was negligent thereafter, because of such incident, in retaining the boy in his employ. The details of the incident are indefinite and incomplete, but so far as the testimony goes there is no evidence of any malice or of any danger to any one. The witness stated that young Guisti showed the pistol "to the other fellow"; that he warned him at the same time to "Look out," and the witness does not know whether or not the pistol was pointed at any one. We are of the opinion that if the court had allowed the case to go to the jury upon the admission and evidence herein discussed, and the jury had returned a verdict for the plaintiffs, the court would have been compelled to have set the verdict aside as unsustained by the evidence. The rule is expressed in the case of Geary v. Simmons, 39 Cal. 224, that a court is justified in granting defendant's motion for nonsuit after the evidence on both sides has been heard in a case, where, if the motion had been denied and a verdict found for plaintiff it would have been set aside as not supported by the evidence.

We are therefore of the opinion that upon every theory of the case, the action of the trial court was proper.

The judgment is affirmed.

I concur: NOURSE, J.

BRITTAIN, J. (dissenting). It is with regret that for the first time since the organization of this division of the court I am compelled to dissent from the opinion and conclusions of my Associates in regard to the controlling facts of the case and the applicability to them of the rules of law which would be unquestionable in a case to which they might properly apply.

The appeal is from a judgment of nonsuit in an action for damages for death by wrongful act. The plaintiffs and appellants are the parents of John Figone, 20 years and 5 months old, who was killed by an employé of the defendant in the defendant's saloon, of which the employé was in sole charge. The shooting was done with a revolver, which the defendant kept within ready reach back of his bar, as the defendant stated, so that if any one tried to hold him up he would be ready for him. At the time of the shooting the defendant's employé, who was his own son, was 17 years old, and had been in the defendant's employ some 15 or 16 months. It was a place where patrons dropped in to get a drink, and, on being served with the drink, if they desired, they were served with a free lunch, the same as in any other saloon. There was a separate dining room. The boy

who did the shooting was sometimes engaged in serving meals in the dining room, sometimes in serving free lunch and making change in the saloon, and sometimes in serving drinks over the bar in the saloon. Section 273f of the Penal Code provides that—

"Any person, whether as parent, * * * employer, or otherwise, * * * who, as employer or otherwise, shall send, direct, or cause to be sent or directed to any saloon, * * * or other immoral place, any minor under the age of eighteen years, is guilty of a misdemeanor."

Figone was killed on March 14, 1917. In November, 1916, the boy who shot Figone drew the same revolver upon another person who entered the saloon for the purpose of patronizing it. A witness to that occurrence testified that at the time the boys were fooling, and that the defendant was present. In his answer the defendant admitted the revolver was drawn upon a patron of the saloon at that time, and asserted that it was for just cause and because of provocation. No facts were stated in the answer to support those legal conclusions. They amounted merely to an admission on the part of the employer that he knew his minor employé had drawn the deadly weapon, which he provided and kept in his place of business, upon a patron of his saloon, and that he, the employer, approved the act. The answer containing the admissions was regularly admitted in evidence without objection on the part of the defendant. In the saloon, at the end of the bar, was a small space, separated from the bar by curtains, to which patrons of the saloon retired for private conversation. This space was called "the office" in a statement made by the shooter to the police after his arrest. The only evidence of what occurred at the time of the killing was in this self-serving statement of young Guisti. He said:

"I was washing glasses, and I did not notice John Figone come into the office. And I was all finished washing glasses, I noticed him in the office. I said, 'Hello, John.' I said, 'How are you?' and he said some Sunday he was going to take me to San Jose and shanghai me. I did not know what the word means. I thought it had a vulgar meaning. I said, 'Oh, no; you are not.' He said: 'Oh, yes.' It was then I jumped behind the counter and took the revolver and held it pointed at him, and I said, 'You are going to stop now?' And all of a sudden I seen him laying on the floor, hollering for help. I am not sure I pulled the trigger, but I heard the gun explode. At the time I pointed the revolver he was halfway up in his chair, and then I seen him on the floor crying for help."

He further stated what he thought was meant by "shanghai," but it is impossible that he could have believed that Figone at that time and in that public place either could or would attempt the act which Guisti described.

The foregoing facts were before the court when the motion for nonsuit was made. They are stated most strongly for the plaintiffs. "Upon a motion for nonsuit, the evidence, and every inference that may be fairly drawn from it, must be viewed in the light most favorable to the plaintiff's claim." Rauer v. Hertweck, 175 Cal. 280, 165 Pac. 948; Goldstone v. Merchants', etc., Co., 123 Cal. 625, 56 Pac. 776; Hanley v. California, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597.

It has been held in this state that a father as such is not liable for the shooting of another child by his minor son, even though it was alleged that the father "willfully, carelessly, and negligently suffered, permitted, countenanced, and allowed his son to have possession of a loaded pistol." Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622, 56 Am. Rep. 101. In the present case, therefore, there is no question concerning the liability of the defendant merely as the father of the boy who did the shooting. The defendant's liability, if he was negligent, resulted from his relationship with the boy as employer.

In support of the judgment it is strenuously contended that the shooting of Figone was not in the course of the employment of Guisti. The familiar rule that an employer is not liable for the tortious act of his employé done outside of the course of employment is invoked, and the long line of cases announcing this salutary rule is cited. The rule has well-defined limitations. The law charges every man with responsibilities he may not evade on the ground that he is an employer. If, for instance, he does not act with the care which an ordinarily prudent man exercises in the selection of his employés, and injury results thereby, the master may not evade responsibility under the "course of employment" rule. The defendant left in sole charge of his saloon his 17 year old employé, and as a part of the equipment of the saloon and within easy reach was a revolver, which the master repeatedly stated he kept so that, if any one attempted to hold him up, he would be ready for him. "Every person who acts through a representative is under obligation to discover the skill, experience, and diligence of his agent, and if he selects one who is incompetent to perform the duties of the service, he will be accountable to any person who may have sustained damage by such incompetency. Indeed proof of known incompetence has been held by excellent authority to be a foundation for the allowance of punitive damages." This statement of the law is supported by numerous authorities. 18 R. C. L., p. 791.

It is argued for the appellants that the employment of the boy in violation of section 273f of the Penal Code constituted negligence per se. Generally the violation of a penal statute which shows on its face that it was

enacted for the protection of a particular class, may not be invoked as showing negligence as a matter of law, except by one within the protected class. This rule also is limited. In a case frequently cited as a leading one upon the rule, it was expressly recognized that a coemployé of a child improperly employed was within the protection of the child labor law. In that case it was further fully shown that there was no causal connection between the violation of the statute and the injury of which complaint was made. It does not support the contention that the violation of such a penal statute, closely connected with an injury to a third person, cannot be relied upon in an action for negligence against the master under the rule requiring him to exercise prudence in the selection of competent employés. Platt v. Southern Photo, etc., Co., 4 Ga. App. 159, 60 S. E. 1068. Section 273f of the Penal Code might properly be considered as one passed for the benefit of the entire community, and, so considered, its violation would amount to negligence per se. It is not necessary so to determine in this case. If it be considered as one primarily passed for the protection of young Guisti, its evident purpose was to protect him and other minors from the evil effects of being sent to a saloon or other immoral place. As a fact only it was an expression, on the part of the people of the state as ordinarily prudent men of their views concerning the competency of minors employed in a saloon. For 15 or 16 months the employer had daily imparted to his youthful employé the lesson that the law defining crimes was not worthy of consideration. Not alone did the morals of young Guisti suffer because he was daily sent to the saloon by his employer, but they were further sapped by the repeated lessons of the employer that the prohibitions of the criminal law were without force.

Again, the "course of employment" rule does not apply where, even though the employer may have exercised ordinary prudence in the selection of his servants, knowledge is brought home to him of habits of wrongdoing, or infirmities of temper or lack of discretion, in the performance of the duties placed upon them by the employer. One illustration of this rule is that "if a railroad company, for instance, knowingly and wantonly employs a drunken engineer, or switchman, or retains one after knowledge of his habits is clearly brought home to the company, * * * and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages." Cleghorn v. New York Central, etc., R. Co., 56 N. Y. 44, 15 Am. Rep. 375. Recognizing the justice of this principle, it has sometimes been held that in permitting employés to indulge in vicious habits of work, the master is guilty of maintaining a nuisance. Hogle v. Franklin, etc., Co., 199 N. Y. 388, 92 N. E. 794, 32 L. R. A. (N. S.) 1038; Fletcher v. Baltimore, etc., Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411; Swinnarton v. Le Boutillier, 149 N. Y. 752, 43 N. E. 990. The reasoning on which these cases depend would apply equally to a case where a motorman, for instance, was retained after the master knew that on one occasion he had fallen in a fit while operating an electric car, or where a master retained a boy in charge of a loaded revolver, knowing he had on one occasion committed an unwarranted assault with it. While the fact of negligence in the final act may not be shown by proof of a similar act of negligence on another occasion, evidence of such an act is proper to show the employer's knowledge of the employé's unfitness for service. 18 R. C. L. p. 791. In the present case the master knew of the wrongful use of the revolver by his minor employé before the shooting in question. He retained him as his employé, and on the day of the shooting left him in charge of the same instrumentality. While it is argued that the shooting of Figone was not in the course of his employment, the master approved the first wrongful use of the instrumentality by his employé. The question of fact was therefore presented as to whether or not a reasonably prudent man would have left the 17 year old boy in sole charge of the saloon, of which the revolver was a part of the equipment.

It is argued that every man may own firearms, and there is nothing unlawful in leaving them loaded. This is true, but "firearms are extraordinarily dangerous. A person who handles such a weapon is bound to use extraordinary care to prevent injury to others, and is held to strict accountability for want of such care." Rudd v. Byrnes, 156 Cal. 640, 105 Pac. 959, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124. Might reasonable men differ in regard to the extraordinary care, or the lack of it, exercised by the master in leaving this loaded revolver within such handy reach of his minor employé, particularly when he knew of its former misuse?

The "scope of employment" rule is also limited by the impossibility of the master to avoid the consequences of an employé's use of dangerous agencies placed in his control by the master. In those cases, "responsibility is made to depend upon the fact that the wrong was made possible by the position of the employé and the instrumentalities furnished by the employer." 18 R. C. L. pp. 787, 788. "All courts agree that when the employer places in the hands and under the control of his employé an instrumentality of exceptionally dangerous character, he is bound to take exceptional precautions to prevent injury being done thereby. * * *

According to the expressions of some opinions, if the owner of an exceptionally dangerous agency places it in the hands of an employé, the negligence of the latter, either in failing properly to guard it, or in improperly using it, is the negligence of the owner, for which he is responsible. The employer is said to be answerable for the exercise of the employé's judgment in the use of the instrumentality." 18 R. C. L. p. 789. It is argued that this rule does not exist in this state by reason of the decision in a case where a locomotive engineer negligently backed his locomotive towards a street car on which the plaintiff was a passenger, and from which she jumped, believing herself to be in imminent danger of injury from an anticipated collision between the locomotive and the car. Stephenson v. Southern Pacific, 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. Rep. 223. All that was decided in that case was that under all the facts there under consideration the rule of nonliability of the master for the tortious act of its servant outside of the line of duty would be applied. Even though the opinion in that case might be construed as a definitive holding that under no circumstances would the wanton misuse of the locomotive by the engineer render the employer liable, that decision never has been, and ought not to be, construed as holding that in no case may the employer be held liable for the misuse of a deadly agency with which he has entrusted his employé. The text above quoted from Ruling Case Law is based upon the citation of authorities from Arkansas, Georgia, Illinois, Indiana, Iowa, Mississippi, New York, Ohio, Pennsylvania, Tennessee, Washington, and Wisconsin.

This court ought not to decide as a matter of law that in the particular case the defendant was guilty of negligence. Neither upon the facts before the trial court could it decide that the master was not guilty of negligence. Giving the Stephenson Case full weight as applying to all the facts in evidence there, and considering the rule which the writer of the article in Ruling Case Law said all courts recognized, the sole question presented on the motion for nonsuit was whether upon consideration of all the facts in this case—the employment of the minor in violation of the penal statute, the placing him in charge of the extraordinarily dangerous instrument, the approval of his former misuse of it by the master, the retention of him in the same capacity and alone in charge of the weapon—might reasonable men honestly reach different conclusions as to whether or not the defendant had exercised that degree of care which ordinarily prudent men would have exercised? If different conclusions upon these facts might be reached by reasonable men, then under the elementary rules stated at the outset of this opinion, nonsuit should have been denied. The plaintiffs had the constitutional right in such a case and upon such facts to have the question of negligence as a matter of fact determined by a jury. "It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true." Burr v. United R. R. Co., 163 Cal. 665, 126 Pac. 873. "Equally well settled is the rule that 'negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be drawn from the evidence.'" Burr v. United R. R. Co., supra; Wahlgren v. Market St. R. Co., 132 Cal. 656, 62 Pac. 308, 64 Pac. 993; Kimic v. San Jose, etc., Co., 156 Cal. 379, 104 Pac. 986. "It is only where the evidence is such that but one conclusion in respect to negligence could be reached by a reasonable and impartial man that the question becomes one of law for the court." Burr v. United R. R. Co., 163 Cal. 665, 666, 126 Pac. 873, 874. "Negligence * * * is never absolute or intrinsic, but is always relative to some circumstance of time, place, or person, and is to be determined by reference to the situation and knowledge of the parties, and all the attendant circumstances; and what would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances." Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. In this case under all the circumstances the granting of the motion for nonsuit ought not be upheld.

It is argued that even though the employer were negligent, unless his negligence was the proximate cause of the injury, the nonsuit should have been granted. The question of proximate cause in such a case is also one of fact which should have been submitted to the jury. An injury that is the natural and probable consequence of an act of negligence is actionable, and such act is the proximate cause of the injury. It need not be the sole cause. If the acts constitute a continuous succession of events, so connected that they become a natural whole, liability will attach. There may be a succession of intermediate acts, each produced by the one preceding and producing the one following. Milwaukee, etc., v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Mack v. Southbound, etc., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; Atkinson v. Goodrich, etc., Co., 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; Purcell v. St. Paul R. Co., 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; Bosqui v. Sutro R. Co., 131 Cal. 397, 63 Pac. 682. Courts have invariably declared their inability exactly to define the meaning of the words "Proximate

cause." The Supreme Court of the United States has said that each case must be tested "largely on special facts belonging to it, and often on the very nicest discriminations." Mutual Ins. Co. v. Tweed, 7 Wall. 52, 19 L. Ed. 65. In regard to lack of that extraordinary care which the Supreme Court of this state has held to be necessary in the use of firearms, in a comparatively recent English case it was held the defendant was guilty of actionable negligence where the defendant left a gun loaded, at full cock, standing inside of a fence on his lands beside a gap from which a private path led over the defendant's lands from the public road to his house, and the defendant's son, aged between 15 and 16, coming from the road through the gap on his way home, found the gun, whereupon he returned with it to the public road, and, not knowing it was loaded, pointed it, in play, at the plaintiff, who was on the road, and who was injured by its discharge. Sullivan v. Creed, 2 English Ruling Cases, 131. In another case, the defendant, being possessed of a loaded gun, sent his servant, a young girl, for it, with instructions to take the priming out, which was accordingly done, and damage occurred to the plaintiff's son in consequence of the careless presenting of the gun at him and drawing the trigger, when the gun went off. The court held the defendant was liable in an action on the case. Dixon v. Bell, 19 English Ruling Cases, 26. The rule in regard to proximate cause is that if but for the negligence of the defendant, in a continuous chain of circumstances, whether coupled with acts of third persons or not, the injury would not have occurred, the defendant's negligence is a proximate cause of the injury. In the present case, upon the evidence of the plaintiffs, considered most strongly for them, but for the defendant's negligence young Figone would not have been killed by the defendant's reckless employé, and the plaintiffs would not have been deprived of the support of their son.

After the nonsuit was granted, upon motion the defendant was permitted to file an amendment to his answer in which, in place of the admission of the defendant of the drawing of the gun upon a patron of the saloon in 1916 and his attempted justification of the act, the defendant averred that he had no sufficient information or belief on the subject to permit him to answer the allegations in that regard, and he denied that the revolver was so drawn by his employé and further denied that he was ever aware that his employé drew his revolver at any time upon any person. While amendments should be liberally allowed, that liberality should only be exercised in furtherance of justice. C. C. P. 473. It has been declared to be a rule that a plaintiff will not be permitted on the trial to deny a fact admitted in the answer. Bliss on Code Pleading, § 430; Bank of Woodland v. Herron, 122 Cal. 107, 54 Pac. 537; Hanson v. Stinehoff, 139 Cal. 169, 72 Pac. 913; Rudd v. Byrnes, 156 Cal. 639, 105 Pac. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124. "Speaking generally, it may be said that the test as to whether or not the court has abused its discretion will depend upon whether the amendment is a permissible amendment which will perfect a cause of action otherwise imperfectly pleaded. In this case the court had tried the action, had taken all of the evidence of all the parties, from which evidence it was satisfied that plaintiffs were not in possession of the land, and could not prove such fact upon a new trial without gross stultification of the evidence which they had formerly given." Norton v. Bassett, 158 Cal. 427, 111 Pac. 253. In the present case in view of the admission of the defendant and his attempted justification of the drawing of the weapon by his employé, and in view of the evidence of the witness who testified that the defendant was present upon that occasion, the denial of information concerning the fact of drawing the revolver and the denial of the fact amounted to such a stultification that the order permitting the amendment cannot be sustained. Spanagel v. Reay, 47 Cal. 608. The court could not by the order permitting the amendment to be filed nullify the evidence before the court on the motion for nonsuit. On retrial of the case, the defendant ought not to be permitted to introduce evidence or put the plaintiffs to the proof of facts upon a matter already admitted of record in the case.

The judgment should be reversed, and the amended answer stricken from the files.

181 Cal. 562

ERICKSON v. RHEE et al. (Sac. 2918.)

(Supreme Court of California. Nov. 24, 1919.)

1. LANDLORD AND TENANT ⟸230(1)—COMPLAINT IN LESSOR'S ACTION FOR RENT.

In lessor's action for rent against original lessee and third persons with whom lessee had entered into a contract, complaint *held* to state cause of action on the lease against third persons as lessees, and not upon original lessee's contract with third persons as a contract made for lessor's benefit.

2. LANDLORD AND TENANT ⟸230(8)—VARIANCE IN ACTION FOR RENT.

Where lessor's action for rent against lessee and third persons with whom lessee had entered into contract was based upon theory that third persons were liable on lease, and where there were no allegations putting in issue the contention that lessor might recover upon lessee's contract with third persons as a contract made for his benefit under Civ. Code, § 1559, lessor could not recover rent from third persons upon theory that such contract was made for his benefit, though third persons set up contract for purpose of showing there was no privity between third persons and lessee.

3. LANDLORD AND TENANT ⟸79(1)—LESSEE'S AGREEMENT WITH THIRD PERSONS NOT ASSIGNMENT OF LEASE.

Where lessee's agreement with third persons provided that lessee should farm a portion of the leased land with money advanced by third persons that third persons should market sufficient crops for payment of rent, and that the parties should divide expenses and crops in specified proportion, and where term of such agreement was less than that of lease, with optional right in third persons to extend term as to a portion of the land, there was no assignment of the lease, the interest acquired by third persons being merely in the nature of a subletting, since it was only a portion of the estate granted by lessor.

4. PARTNERSHIP ⟸15 — PARTNERSHIP IN BUSINESS OF FARMING.

Where lessee's agreement with third persons provided that lessee should farm a portion of the leased land with money advanced by third persons, that third persons should market sufficient crops for payment of rent, and that the parties should divide expenses and crops, term of agreement being less than that of lease, with optional right in third persons to extend term as to a portion of the land, the partnership relation created was not in the ownership of the lease, but in the business of farming.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Martin Erickson against S. K. Rhee and J. L. Siller and L. G. Siller, partners doing business under the firm name and style of Siller Bros. From a judgment denying plaintiff relief as to defendants J. L. Siller and L. G. Siller, partners doing business under the firm name and style of Siller Bros., plaintiff appeals. Affirmed.

John C. Scott, of Oakland, for appellant.

Sheridan Downey and Downey, Pullen & Downey, all of Sacramento (Vincent Suhr, of San Francisco, of counsel), for respondents.

MELVIN, J. Plaintiff appeals from an adverse judgment in an action for certain rents. The substance of the judgment was that "plaintiff take nothing from said defendants L. G. Siller and J. L. Siller, partners doing business under the firm name and style of Siller Bros."

By his pleading plaintiff averred: That on November 17, 1915, he leased to defendant S. K. Rhee land in Yolo county, described as follows:

"For the first year, all that portion of land in the S. W. quarter of section 33, township No. 9 north, range 1 east, of Mt. Diablo meridian, not now sowed to barley by the first party, and after the first year, then for the remainder of the term of this lease the following lands: The S. E. quarter of section 32 and the southwest quarter of section 33, all in township No. 9 north, range 1 east, Mt. Diablo meridian."

That said Rhee agreed to plant said premises to rice, as far as possible, and to pay $7 as rental for each acre so planted, and to pay such rent on November 17, 1916, together

with $335 on the rent for the year then commencing. That Rhee entered into possession of the premises. That, in relation to the farming and cultivation of the land, defendants, Rhee and Siller Bros. (the latter obtaining for that purpose a copy of the lease), entered into an agreement. That "pursuant to such agreement between Rhee and Siller Bros. the said Siller Bros. became partners with said Rhee in the farming of said leased premises under said lease and in pursuance of the terms thereof." That thereafter defendants planted 87 acres of the tract to rice, and there became due "as a rental from defendants" $609 and the further sum of $335, aggregating $944. That defendants, and in particular Siller Bros., did, in violation of the terms of the lease, take, remove, and carry away the crops without paying the rents. That the lease further provided for a reasonable attorney's fee to be fixed by the court in the event of an action by either party against the other; and that plaintiff was entitled to $150 as such fee.

Defendants Siller Bros. by their answer admitted the leasing of the premises by Rhee, as alleged in the complaint, but denied that they became partners with Rhee "in the farming of said leased premises, under said or any lease." They admitted, however, that they did enter into an agreement with Rhee in relation to farming the premises, and pleaded that contract as an exhibit. Siller Bros. also denied that they ever planted to rice 87 or any other number of the acres described in the lease, and denied liability for any amount of rental.

The agreement provides that Rhee shall farm about 90 acres of the land held by him under lease from Erickson for the term of one season ending December 31, 1917. There are elaborate provisions for the presentation of accounts to Siller Bros., for the insurance, at Rhee's expense, of the safety of the men employed, and the furnishing of the farming machinery and implements by him. Siller Bros. agree to furnish Rhee $10 per acre for all land actually planted to rice, and additional sums up to $5 per acre, if Rhee should be unable out of his own funds to provide money additional to the $10 sufficient to bring the rice to harvest. There are certain provisions in the contract for repayment of any additional sums so advanced with premiums. Rhee agrees to mortgage his interest in the crop to secure the repayment of all advances. By the terms of the agreement expense of harvesting and all expenses thereafter are to be borne in the proportion of two-thirds by the copartnership and one-third by Rhee. The contract also contains the following provision:

"Upon the harvesting of said crop it is to be divided as follows: Two-thirds of said crop shall go to the party of the first part (Siller Bros.), and one-third to the party of the second part (Rhee). It is agreed that sufficient of said first party's share of said crop shall be marketed by the first party to pay owner of said land the sum of three dollars and thirty-four cents ($3.34) per acre for each acre of land planted to rice and used in the cultivation thereof, said sum being the first party's share of said cash rental of said property. It is understood that sufficient of said second party's share of said crop shall be marketed by the party of the first part to pay the owner of said land the remainder of said cash rental as specified in that lease heretofore mentioned by and between Martin Erickson and S. K. Rhee."

The party of the first part (Siller Bros.) had the right of extending the agreement either one or two years, and there were minor provisions not necessary to be here noticed.

The court found, among other things, "that a partnership existed between the defendant S. K. Rhee and the defendants J. L. Siller and L. G. Siller, in relation to the farming of said premises, but not in the ownership of said lease"; that the lease from plaintiff to Rhee was for three years, but the agreement as to the farming of the property was to continue for two or three years at the option of the Sillers, and that there never was anything owing from Siller Bros. to plaintiff as rental. Among the conclusions of law the court determined that the Sillers were under no obligation to pay to plaintiff any part of the rent reserved in the lease from plaintiff to Rhee; and "that any interest in the real property described in said lease that may have been held by any partnership in relation to farming said real property, between the defendant S. K. Rhee and the defendants J. L. Siller and L. G. Siller, partners as aforesaid, was in the nature of a subletting of said property, and not of an assignment of said lease."

[1, 2] From the foregoing statement of the pleadings, the findings and conclusions, it is apparent that the cause was tried and determined upon the issues set forth in the complaint and met by the answer. The plaintiff sued the copartnership, Siller Bros., as a lessee, and not upon the farming contract, as one made for his benefit. An examination of the complaint shows that while reference is made to the contract between Rhee and Siller Bros., the terms of that agreement are not alleged, nor does Erickson seek to recover upon any provision contained in it. The suit was for rent, attorney's fee, and costs, and there was not even a prayer for general relief.

It is now contended by plaintiff, however, that by setting up the contract between Rhee and the other defendants in the answer they stood squarely upon its terms, and that if it be an agreement made for plaintiff's benefit, he is entitled to judgment against all of the parties to it. The obvious answer to this contention is that by their pleading defend-

ants were bound to set up the contract as indicating that there was no privity between Siller Bros. and the original lessor. They did not seek to establish by it any claim against Erickson, nor to confess any obligation to him. If plaintiff, on being apprised of the full text of the agreement, believed that he was entitled to judgment under its terms according to the provisions of section 1559, Civil Code, as a third person for whose benefit it was expressly made, he should have put that matter in issue by a pleading distinctly demanding judgment based upon that contract interpreted according to said section. This he did not do. The cause was tried upon the theory of the liability of Siller Bros. under the original lease. There was no allegation that the contract between Rhee and the copartners, Siller Bros., was not rescinded by the parties thereto before the complaint in this action was filed. There was no allegation that the Sillers ever marketed any rice or converted any portion of it to their own use. In short, there was nothing to put in issue the contention that plaintiff might have recovered upon the farming agreement as one made for his benefit. It is therefore not necessary to discuss the very interesting question whether that agreement was in its essence such a contract as under section 1559 of the Civil Code permits a third person to take advantage of it, or was one in which the covenant as to rent in the agreement was merely incidentally for the benefit of plaintiff, and therefore not one which he might enforce because falling under the rule announced in such cases as Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100, and Lake Ontario, etc., R. R. v. Curtiss, 80 N. Y. 219.

[3] Appellant contends that the transaction between Rhee and Siller Bros. amounted to an assignment of the lease. He attacks the court's conclusion that any interest of Siller Bros. in the real property described in the lease was in the nature of a subletting of said property, and not of an assignment of the lease. The conclusion of the court was correct. The contract between Rhee and the Sillers had relation to a portion only of the whole estate taken by Rhee. The latter parted with only a portion of the term conveyed by the lease to him. It is true that Siller Bros. were given an optional right to an extension of the term relating to the tract of 87 acres, but, as was well declared in the opinion of the learned District Court of Appeal when this cause was heard by that tribunal "this provision was a mere inchoate right, which was not coextensive with the entire estate in the leasehold acquired by Rhee." The facts of this case bring it clearly within the rule well stated by Prof. Tiffany in the first volume of his work on Landlord and Tenant at page 907 as follows:

"As regards the * * * transfer by the tenant * * * of an estate in the whole premises less than that which he has himself, leaving a reversion in him, the courts are in unison in considering it not an assignment but a sublease, making the transferee tenant of the transferor. The fact that the interest transferred is of a duration, but slightly less than the interest of the tenant is immaterial, and so the fact that there is a difference of a day or of a fraction of a day is sufficient to constitute the transfer a sublease and not an assignment."

This text is supported by many citations of authority.

[4] Further commenting upon the appellant's contention that the transaction was an assignment, Mr. Justice Hart, for the District Court, used the following language:

"Again, in Stewart v. Long Island R. R. Co., 102 N. Y. 607 [8 N. E. 201, 55 Am. Rep. 844], it is said: 'The rules relating to the effect of an assignment of a lease are so well settled that it is hardly necessary to do more than refer to them. Where a lessee assigns his whole estate, without reserving any reversion therein in himself, a privity of estate is at once created between his assignee and the original lessor, and the latter has a right of action directly against the assignee, on the covenant to pay, * * * but if the lessee sublets the premises, reserving or retaining any such reversion, however small, the privity of the estate is not established, and the original landlord has no right of action against the sublessee, there being neither privity of contract nor of estate between them.'

"In the present case there was no assumption of the lease by Siller Bros. As above stated, whatever interest they acquired in the lease was only a portion of the entire estate granted by the plaintiff, and if, therefore, there was any transfer of interest in the lease, it amounted only to a sublease.

"The case of Bedford v. Terhune, 30 N. Y. 453 [86 Am. Dec. 394], relied upon by the appellant here as in support of the position that the effect of the agreement between Siller Bros. and Rhee was the assignment of the lease, supports the above conclusion rather than the contention of appellant. * * * The court there said, quoting Woodfall's Landlord and Tenant, 345, that 'an assignment, as contradistinguished from an underlease, signifies a parting with the whole term,' and quoting 1 Hilliard's Abridgment, p. 126, § 55, that 'the ordinary distinction between an assignment and an underlease is that the former transfers the land for the whole term; the latter, for only part of it.' The court did say in that case, quoting from the syllabi: 'Where by the terms of a lease it is made a ground of forfeiture of the term if the lessees shall let or underlet without the written consent of the lessor, and parties other than the lessees are in possession without such consent, in the absence of any proof as to the agreement under which they entered, the presumption (if any presumption is to be indulged in) is that the transfer to the occupants was by assignment, and not by underletting.' In the present case, as we have shown, the agreement between Siller Bros. and Rhee covered but a small quantum of the term granted by the lease to Rhee, he reserving the remainder of the

whole interest to himself, both as to the term and the quantity of the land conveyed by the lease.

"But that a partnership relation was created by the agreement between Siller Bros. and Rhee, not in the ownership of the lease, but in the business of farming the 87-acre tract, we think is plainly shown by the language of the said agreement."

With the foregoing discussion and conclusion we entirely agree.

But it is argued that by joining in a partnership arrangement to farm the land and by their conduct, particularly in view of that part of their agreement by which certain parts of the crop were to be marketed by Siller Bros. to provide a fund for the payment of the rent, Siller Bros. assumed a definite part of the debts of the copartnership, and must respond, therefore, to a demand for payment of the rent in that proportion. The difficulty about this contention is that neither was it alleged by pleading nor shown by proof that any of the crop had been sold. The contract was not one for the purchase of a part of the lease, but, as the court found, for farming the land. A fund was to be created for the payment of the rent by the sale of part of the crops, but this created no trust for the benefit of plaintiff. It was a provision for the benefit of the lessee, who alone was responsible for the rent. That provision did not convert the sublease into an assignment.

No other alleged errors require discussion.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; LENNON, J.; OLNEY, J.; LAWLOR, J.

181 Cal. 627

ARTANA v. SAN JOSE SCAVENGER CO.

(S. F. 8610.)

(Supreme Court of California. Dec. 4, 1919.)

1. PARTNERSHIP ⊂=212—RIGHT TO PLEAD AS AN INDIVIDUAL IN ACTION AGAINST FIRM.

In action against a copartnership alone as a legal entity under Code Civ. Proc. § 388, for an accounting, a demurrer purporting to be the demurrer of D. alone as an individual, and not the demurrer of the defendant partnership, was not entitled to be considered on objection that D. was a stranger to the action.

2. PARTNERSHIP ⊂=204—DISMISSAL OF SUIT AGAINST FIRM ON APPEARANCE OF A MEMBER AS AN INDIVIDUAL.

In action against a copartnership alone as a legal entity under Code Civ. Proc. § 388, for an accounting, in the absence of any appearance by it, judgment of dismissal in its favor and for costs should not have been given.

3. PARTNERSHIP ⊂=264—PURCHASE OF INTEREST OF PARTNER DISSOLVES PARTNERSHIP.

If plaintiff succeeded in purchasing at execution sale the interest of one of the partners, such purchase dissolved the partnership (Civ. Code, § 2450, subsec. 4), leaving plaintiff with his action against the remaining partner or partners to obtain his interest.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Henry Artana against the San Jose Scavenger Company. Judgment of dismissal, and plaintiff appeals. Reversed and remanded.

William H. Johnson, of San Jose, for appellant.

Chauncey Tramutolo, of San Francisco, and Maurice J. Rankin, of San Jose, for respondent.

ANGELLOTTI, C. J. This is an appeal from a judgment of dismissal given in favor of the San Jose Scavenger Company, a copartnership, upon sustaining a demurrer to a complaint.

The action was brought against the copartnership alone as a legal entity, under the provisions of section 388, Code of Civil Procedure, which provides that—

"When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates."

Concededly the provisions of this section authorize an action against a copartnership by its common name; the section recognizing the copartnership as a distinct legal entity for the purposes thereof. The action was one to have the interest of the plaintiff, claimed to have been acquired by purchase at an execution sale of the interest of one of the partners in the copartnership, ascertained, and for an accounting. The record does not show how summons was served on the partnership defendant, or, indeed, that it was ever served on any of the partners. However, a demurrer was interposed to the complaint by one Peter Devincenzi, who was not named in the complaint, describing himself as "sued as San Jose Scavenger Company, a copartnership." This demurrer purported to be the demurrer of said Devincenzi alone, as an individual, and did not purport to be the demurrer of the defendant partnership. Plaintiff thereupon made a motion for an order striking such demurrer from the files, on the ground that Devincenzi is "a stranger to the action, and not a party thereto, and upon the further ground that the said demurrer is sham." This motion was denied. The de-

murrer was thereafter sustained, and judgment given "that plaintiff take nothing by his said complaint," and "that the said action be dismissed." This is the judgment appealed from.

[1] We see no good answer to the claim of appellant seasonably made, and ever since insisted on, that the attempted demurrer was not entitled to be considered. It did not purport to be the demurrer of any party to the action, for the only party defendant was the San Jose Scavenger Company, a partnership, which, for the purposes of the statute (section 388, Code Civ. Proc.) is regarded as a legal entity distinct from its members. Although, by virtue of the amendment of the section in 1907, the judgment in an action so brought binds, not only the joint property of the associates, but also the individual property of the party or parties served with process, it is still true that the action contemplated by the section is one against the associates as such to enforce a claim existing against the association, and is not an action against the individual members of the association; that is, unless they are, as individuals, made parties thereto. The association, whether it be a copartnership or other association of individuals transacting business under a common name, is, for the purposes of the section, a legal entity distinct from its members, and it is this legal entity which is in this action the sole party defendant. See, generally, Bollman Co. v. Bachman & Co., 16 Cal. App. 589, 591, 117 Pac. 690, 122 Pac. 835, and cases there cited. The record does not show that Devincenzi was one of the associates or partners, and the complaint does not purport to state any cause of action against him. So far as the record shows he is an absolute stranger to the action. Certainly his demurrer as an individual is not the demurrer of the sole defendant in the action, viz. the San Jose Scavenger Company, a copartnership.

[2, 3] It is furthermore clear that, in the absence of any appearance by the sole defendant, judgment in its favor of dismissal of the action against it, and for its costs, should not have been given. It seems improper, in the absence of competent objection to the complaint, to discuss the claims made in the brief of respondent relative to its insufficiency as a pleading. We may say, however, that it appears to us that plaintiff may have a good cause of action against an existing copartnership known as the San Jose Scavenger Company, if such there be, or against Devincenzi, doing business under that name, on the theory that such copartnership, as it now exists under that name, or Devincenzi, is holding property, belonging to him, a person not a member of the partnership, for which it refuses to account. If he did succeed in purchasing, at execution sale, the interest of one of the partners in the former San Jose Scavenger Company, such purchase dissolved the partnership (subd. 4, sec. 2450, Civ. Code), leaving him with his action against the remaining partner or partners to obtain his interest; but it is possible that a new partnership has been created under that name, of which he is not a member, which is withholding his property.

It is possible that Devincenzi was a member of such a copartnership, served with summons in this action, and authorized to appear for and in its name, and that the demurrer was inadvertently filed by him as an individual. In that event, we think the lower court should allow him to file an amended demurrer in the name of the copartnership.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

We concur: OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SHAW, J.

181 Cal. 599

WOODHEAD v. WILKINSON. (L. A. 5326.)

(Supreme Court of California. Dec. 1, 1919. Rehearing Denied Dec. 29, 1919.)

1. TRIAL ⟸397(1) — FINDINGS RENDERING OTHERS UNNECESSARY.

There was no necessity of finding on defensive allegations, they being negatived by the facts found.

2. NEGLIGENCE ⟸1—RESPONSIBILITY UNAFFECTED BY PURPOSE.

Defendant's purpose in stopping his car after running into plaintiff was immaterial, as no purpose, however benevolent, excuses negligence.

3. TRIAL ⟸397(1)—FINDING COVERING CONTRIBUTORY NEGLIGENCE.

Contributory negligence is covered by finding that defendant's negligent acts and omissions were the sole and proximate cause of plaintiff's injuries.

4. HIGHWAYS ⟸173(2)—DUTY OF AUTO DRIVERS TO PEDESTRIAN TO SOUND HORN.

Defendant, who ran his auto into plaintiff, walking on the right side of the highway outside the paved part, and who under St. 1915, p. 405, § 12, was under the necessity of sounding a warning "whenever necessary," and by section 20a was required to drive with due regard for safety of pedestrians, was not relieved of duty to sound his horn merely because plaintiff could see the glare of his headlight from behind; this not apprising her of the fact that he was leaving the paved way.

5. HIGHWAYS ⟸173(2)—DUTY OF AUTO DRIVERS TO PEDESTRIAN TO LOOK AROUND WIND SHIELD.

One driving his auto on a highway against a pedestrian was negligent in not looking around

the end of his wind shield if under all the circumstances, because of glare of lights, etc., this was the only way in which he could safely proceed.

Department 2.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Florence M. Woodhead against J. H. Wilkinson. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Vincent Hannon and Joseph E. Hannon, both of Los Angeles, for appellant.

Stephens & Stephens and Frank Dougherty, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued for damages for personal injuries, charging defendant with negligently driving an automobile over her.

The action was tried by the court without a jury. Judgment was for damages in the sum of $1,500.

The facts as found were substantially as follows:

On the evening of November 14, 1915, plaintiff had been driving her motorcar on the state highway near Ontario, in the county of San Bernardino. Her attention, and the notice of her guests in the automobile, had been attracted by the shouts and actions of the defendant, who was in a car that had stopped at the side of the road, and after proceeding about a quarter of a mile she had stopped at the request of her father, who, believing that defendant and his companions were in trouble, wanted to go back to assist them. She had turned to the right and had stopped her car facing west, with the two southerly wheels on the paved portion of the road, and the two northerly wheels on the unpaved part. The highway was 60 feet in width, the paved portion being 18 feet wide. The rear light was burning, as were the headlights on the forward portion of the car. At the time of the accident plaintiff had alighted from her car and, having crossed and recrossed the road, was walking in a westerly direction on the northerly side of the road about 3 feet north of the paved portion thereof and about 15 feet from her automobile.

Defendant approached plaintiff from behind and, as the court found, so negligently drove his automobile as to run upon and over plaintiff, inflicting serious injuries.

Among other findings were those to the effect that defendant violated the laws of the state of California by failing to sound his horn and by failing to turn to the left to pass the plaintiff's car. There was a general finding of defendant's negligence and more specific findings:

"That said defendant carelessly and negligently failed to sound any horn or suitable signal upon approaching plaintiff's automobile standing on the highway.

"That the vision of the defendant through the wind shield of his machine was obscured by the reflection of the headlight of a machine approaching from his rear.

"That said defendant carelessly and negligently failed to look around or to the side of his wind shield, so as to observe the said plaintiff.

"That said defendant carelessly and negligently failed to observe the highway immediately in front of his automobile to avoid striking and injuring the plaintiff."

Appellant's first objection was that the court failed to pass upon his pleaded defense and to make findings thereon. His defense was that the glare upon his glass wind shield from the lights of a machine behind him interfered with his vision; that in order to let the machine pass he slackened his speed and turned to the right side of the road; that he then discovered plaintiff's motionless car in front of him; that he determined to stop, and did stop, for the double purpose of allowing the machine with the glaring headlights to get in front of him and to offer aid to the occupants of the standing machine, if they needed it; that he had almost stopped when he first saw plaintiff about 30 feet behind her car, too late, however, to avoid striking her; and that all this time he was making every effort that a prudent person could make to avoid accident by shading his eyes with his hat and peering through the lower part of the wind shield.

[1, 2] The court did find upon all of the essential matters pleaded in the answer. It was found:

"That the vision of the defendant through the wind shield of his machine was obscured by the reflection of the headlight of a machine approaching from his rear."

This finding is even stronger than defendant's allegation, for admittedly his vision was not entirely shut off, yet the court found that it was "obscured." There was no finding that he did not strike the plaintiff when she was 30 feet from her automobile. None was necessary, for it was found that the real distance was 15 feet. This negatives, also, the allegation that he was stopping 30 feet from plaintiff's car.

There was no necessity for a finding regarding his double purpose in stopping. None was necessary. His purpose was entirely immaterial to the issues involved. No purpose, however benevolent, excuses negligence. There was no necessity for a specific finding upon the matter of the defendant's failing to look or looking through the lower part of the wind shield while using his hat as a shade. The general finding of negligence covers this matter, and the court found, also, that under all the circumstances it was negligence for him not to look around the end of the wind shield. The other defensive allegations were completely negatived by the facts found.

[3] Defendant complains because, as he asserts, there was no finding on the issue of contributory negligence. There was an allegation that plaintiff's negligence was the proximate cause of the injury. The court found, however, after enumerating defendant's acts of negligence:

"That each and every one of the foregoing negligent acts and omissions on the part of the defendant were the sole and proximate cause of the injuries sustained by the plaintiff as hereinafter set forth."

This covers the subject of plaintiff's alleged negligence.

[4] Attack is made upon the two findings that defendant was negligent in failing to sound his horn. Admittedly, plaintiff saw the glare from his headlight and knew that a car was coming up from behind; therefore (so defendant argues) there was no use for an alarm, and the laws of California do not require the sounding of a horn unless one means to pass another person or vehicle, and defendant, being about to stop, was not under the rule. The mere fact that plaintiff could see the glare of defendant's headlights was not enough. True, it apprised her of his approach, but not of the fact that he was leaving the paved portion of the road and running partly to the north thereof. She was justified in assuming (as she says she did) that he was following the usual custom of drivers. Lawyer v. Los Angeles Pacific Co., 161 Cal. 53, 118 Pac. 237. He was under the necessity of sounding a warning "when ever necessary." Stats. 1915, p. 405, § 12. That plaintiff had a right to be there cannot be denied (Raymond v. Hill, 168 Cal. 473, 143 Pac. 743), and defendant was not absolved from the duty of giving her fair warning of his approach, if the circumstances made such warning necessary, merely because she could see the glare of his headlights. He was under the rule of section 20 (a) of the law of 1915, then in effect, which declares that—

"The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians."

The plaintiff, hearing no unusual sound and seeing radiance that might have been caused by a car about to pass to her left, did not look back until the noise of the machinery became so loud as to frighten her. It was then, she said, too late, for at that moment the car was almost upon her.

[5] Appellant also complains of the finding that he was negligent because, when he found that his vision was obscured by the glare upon his wind shield from the lights of the approaching automobile, he failed to look around the side of the shield. Obviously, he would be bound as a careful driver to stop as soon as he could reach a place by the side of the road, or to place himself in a position from which he could see the road over which he was driving. He did not stop at once, and if, under all the circumstances, looking around the end of the wind shield was the only way in which he could safely proceed, then he was negligent in failing to adopt that plan. The same reason applies to the finding that he was negligent in failing to observe the highway immediately in front of the car which he was driving.

From the record it is evident that defendant was acting with carelessness of the most reprehensible sort.

Judgment affirmed.

We concur: WILBUR, J.; LENNON, J.

181 Cal. 616

LOS ANGELES INV. CO. v. WILSON et ux. (L. A. 5273.)

(Supreme Court of California. Dec. 1, 1919. Rehearing Denied Dec. 29, 1919.)

VENDOR AND PURCHASER ⊂=182—OVERPAYMENT ON INSTALLMENT APPLIES ON SUBSEQUENT INSTALLMENTS.

Under contract called a "lease with privilege of purchase" and providing for rental of $36.00 on or before the first of each month, purchaser or lessee was not in default so long as her credit if applied to debt showed an average of more than $36.00 for each month that agreement had been in existence.

Department 2.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Los Angeles Investment Company against Edward A. Wilson and wife. Judgment for plaintiff and defendants appeal. Reversed.

F. M. Shepard and H. E. Gleason, both of Los Angeles, for appellants.

Flint & Jutten, L. W. Jutten, H. S. Mackay, Jr., Ed. R. Brainerd, Jr., William R. Flint, and J. H. Schenck, all of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from a judgment in favor of plaintiff in an action to terminate an agreement in writing by which Jennie B. Wilson entered into a contract with plaintiff to lease certain property with the privilege of purchase. Edward A. Wilson is made a party to the action because he is the husband of said Jennie B. Wilson.

The instrument on which the action was founded is called a "lease with privilege of purchase." It relates to lot 37, tract No. 1798, as per map recorded in book 21, page 40 of maps, records of the county of Los Angeles. The term is for 120 months, com-

mencing on the 1st day of March, 1913. The rental is $36, payable in advance on or before the first day of each month. It was agreed that if any default should be made in payment of rent or any other covenant or covenants the landlord might reenter the premises, and that the rights of the tenant should thereupon cease and that the agreement of sale should immediately terminate. The tenant was given the right to purchase the lot for $3,550, plus taxes, insurance and assessments, and interest at 7 per cent. per annum. And it was further provided that—

"Any amounts paid as rent shall apply, first to the payment of interest due, second to the payment of taxes, insurance and assessments, and the balance shall be applied to the payment of the principal."

It was agreed that when the vendee should have paid 40 per cent. of the purchase price and interest the vendor would execute a deed to the property and take a mortgage.

Plaintiff's action was based upon alleged default in the payment of monthly installments. Defendants denied any such default, and in a cross-complaint alleged that on March 25, 1913, and during the faithful performance by her of the contract, Mrs. Wilson elected to and did purchase the premises by payment to plaintiff of $300, and the further sum of $36 per month until April 3, 1916, when, it is alleged, the Los Angeles Investment Company abandoned the agreement and refused further performance, after receipt of $1,446 under the contract.

The court found that $1,446 had been paid by defendant and cross-complainant, $300 in March, 1913, and various other sums each of $36 or double that amount, irregularly paid up to November 17, 1915; that the sum of $30 was received February 5, 1916, and that "no payments, pursuant to the terms of said agreement have been offered or received subsequent to January 1, 1916." It was also found that subsequent to that time and up to the commencement of the action $180 became due in installments of $36 per month, and that on January 1, 1917, there was due the further sum of $288 (or $468 altogether). The court found, also, that at all times since the date of the agreement plaintiff was ready and willing to perform all the covenants of the agreement by it to be performed, and that at all times since the date of said contract Jennie B. Wilson was ready and able and willing to keep and perform all the conditions and terms thereof. As conclusions of law, it was determined that plaintiff should have its title quieted, the premises restored, and that defendants should take nothing unless within 30 days of judgment they should pay $468 to plaintiff, whereupon Jennie B. Wilson should be restored to her former rights. The findings of fact and conclusions of law were dated January 30, 1917, and under date of March 5, 1917, a decree and judgment were given, quieting plaintiff's title to the premises and declaring the contract canceled and of no effect.

Appellants insist that Mrs. Wilson was not in default at the time of the commencement of the action. This is true if the contract did not require the payment of at least $36 every month beyond any sums that might have been credited on the purchase price because the sum of $300, made up of two payments during the first month of the life of the agreement (March, 1913), if added to the amounts paid at irregular intervals averaging $36 a month up to January 1, 1916, would bring the average up to $36 a month for a much longer period. In other words, Mrs. Wilson's counsel contend that: (1) The agreement, while termed a "lease with privilege of purchase," was really a conditional sale of the property for $3,550, payable in installments of $36 or more monthly; (2) that the vendee was not in default so long as her credit, if applied to the debt, showed an average of more than $36 for each month that the agreement had been in existence; and (3) since her credit at the date of the institution of the suit was sufficient to show an average of more than $36 a month, the suit was premature, as no breach of the contract had been made at that time. Stated in figures, the position of defendants is as follows:

Total amount paid by defendants, under terms of the contract, as shown by plaintiff's evidence, and admitted by the pleadings		$1,446
Total number of monthly payments, from May 1, 1913, the date of the agreement to May 18, 1916, the date of the commencement of the action, 37 months, at $36 per month	$1,332	
Balance to credit of defendants on date of commencement of action	114	
		$1,446

We see no escape from this conclusion. The agreement did not require the payment of any sum greater than $36 a month for 120 months. Payment of a greater sum was optional with Mrs. Wilson. If she chose to pay more than $36 at any one time (as she did), such payment must be considered as having been made "on or before" any date on which she failed to make payment of $36. The finding that Mrs. Wilson was in default at the commencement of this action was therefore without support. The action was prematurely commenced.

The judgment is reversed.

We concur: WILBUR, J.; LENNON, J.

(181 Cal. 589)

RILEY, Real Estate Com'r, v. CHAMBERS, State Controller. (Sac. 2985.)

(Supreme Court of California. Nov. 29, 1919. Rehearing Denied Dec. 29, 1919.)

1. CONSTITUTIONAL LAW ⊂⊃88—REGULATION OF LAWFUL AND USEFUL OCCUPATIONS WITHIN POLICE POWER.

The right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, but such an occupation may be subjected to regulation in the public interest, even though such regulation involves in some degree a limitation on the exercise of the right regulated.

2. BROKERS ⊂⊃1 — STATUTE FOR LICENSING RIGHT TO DO BUSINESS AS BROKER VALID.

St. 1919, p. 1252, providing for the licensing of brokers and real estate salesmen and requiring persons desiring to engage in such business to furnish evidence of good moral character, etc., is valid in view of the peculiar nature of the employment.

3. BROKERS ⊂⊃1—LICENSING ACT NOT INVALID AS GIVING REAL ESTATE COMMISSIONER ARBITRARY POWERS.

St. 1919, p. 1252, forbidding any one from engaging in business as a broker or real estate salesman without having procured a license from the real estate commissioner is not invalid as giving the commissioner, to whom proofs of honesty, etc., are to be submitted, an arbitrary power to refuse to license.

4. CONSTITUTIONAL LAW ⊂⊃46(3) — VALIDITY OF SEPARABLE PORTIONS NOT DETERMINED WHERE ATTACK IS ON ACT AS WHOLE.

Where the controller of the state declined to approve a warrant for the expenses of the real estate commissioner, whose office was created by St. 1919, p. 1252, on the theory that the act was invalid, the validity of separable portions of the act whose invalidity would not cause the whole act to fall will not be determined in proceedings to compel the controller to approve the warrant.

5. STATUTES ⊂⊃64(2)—INVALIDITY OF PARTS OF ACT REGULATING BROKERS NOT DEFEATING WHOLE ACT.

Those portions of St. 1919, p. 1252, creating real estate department and providing for the licensing of brokers and real estate salesmen, which relate to the power of the commissioner to rescind licenses and the burden of proof on review of commissioner's action by court are separable from the main purpose of the act, and their invalidity will not destroy the whole act.

6. STATUTES ⊂⊃102(1)—PERMISSION TO DEPARTMENT HEAD TO FIX SALARIES NOT SPECIAL LEGISLATION.

That the salaries of deputies and employés of the real estate commissioner whose office was created by St. 1919, p. 1252, were not fixed, but were left to the commissioner, does not make the act discriminatory and special legislation.

7. STATUTES ⊂⊃81 — COLLECTORS OF RENT CLASSIFIED AS BROKERS NOT UNREASONABLE CLASSIFICATION.

St. 1919, p. 1252, requiring brokers and real estate salesman to be licensed, is not unreasonably discriminatory because it classed collectors of rent with brokers.

8. STATUTES ⊂⊃81 — EXCEPTING PERSONS HOLDING POWER OF ATTORNEY FROM ACT LICENSING BROKERS NOT UNREASONABLE CLASSIFICATION.

St. 1919, p. 1252, providing for the licensing of brokers and real estate salesmen, but which excluded persons holding power of attorney, is not for that reason invalid as discriminatory; for it must be presumed that by persons holding power of attorney was meant persons authorized to complete negotiations for the lease or sale, and not merely persons holding written authority to bring parties together, etc.

9. STATUTES ⊂⊃81 — LICENSE FEES OF BROKERS AND REAL ESTATE SALESMEN NOT UNREASONABLY DISCRIMINATORY.

St. 1919, p. 1252, providing for the licensing of brokers and real estate salesmen, is not invalid as unreasonably discriminatory because it exacted a $10 license fee from brokers and only a $2 fee from real estate salesmen.

10. STATUTES ⊂⊃81—LICENSING BROKERS AND REAL ESTATE SALESMEN NOT UNREASONABLE CLASSIFICATION.

As trustees, whether renting or selling the property under deeds of trust, are not brokers or real estate salesmen, the fact that St. 1919, p. 1252, requiring brokers and real estate salesmen to be licensed, specifically omitted only trustees selling under a deed of trust, does not make the act unreasonable and discriminatory.

In Bank.

Application by Ray L. Riley, as Real Estate Commissioner of the State of California, for writ of mandate to be directed against John S. Chambers, as Controller of the State of California. Writ issued.

Max J. Kuhl, of San Francisco, for petitioner.

Jos. L. Atteridge, of Sacramento, and Wesley E. Marten, of Los Angeles, for respondent.

Fry & Wood, of Oakland, amici curiæ.

OLNEY, J. The Legislature of 1919 passed an act (Stats. 1919, p. 1252) purporting to regulate the business of acting as a real estate broker or salesman in California, creating a state real estate department with an official having the title of real estate commissioner at its head, and providing for the payment of the expenses of the department out of a certain fund in the state treasury. The petitioner, Ray L. Riley, was appointed real estate commissioner, incurred certain expenses on account of his department, and sought their payment out of the state treasury in the manner provided by the act. The respondent, the state controller, refused to au-

thorize such payment, having apparently some doubt as to the constitutional validity of the act. Thereupon the commissioner sought to obtain a writ of mandate from this court to compel the controller to authorize the payment of the expenses in question. A demurrer was interposed to the petition for a writ, and the matter has been submitted to us upon this demurrer. The only points raised are as to the constitutionality of the act.

The act makes it unlawful for any person or corporation to act as a real estate broker or real estate salesman without first obtaining a license. A real estate broker is defined as any "person, copartnership or corporation who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, rents, or places for rent, or collects rent from real estate, or improvements thereon, for others as a whole or partial vocation." A real estate salesman is defined as one who for compensation and as a whole or partial vocation is employed by a real estate broker to do any of the things specified in the definition of a broker.

The act provides that it shall not apply to any one acting in regard to his own property, to any one "holding a duly executed power of attorney from the owner," to any attorney at law acting in his professional capacity, or to any receiver, trustee in bankruptcy, or trustee selling under a deed of trust. It also provides that a single act of selling, etc., shall make the person a real estate broker.

The required license is to be issued by the real estate commissioner upon written application, accompanied in the case of a broker, by the recommendation of two real estate owners certifying that the applicant is "honest, truthful and of good reputation," and in the case of a salesman by a similar recommendation and certification by his employer. The act does not in so many words authorize the commissioner to refuse a license if he is not satisfied as to the honesty, truthfulness, and good reputation of the applicant, but such authority is necessarily implied. For the license a broker is required to pay an annual fee of $10 and a salesman one of $2.

The commissioner is given power to suspend or revoke any license for dishonest dealing by the licensee after the presentation of written charges against him and an opportunity afforded him to be heard. The decision of the commissioner suspending or revoking any license is made subject to review by the courts in accordance with the provisions of the Code for the issuance of writs of review; the action of the courts, however, being limited by the act to determining whether there has been "an abuse of discretion" on the part of the commissioner.

Any one acting as real estate broker or salesman in violation of the act is made liable to punishment, if an individual, by a fine not exceeding $2,000 or by imprisonment not exceeding two years, or by both fine and imprisonment, and, if a corporation, by a fine not exceeding $5,000.

A real estate department is, as we have said, created with the real estate commissioner as its head. The latter is authorized to employ such deputies and assistants as he may need and fix their compensation. No limit is placed on his discretion in this respect, other than the practical limit incident to the fact that all the expenses of the department, including the $5,000 salary of the commissioner himself, are payable only out of a certain fund in the state treasury, which, in turn, is made up solely of fees collected by the department.

[1] Such being the general scope and outline of the act, a number of objections are made to it. The most important of these is that the act is an unreasonable interference with the right of every citizen to engage in a legitimate and useful occupation. This objection is fundamental, and, if sound, the whole act falls, since its sole primary purpose is to hedge about the pursuit of the vocation of a real estate broker or salesman with certain restrictions. That such vocation is a legitimate and useful one cannot be controverted. Nor can it be controverted that the right to engage in a lawful and useful occupation cannot, in effect, be taken away under the guise of regulation. On the other hand, it is equally true that a lawful and useful occupation may be subjected to regulation in the public interest, and that all regulation involves in some degree a limitation upon the exercise of the right regulated. The test is whether or not the limitation imposed is really by way of regulation only; is one whose purpose and effect go no further than throwing reasonable safeguards in the public interest around the exercise of the right. If the limitation is of this character, its imposition is a proper exercise of the police power resident in the Legislature, and whose exercise is one of the latter's most important functions.

Now, the single primary purpose of the act is to require of real estate brokers and salesmen that they be "honest, truthful and of good reputation." All of its provisions, including the requirements of a license, are but incidental to this single purpose and designed to accomplish it. In the nature of things no amount of regulation can insure the possession of those qualities by every one engaged in the business, and it is easy to conceive of regulations which would have this as their sole object and yet be so extreme as practi-

cally to take away the general right of engaging in the business. Two questions, therefore, arise regarding such regulations as those here imposed: First, is the general limitation that only persons of good character may engage in the particular business a safeguard which may reasonably be required as to that business? and, second, are the specific limitations prescribed to accomplish the general purpose no more than reasonable therefor?

[2] As to the second question, there is no controversy in the present case, and in fact there could not well be any. It is clear that, if it is permissible to require some assurance of good character, the specific limitation imposed for that purpose by this act that every one seeking to engage in the business shall file a written application accompanied by a certificate of good character is no more than reasonable. The controversy is over the first question, whether or not the general limitation that only persons of good character should engage in the business is a permissible one. The position of counsel opposing the validity of the act is that—

"To prevent a person engaging in a lawful and innocuous business or occupation because of his moral character or reputation is in our opinion an arbitrary invasion of private rights and liberties."

This may be true of some businesses and vocations. It is certainly not true of all. Where the occupation is one of which it can be fairly said that those pursuing it should have certain particular qualifications it is within the power of the Legislature to exact reasonable assurances of those pursuing the occupation that they do possess these qualifications. The most familiar illustrations of this are the qualifications of preliminary training and learning required of professional men such as lawyers, physicians, dentists, pharmacists, and architects. Where the occupation is one wherein those following it act as the agents and representatives of others and in a more or less confidential and fiduciary capacity, it certainly can be fairly said that those pursuing it should have in a particular degree the qualifications of "honesty, truthfulness and good reputation." The occupation of a real estate agent is of just this sort. He acts for others and in a more or less confidential and fiduciary capacity. As a result there is particularly required of him for the proper discharge of his duties honesty and truthfulness, and the Legislature has the right to require some assurance of their possession by every one following the occupation. One strong assurance of their possession is a good reputation.

No extended discussion of this point is necessary. It is definitely settled by the Supreme Court of the United States in Hall v. Geiger-Jones Co., 242 U. S. 539, 37 Sup. Ct. 217, 61 L. Ed. 480, Ann. Cas. 1917C, 643. The state of Ohio had passed a law requiring every dealer in securities, such as a bond house, to obtain a license from the state superintendent of banks. As a condition of obtaining such a license the dealer was required to establish his good repute to the satisfaction of the state official. The same attack was made upon the law by reason of this provision as is now made upon the California law, but its validity was upheld. So far as this point is concerned, there is certainly no difference between the occupation of a dealer in securities and that of a real estate agent. In fact, the relation of the latter to his client is of a more fiduciary character than that of the security dealer to his customer.

[3] Another and cognate objection is that the act is invalid because it gives the commissioner arbitrary power to determine who may have a license, and therefore who may lawfully engage in the real estate business. If such arbitrary power were in fact conferred by the act, it may well be that the objection would be good. But such power is not conferred either in the granting of licenses or in their revocation. An applicant for a license is entitled to it if he presents the required recommendation and certificate, unless the commissioner is not satisfied that he has, in fact, the qualifications of honesty, truthfulness, and a good reputation; in other words, the commissioner has no discretion unless he doubts the possession by the applicant of those qualifications which it was the purpose of the act to assure.

But it may be said that the power of the commissioner to refuse a license if he is not satisfied as to the character of the applicant practically gives him arbitrary power, as he alone can determine whether he is satisfied or not. This, however, is not true. While the commissioner has the power to refuse a license if he is not satisfied as to the character of the applicant, his discretion is not arbitrary. There must exist facts which reasonably justify his conclusion that the applicant is not of good character and reputation. If such facts do not exist, it is his duty to issue the license, and this duty can be enforced by the courts.

No extended discussion of this objection is necessary, since here, also, the matter is definitely settled by Hall v. Geiger-Jones Co., supra. With this such decisions as Los Angeles v. Hollywood Cemetery Association, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, Schaezlein v. Cabaniss, 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122, and La Junta v. Heath, 38 Colo. 372, 88 Pac. 459, are not in conflict, since the acts or ordinances involved in those cases conferred the power of granting or refusing the right requested without any specification of the conditions upon which it should be granted or refused.

The power conferred was both uncontrolled and unguided.

[4, 5] A third objection is that the act confers judicial powers upon the commissioner, a nonjudicial official. This objection is founded upon the fact that he is given the power after a hearing or opportunity for a hearing to suspend or revoke any license in case the licensee is guilty of any one of a number of acts, all of which come within the general designation of dishonest dealing. But whether the conferring of this power upon the commissioner is constitutionally valid or not we need not determine at this time, and we express no opinion. It is a sufficient answer to the objection, so far as this proceeding goes, that this portion of the act is not directly involved, and that it plainly is but a detail, and not an essential part, of the act, and is separable from the balance without affecting the substantial accomplishment of the purpose for which the act was passed, so that, even if invalid, it invalidity would not render the whole invalid, and in particular would not affect the question involved here, the right of the commissioner to have the expenses of his office paid in the manner provided.

The remaining objections to the act are that in a number of different respects it makes unreasonable discriminations, and is therefore special legislation. Two such alleged discriminations are pointed out by counsel for the respondent. The first is the provision that on a review by the Courts of the commissioner's action in suspending or revoking any license the burden of proof is upon the licensee to show an "abuse of discretion" on the part of the commissioner. This provision is but a part of the general provision giving the commissioner power to suspend or revoke licenses, and what we have just said in regard to the objection to this general provision applies with double force to this part of it. Even if invalid, as to which we express no opinion, the provision is plainly separable from the balance of the act, and does not affect its validity.

[6] The second alleged discrimination is that the salaries of the deputies and employés of the commissioner are not fixed, but their amount is left to the discretion of the commissioner. In many cases it is advisable, if not necessary, that the compensation of employés, even of public employés, be left to the discretion of the official in charge of the department where they are employed and who is responsible for the efficiency of that department. It cannot be said that conferring this power in one case and not in others is the making of an unreasonable distinction.

[7] The remaining objections—all because of alleged unreasonable discriminations—are made by counsel appearing as amici curiæ. The first of these is that the act makes a difference between collectors of rents and collectors of other obligations. Those engaged in collecting rents and not otherwise engaging in the real estate business might well have been omitted from the operation of the act. But the business of collecting rents is so closely connected with the real estate business generally, and it is so usual for the first to be carried on as a part of a general real estate business, that we cannot say the Legislature was not justified in classifying them together and thereby making a distinction between collectors of rent and other collectors.

[8] The second objection of amici curiæ along this line is that an unreasonable distinction is made when the act excepts "persons holding a duly executed power of attorney from the owner." The soundness of this objection depends upon what is meant by a "power of attorney." Power of attorney to do what? The act does not say. Any written authority by one man to act for another may be said to be a power of attorney, and the argument of amici curiæ is that as used in the act in question it must include authority to act as broker merely, to negotiate sales, leases, or other transactions in real property, as distinguished from authority to consummate the transaction. If this be so, they argue, in effect, and argue truly, any broker, while continuing to act solely as a broker, may yet escape from the restrictions of the act by always securing written authority, and there is no reason why any distinction should be made between brokers who always act under written authority and those who do not, so far as subjecting them to regulation is concerned.

Such a construction of the act, however, is not a reasonable one. It would not only render the act invalid, but, even if it did not do this, it would practically render it ineffective, since, as has been said, any broker could secure escape from its provisions merely by being careful to secure written authority in every case. A much more natural construction is that by power of attorney is meant written authority to act for and in place of the principal in consummating the transaction as distinguished from merely negotiating it. This construction removes the objection of unreasonable discrimination; for such an agent is much more than a broker, and there is nothing unreasonable in not applying to him the regulations applicable to brokers.

[9] A third distinction urged by amici curiæ as unreasonable is that between brokers and salesmen. The discriminations between the two made by the act are that brokers pay an annual license fee of $10 and salesmen of $2, and the former is required to furnish certificates of character by two landowners, while the latter furnish certificates by their employers. But certainly a larger fee and a different certificate may reasonably

be exacted from a broker engaged in business for himself than are exacted from a salesman working for another.

[10] The fourth point of amici curiæ is that trustees selling under a deed of trust are excepted, and no exception is made of trustees doing anything else than selling, such as leasing or renting, or collecting rents. The reply is that trustees, whether selling or doing something else, do not come within the purview of the act. The express exception of trustees selling under a deed of trust adds nothing, and the act would be the same if it made no mention of trustees.

The fifth point made by amici curiæ is that officers of a corporation licensed to do business as a real estate broker may act as brokers or salesmen without being subject to the requirements of the act. Suffice it to say that we do not so read the act.

There are a number of other objections made, but, inasmuch as counsel themselves say that they are made not so much to impeach the validity of the act as to show its injustice, a consideration addressable to the Legislature, but not to us, no discussion of them is required.

It is ordered that the writ issue as prayed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; WILBUR, J.; LAWLOR, J.

43 Cal. App. 742

RICH v. MOSS BEACH REALTY CO.

(Civ. 2903.)

(District Court of Appeal, First District, Division 2, California. Oct. 23, 1919. Rehearing Denied Nov. 22, 1919; Hearing Denied by Supreme Court Dec. 22, 1919.)

1. TRIAL ⟸396(1)—CONFINEMENT OF FINDINGS TO ISSUES.

Findings should be confined to the facts in issue; the province of the court being to determine, and not to raise, issues.

2. APPEAL AND ERROR ⟸714(5)—NO CONSIDERATION OF UNSUPPORTED STATEMENTS IN BRIEFS.

An appellate court will not consider statements in briefs which find no support in the record on appeal.

3. APPEAL AND ERROR ⟸846(6)—NO DISREGARD OF EITHER OF CONFLICTING FINDINGS.

In an action for commissions for making sales of land, where in the absence of any evidence on appeal it appears that the finding that plaintiff had a written contract entitling him to 35 per cent. of the price of lots conflicts with the finding that the reasonable value of his services was 25 per cent. of the price, not exceeding the amount paid by the purchasers, the appellate court cannot disregard either of the findings, and must reverse judgment rendered in accordance with the second finding.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by George O. Rich against the Moss Beach Realty Company. Judgment for defendant, and plaintiff appeals. Reversed.

Ross & Ross, of Redwood City, and J. J. Lermen, of San Francisco, for appellant.

J. E. Pemberton, of San Francisco, for respondent.

BRITTAIN, J. The appeal is on the judgment roll alone. The suit is for the balance due on an open book account for commissions claimed by the plaintiff for making sales of land owned by the defendant. The answer was twice amended. In the answer on which the parties went to trial the debt was denied, and a counterclaim also alleged to have been on an open book account was set forth. The case was tried by the court without a jury on June 1, 1916, and it was found that the defendant was indebted to the plaintiff in the sum of $2,672.35, which sum was about $100 less than the plaintiff claimed, and it was further found that none of the allegations of the answer or counterclaim was true except the allegation of corporate existence of the defendant. Judgment was entered in favor of the plaintiff for the amount found to be due with interest; the aggregate being $3,257.78.

Motion for new trial was granted on September 29, 1916, at which time no appeal from the order was permitted. Code Civ. Proc. § 963. The order limited the new trial to "the single issue as to the value of the services rendered by the plaintiff in his complaint alleged to have been performed, no evidence having been offered or introduced by either party as to the reasonable value of said services, but that as to all other issues said motion for new trial was denied."

According to the new findings, prior to July 1, 1909, the defendant entered into a written contract with the plaintiff employing him as agent to sell its subdivision of real property "for a commision of 35 per cent. of the selling price of the property so sold by him," and that, pursuant to said contract, the plaintiff secured various persons who offered to buy different parcels of land, and the defendant entered into a written contract of purchase and sale with each such person. Then follows in the findings a statement showing a list of names of 25 purchasers, the purchase price of the respective lots agreed to be paid by them in their written contracts with the defendant, the amounts respectively paid by them, and the amounts paid on account of commissions in each instance. The aggregate purchase price was $14,540.50. The amount of commissions at 35 per cent. would have been $5,190.17. The table showed the purchasers had paid on their contracts $5,145.88; the plaintiff had received $2,413.39; the dif-

ference between this amount and 35 per cent. of the purchase price is $2,776.78. The court further found that the reasonable value of the plaintiff's services "is 25 per cent. of the purchase price under each contract, not exceeding, however, the amount received by the defendant on account of the purchase price under the respective contracts of purchase," which amount was found to be $2,639.58 on account of which the plaintiff had received $2,413.39 therefore paid him, leaving a balance of $226.19. The court expressly repeated the findings concerning the untruthfulness of the defendant's answer and counterclaim. The judgment was for $226.19 and interest, making a total of $311.43. There was no express finding concerning the balance due on the alleged open book account. In support of the judgment it is argued that such a finding must necessarily be implied.

[1] The appellant argues that the finding in regard to the reasonable value of the services was outside of any issue raised by the pleadings, and that it should be disregarded. The rule is that findings should be confined to the facts in issue; the province of the court being to determine, but not to raise, issues. Burnett v. Stearns, 33 Cal. 468; Ortego v. Cordero, 88 Cal. 221, 26 Pac. 80; Rudel v. Los Angeles Co., 118 Cal. 286, 50 Pac. 400; Riverside, etc., Co. v. Gage, 108 Cal. 240, 41 Pac. 299. Under the order granting the motion for new trial upon the single issue of the value of the services, the plaintiff went to trial. The appeal being on the judgment roll alone, it does not appear what objection, if any, the plaintiff made at that time. In support of the judgment and in the absence of any showing to the contrary, it might be inferred that the plaintiff waived objection which might possibly have been made to the trial of that issue. Similarly from the findings it might be inferred that on the trial of that issue the written contract between the plaintiff and the defendant was introduced in evidence, and that other evidence was introduced. None of the evidence is before this court. It may be that there were matters presented for the determination of the trial court upon which, upon proper findings, the second judgment might have been supported.

[2, 3] On behalf of the respondent a brief has been filed in which are unsupported statements of fact concerning the relationship of the parties and the validity and construction of the contract which the trial court found was made. The rule that an appellate court will not consider statements in briefs which find no support in the record on appeal is too well established to require citation of authority. There are other unsupported statements in the respondent's brief which are denied in the closing brief of the appellant. There is nothing in the record by which this issue of fact can be determined by this court. Based on these unwarranted statements in the respondent's brief is the argument that the appellant has not made it to appear on this appeal that justice has miscarried, and that the judgment ought to be affirmed under the provisions of section 4½ of article 6 of the Constitution. In the absence of any evidence, it appears the finding that the plaintiff had a written contract entitling him to 35 per cent. of the selling price of lots conflicts with the finding that the reasonable value of plaintiff's services was 25 per cent. of the selling price of the lots, but in no case in excess of the amount paid by the purchasers. This court cannot disregard either of these findings. In view of the conflict it cannot say that the appellant is entitled to a judgment in accordance with the first of the two findings, but if the first finding is correct, it would clearly appear that there was a miscarriage of justice in rendering judgment in accordance with the second finding.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

43 Cal. App. 512

MERCANTILE TRUST CO. OF SAN FRANCISCO v. STOCKTON TERMINAL & E. R. CO. et al. (Civ. 2009.)

(District Court of Appeal, Third District, California. Oct. 10, 1919. Hearing Denied by Supreme Court Dec. 8, 1919.)

1. JUDGMENT ⊂=139—DISCRETION OF COURT IN VACATING DEFAULT.

The granting of motions to set aside defaults is largely in the discretion of the trial court, and its action will not be disturbed unless there has been an abuse of such discretion.

2. JUDGMENT ⊂=138(1)—VACATION OF DEFAULT PROPERLY DENIED.

Where defendant failed to plead within the time required and default was entered, the court properly refused to vacate the default, though after entry thereof defendant filed a demurrer.

3. PLEADING ⊂=85(4)—EXTENSION OF TIME.

In suit against railway company, where secretary, on whom service was made but who was not named in complaint as party, procured an order giving him as a defendant further time to demur or answer, which made no mention of railway company, such order did not extend time of latter.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by the Mercantile Trust Company of San Francisco, a corporation, against the Stockton Terminal & Eastern Railroad Company and others. From a judgment for plaintiff, the named defendant appeals. Affirmed.

A. H. Carpenter, of San Francisco, for appellant.

Morrison, Dunne & Brobeck, of San Francisco, and T. S. Louttit, of Stockton, for respondent.

ELLISON, Presiding Judge pro tem. This suit was brought by plaintiff against the Stockton Terminal & Eastern Railroad Company to foreclose a mortgage made by it to plaintiff to secure an issue of bonds of the defendant company. When the suit was brought one C. M. Prater was secretary of the defendant corporation. His name did not appear in the complaint as a party to the suit. In the action summons was delivered to the sheriff of San Joaquin county for service and his return thereon was to the effect that he served the same upon the defendant corporation on the 11th day of June, 1917, by delivering to and leaving with C. M. Prater, as secretary of said Stockton Terminal & Eastern Railroad Company in San Joaquin county, a copy of said summons attached to a copy of the complaint therein.

On the 20th day of June, 1917, said court made the following order:

"For good cause shown, it is hereby ordered that C. M. Prater, served as one of the defendants in the above-entitled action, have until the 1st day of July, 1917, to appear and demur or file such other answer as he may desire."

On the 26th day of June, 1917, no answer or demurrer having been filed by the defendant company, the county clerk of said county, on application of the plaintiff, duly entered the default of said defendant. On the 30th day of June, 1917, said defendant company (after its default had been entered) served and filed with the clerk of said court a general demurrer to the complaint in said action.

On the 20th day of December, 1917, the defendant company gave notice of a motion to set aside its default on the ground (as stated in the notice) that it was entered "when defendant's time for appearing, demurring or answering as allowed by the judge of said court had not expired," and upon the ground that it was wrongfully and unlawfully entered by the plaintiff for the purpose of depriving the said defendant of its day in court.

The affidavit upon which said motion was heard, made by C. M. Prater, secretary of the corporation defendant, stated that on June 11th he was served with summons in the action; "that he was not informed by the serving officer and he did not know whether such service was upon him individually or as an officer of said railroad company"; that thereupon he obtained an order from the judge of said court "whereby affiant was granted until some time in July, 1917, to appear in said action; that after the said order was made, and while it was in full force and effect, the plaintiff wrongfully and unlawfully caused default to be entered against the defendant corporation whereby said defendant and the affiant were unlawfully deprived of their day in court and prevented from making its or his appearance in said case and in direct violation of the order of the court."

When said motion to set aside said default came on for hearing it was denied by the court, and thereafter judgment of foreclosure was given and made. The defendant appeals from the judgment, and the only point made is that, under the indicated circumstances, the clerk had no authority to enter the default and that the court erred in denying his motion to set it aside.

[1-3] The foregoing chronological statement shows: (1) That when the clerk entered the default of the defendant corporation its time to appear in the action had fully expired and it was his duty, upon application of the plaintiff, to make the entry he did. (2) That no order had ever been made, either by the court or judge, extending the defendant corporation's time to plead; the order giving further time to plead, made on June 20, 1917, was an order that C. M. Prater, served as one of the defendants, have until July 1st to plead. This was not an order extending the time of the corporation to plead, and it does not appear that said corporation ever asked for any extension of time. (3) After the defendant's default had been regularly entered it had no right to file a demurrer or any other pleading until the default had been set aside. There are some cases holding that, where defendant files a demurrer after his time to plead has expired but before his default has been entered, the court should dispose of it in some way before entering judgment, but this is not such a case. (4) The defendant's motion to set aside the default was properly denied. It is difficult to know on exactly what ground it was made. The affidavit in support of it does not allege mistake, surprise, or excusable neglect. The gist of it seems to be contained in the following:

"That after said order was so made granting further time to affiant to so appear, and while said order was in full force and effect, the plaintiff herein wrongfully and unlawfully caused a clerk's default to be entered against the defendant Stockton Terminal & Eastern Railroad Company whereby said defendant and affiant, as such officer and the person upon whom said summons has been served, were unlawfully deprived of their day in court," etc.

A sufficient answer to all this is found in the fact that no order was ever made extending the time for defendant corporation to plead, and as to affiant, personally, it does not appear that his default was ever entered or that he ever filed any pleading and, lastly, the granting of motions to set aside defaults

is largely in the discretion of the trial court, and its action will not be disturbed unless there has been an abuse of such discretion. On the showing made in this case it would have been an abuse of discretion to have granted the motion.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

43 Cal. App. 722

CAMBRIDGE v. RAMSER. (Civ. 2014.)

(District Court of Appeal, Third District, California. Oct. 22, 1919.)

1. VENDOR AND PURCHASER ⟸314(1)—SUFFICIENCY OF COMPLAINT IN ACTION BY VERDICT FOR FRAUD.

A complaint by the owner of a sawmill and timber lands, setting up that because of defendant's representations that he could procure money to pay for the same within a reasonable time defendant was admitted into possession, that defendant operated the mill and used logs belonging to the vendor, but failed to pay the price named, though he had been in possession about six months, etc., is sufficient as against general demurrer to state a cause of action, for the court might well consider that the time elapsing was a reasonable time, as what is a reasonable time is a question of fact and depends upon the circumstances of each case.

2. FRAUD ⟸43—SUFFICIENCY OF COMPLAINT TO STATE CAUSE OF ACTION FOR FRAUD.

A complaint alleging that plaintiff, the owner of timber land and a sawmill, admitted defendant into possession by virtue of his representations that he could obtain funds to pay for the same, etc., that defendant operated the mill but had not paid for the same or the logs used, *held*, as against a general demurrer, to state a cause of action for fraud, upon which theory plaintiff would be entitled to treat the contract as void and recover possession of the property.

3. WASTE ⟸20—SUFFICIENCY OF COMPLAINT TO ENJOIN INJURY TO REAL PROPERTY.

A complaint by the owner of a sawmill and timber land, setting up that defendant had been admitted into possession of the mill under an agreement to pay therefor, and had used logs and timber but had not paid the price agreed, etc., *held* sufficient, as against general demurrer, to state a cause of action to prevent and enjoin a threatened injury to real property in the nature of waste.

Appeal from Superior Court, Modoc County; Clarence L. Raker, Judge.

Action by W. R. Cambridge against Benjamin C. Ramser. From a judgment for plaintiff, after defendant's demurrer was overruled and defendant declined to plead further, defendant appeals. Affirmed.

Oscar Gibbons, of Alturas, for appellant.

Jamison & Wylie, of Alturas, for respondent.

BURNETT, J. The plaintiff in the action alleged:

That he is the owner of a certain sawmill and certain lands connected therewith, upon which there is a large quantity of timber suitable for manufacturing lumber; "that in the month of January or February, 1918, the said defendant represented to plaintiff that he could secure the necessary money to purchase the said mill from plaintiff, and agreed with plaintiff that if said plaintiff would place him in the possession of the said sawmill and furnish him with timber to run the said sawmill he could and would procure the money to pay plaintiff for the same within a reasonable time thereafter; that, relying upon the said representation of defendant that he could within a reasonable time secure the money to pay to plaintiff the purchase price of said mill, plaintiff put the said defendant in possession of the said sawmill and furnished him with a large amount of logs then lying in the yard of said mill, and gave him permission to use the said logs for manufacturing lumber with the said mill, and gave him permission to cut and use the said timber standing and being on plaintiff's said land for use in the said mill; that the said defendant has failed and neglected to pay to plaintiff any part or portion of the purchase price of said mill, and has used in running the said mill all of said logs lying in said yard, and has cut timber in said lands of plaintiff for the use of the said mill; that it was agreed that defendant would pay to plaintiff for the said sawmill the sum of $500; that said defendant also agreed with plaintiff that he would pay him at the rate of $1 per thousand feet for all logs and timber used by defendant in running the said sawmill, taken from the timber belonging to plaintiff as aforesaid; and that the said defendant has, since he took possession of the said sawmill, used therein about 150,000 feet of logs and timber in running the said sawmill, and has used the sums realized from the lumber produced from said logs and timber for his own uses and purposes and has paid nothing to plaintiff on account of said logs or timber; that all of the representations of defendant made to plaintiff to induce him to place the said defendant in possession of the said sawmill and furnish him with the said logs and lumber, to the effect that he could and would procure the money to pay for the same within a reasonable time, were and are false and fraudulent and were designedly, falsely, and fraudulently made by defendant to plaintiff, with the intention and for the purpose of inducing plaintiff, and did induce plaintiff, to place the defendant in the possession of said sawmill and permit the defendant to use the said logs and timber."

There is a further allegation that defendant is wholly insolvent and is threatening and intends to remain in possession of said sawmill, and to cut and use the plaintiff's

said timber to plaintiff's great damage and loss, and that the defendant is now, wrongfully and unlawfully and without right, withholding the possession of said sawmill from the plaintiff. There was a demurrer to the complaint upon the ground "that said complaint does not state facts sufficient to constitute any cause of action against the defendant herein." The demurrer was overruled, and defendant declining to answer, judgment by default was entered for plaintiff, from which the appeal has been taken.

[1-3] While the complaint is somewhat inartificially drawn, it is quite manifest that it states a cause of action, and that the general demurrer was properly overruled. Viewing the complaint in one aspect, we find the allegation of an agreement to sell on the part of plaintiff and to purchase by defendant a certain sawmill belonging to the former for the sum of $500, and also certain logs and growing timber on the land of plaintiff for the consideration of $1 per thousand feet; that the purchase price was to be paid within a reasonable time; that in pursuance of said agreement defendant took possession of said property and has not paid any part of the purchase price. The only element of the agreement that is at all uncertain is as to the time when the purchase price was to become due. It appears, however, that the agreement was entered into in January or February of 1918, and the action was commenced on August 29th of the same year. This period might very properly be determined by the court to constitute a reasonable time; in other words, the facts were sufficient for the court to conclude that the obligation to pay the purchase price had matured. If there were any special considerations that would tend to rebut or to controvert this theory, it was incumbent upon the defendant to set them up in his answer. The question of "reasonable time" is generally a question of fact and depends upon the circumstances of each particular case. Luckart v. Ogden, 30 Cal. 547. Again, the pleader has attempted to set up fraud, which would avoid the entire contract of sale and purchase. The facts are hardly alleged according to the accepted rules of pleading, but they are probably sufficient as against a general demurrer. Upon this theory the contract could be treated as entirely void and plaintiff could recover the possession of the property thus fraudulently obtained by defendant. In another view of the complaint it may be regarded as an action to prevent and enjoin a threatened injury to real property in the nature of waste. Hatton v. Gregg, 4 Cal. App. 545, 88 Pac. 594.

At any rate, since there was no demurrer for uncertainty, we are satisfied that the ruling of the lower court was correct, and the judgment is therefore affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

43 Cal. App. 772

WEBSTER v. WEBSTER. (Civ. 3071.)

(District Court of Appeal, First District, Division 1, California. Oct. 25, 1919.)

1. DIVORCE ⟹235, 286 — ALIMONY DISCRETIONARY WITH TRIAL COURT; REVIEW OF DISCRETION.

The granting of alimony in actions for divorce is a matter which lies largely in the discretion of the trial court, and it must be made to clearly and affirmatively appear upon the face of the entire record in the case that this discretion has been abused before the appellate tribunal will be moved to interfere where alimony is denied.

2. DIVORCE ⟹235—DENIAL OF ALIMONY SUSTAINED.

Denial of alimony *held* not an abuse of discretion, although defendant husband had property.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by Harriet White Webster against Daniel Webster for a divorce. From a judgment granting the divorce but denying alimony, the plaintiff appeals. Affirmed.

H. B. Churchill, of Lakeport, and R. Clarence Ogden, of San Francisco, for appellant.

C. M. Crawford, of Lakeport, for respondent.

RICHARDS, J. This is an appeal by the plaintiff in an action for divorce wherein she was granted a divorce from the defendant on the ground of cruelty and failure to provide, but was denied alimony. The appeal is upon the judgment roll, and the sole contention of the appellant is that the findings of the trial court do not support that portion of the judgment which refuses to allow the plaintiff alimony.

The findings are to the effect that the defendant was guilty of the specific acts of cruelty set forth in the complaint as a ground of divorce, and also that the defendant, while able so to do has been guilty of failure to provide; that the plaintiff is without means of self-support; that the defendant is the owner of certain separate real property of the value of $4,000, upon which there is an indebtedness of $1,800, secured by a trust deed; that the defendant has also certain miscellaneous separate personal property in the way of farm produce, implements, and

animals of the value of about $600, and is indebted in store accounts to the extent of about $1,500; that the plaintiff has no interest in any part of said property; that during the trial of the action the defendant paid to the plaintiff on motions for alimony the sum of $150; that the plaintiff has no means whatever and is physically unable to earn her own livelihood and maintenance, and has incurred obligations during the trial of the action for board and for counsel fees and costs which she is unable to pay. Notwithstanding these findings of fact the court refused to allow the plaintiff either permanent alimony or counsel fees or costs, and it is the appellant's contention herein that it was an abuse of discretion on the part of the trial court to so refuse the plaintiff this relief, while granting her a divorce on the grounds of the defendant's cruelty and failure to provide.

This appeal is before us on the judgment roll alone, and it is so by the plaintiff's choice. The evidence educed before the trial court is not before us, and it has been omitted from this record also by the plaintiff's choice. The defendant had no selection nor any way of adding to this record the evidence in the case, even had he desired so to do. We are therefore left entirely in the dark as to the causes as they might have been disclosed by the evidence which moved the trial court to refuse to allow the plaintiff either alimony, counsel fees, or costs, while granting her prayer for divorce.

[1] The granting of these incidental forms of relief in actions for divorce is a matter which lies largely in the discretion of the trial court, and it must be made to clearly and affirmatively appear upon the face of the entire record in the case that this discretion has been abused before the appellate tribunal will be moved to interfere. Such a record is not before us, but from the admissions in the pleadings and the findings in the case certain facts appear which may serve to indicate that a state of things might have been shown in the evidence which must have justified the trial court in severing the marriage relation between the parties hereto without further relief to either. The parties were married in the month of July, 1914; this action for divorce was commenced on August 10, 1917. Both of the parties had been married before and both had children by such prior marriages. The family troubles of the pair began shortly after their union, and were apparently stormy during the brief period of its continuance. Much of these troubles grew out of the bringing together of these two sets of children in the same household, if we are to accept the plaintiff's own recital of the causes of these family discords.

[2] These fleeting glimpses of the case may well serve to indicate a state of the evidence on its trial which would have fully justified the action of the trial court in refusing to the plaintiff any further relief than that of the temporary alimony awarded her and the bare decree of divorce. This being so, we are constrained to hold that a sufficient showing of abuse of discretion in this regard has not been made by this appeal upon the judgment roll alone.

Judgment affirmed.

We concur: BEASLY, Presiding Judge pro tem.; KERRIGAN, J.

43 Cal. App. 748

SLATER v. RAUER et al. (Civ. 2936.)

(District Court of Appeal, First District, Division 1, California. Oct. 24, 1919.)

1. BROKERS ⟸94—AUTHORIZATION TO SELL AND RECEIPT FOR DEPOSIT DOES NOT AUTHORIZE CONTRACT OF SALE.

An authorization of real estate broker, headed "Authority to Sell," addressed to the broker, stating, "You are hereby exclusively authorized to sell and receipt for a deposit on sale of the following described property," the sale price being fixed and signed by the owner who is to furnish a good and sufficient conveyance free from all incumbrances, *held* not sufficient to authorize the broker to execute a contract of sale binding the owner.

2. BROKERS ⟸94—AUTHORIZATION TO SELL AND RECEIPT FOR DEPOSIT DOES NOT AUTHORIZE CONTRACT OF SALE.

An authority to a broker to sell the lands of his principal does not constitute a sufficient authorization to execute a contract with purchaser binding on the owner, merely because the broker is entitled to receipt for a deposit on sale.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by J. L. Slater against J. J. Rauer and another. Judgment for defendants on demurrer, and plaintiff appeals. Affirmed.

Watt, Miller, Thornton & Watt, of San Francisco, for appellant.

Harrison S. Robinson, of Oakland, for respondents.

RICHARDS, J. This is an appeal by the plaintiff from a judgment in the defendants' favor after an order sustaining their demurrer to the plaintiff's amended complaint, the latter having declined to amend.

The action is one for the specific performance of a contract for the sale of real estate purporting to have been made with the plaintiff by a firm of real estate agents on behalf

of the defendant Rauer, claiming to act as such agents and having the right to make said contract of sale under an alleged authorization so to do executed by Rauer. The complaint sets forth the contract of sale and the alleged authorization in hæc verba, and the only question for decision presented to the court upon appeal is as to whether said authorization was sufficient in its terms to empower the said agents to execute the contract of sale in question and to bind the defendants thereby to execute a conveyance to the plaintiff of the premises in question; the defendant Doyle having been given a conveyance of the property by Rauer after the execution and recordation of the aforesaid contract of sale.

The authorization upon which the plaintiff relies is headed "Authority to Sell" and is addressed to Pollard & Son, the firm of real estate agents who attempted to make the contract of sale by virtue of its terms. It states:

"You are hereby exclusively authorized to sell and receipt for a deposit on sale of the following described property."

Here follows the description. The authorization then proceeds to fix the price at which the property shall be sold at $20,000, "or such lower figure as I may agree to accept," and then provides that the undersigned, J. J. Rauer, is "to furnish a good and sufficient conveyance free from all incumbrances."

The appellant contends that this authorization was sufficient to empower the said firm of Pollard & Son to execute the contract of sale of the premises described herein to him for the purchase price of $20,000, and that he is entitled to have such contract of sale specifically performed by said Rauer and his subsequent transferee.

[1] We cannot give our assent to this contention. The courts of this state have uniformly held ever since the early case of Duffy v. Hobson, 40 Cal. 240, 6 Am. Rep. 617, that the use of the words "authorized to sell" in a real estate agent's agreement does not authorize the agent holding the same to enter into a written contract of sale with a customer for the property described therein which would be binding upon the principal. Duffy v. Hobson, supra; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758; Stemler v. Bass, 153 Cal. 791, 96 Pac. 809; Church v. Collins, 18 Cal. App. 745, 124 Pac. 552; Salter v. Ives, 171 Cal. 790, 155 Pac. 84; Thompson v. Scholl, 32 Cal. App. 4, 161 Pac. 1006.

[2] It is, however, contended by the appellant herein that while the words "authorized to sell" might not of themselves convey power to the agents to execute a binding contract of sale, that these words may be aided by other phrases in the authorization so as to give this grant of power; and in this connection the appellant insists that the phrase in the document in question which entitled the real estate agents "to receipt for a deposit on sale" would work such extension of power. But certain of the cases deal with this precise question, holding that the inclusion of this clause in the authorization will not suffice to so extend its terms. In the cases of Armstrong v. Lowe, supra, Church v. Collins, supra, and Thompson v. Scholl, supra, this precise clause was incorporated in the several authorizations there under review, and in each of said cases it was held that the authority to execute a contract of sale binding upon the owner had not been conferred. In the case of Church v. Collins, supra, the court used the following language in regard to an agent's authorization fully as strong in its terms as the one under review in the instant case:

"We are of opinion that the agreement between the defendant and the real estate brokers conferred no authority upon the latter to execute a contract for the sale of the property involved here to the plaintiff or to any other party, and that therefore the court properly sustained the demurrer to the complaint. * * * The rule deduced from the authorities with regard to the power or right of agents to execute contracts of sale of real property for the owners thereof is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such is its purpose."

The appellant directs our attention to the case of Bacon v. Davis, 9 Cal. App. 83, 98 Pac. 71, as enunciating a rule applicable to the case at bar. In that case the agents were authorized by the owner "to sell for me, in my name," the property in question; and the court held these words sufficient to authorize the execution of a contract of sale. In the case of Church v. Collins, however, the ruling in the case of Bacon v. Davis was expressly called to the attention of the appellate tribunal, and that court therein distinguished that case from the case there at bar in the following words:

"A comparison of the agreement in the case at bar with the one in the Bacon Case will readily disclose a radical distinction between the two. Here there is no such authority given the brokers as is necessarily implied from the language in the Bacon agreement, 'to sell for me, in my name'—language that can import nothing short of an intention in the vendor to bestow upon his agent the right and the power to execute in his (the vendor's) name a contract to convey."

The same distinction was pointed out in the cases of Stemler v. Bass, supra, and Thompson v. Scholl, supra. In view of what seems to be a settled line of authority as set forth in the foregoing cases, we are constrained to hold that the agents' authorization upon which the appellant relies in the

instant case was not sufficiently ample in its grant of power to justify the agents holding the same in their attempt to execute a contract of sale with the plaintiff and appellant herein which would be binding upon their principal or his transferee.

It follows that the judgment of the trial court must be affirmed. It is so ordered.

We concur: KERRIGAN, J.; BEASLY, Judge pro tem.

43 Cal. App. 685

VAN DEMARK v. CALIFORNIA HOME EXTENSION ASS'N et al. (Civ. 3019.)

(District Court of Appeal, Second District, Division 2, California. Oct. 20, 1919.)

1. CONTRACTS ⟸250 — DISSATISFACTION CLAUSES; REASONABLENESS OF RESCISSION.

Where a party to a contract is given the option to return property, or refuse to perform, if dissatisfied, he may exercise his option without any practical or utilitarian reason where the right involved is one which is submitted to his taste, or fancies, feelings, or judgment; but, when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject-matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded.

2. CONTRACTS ⟸250, 282—RIGHT TO REJECT OR RESCIND IF DISSATISFIED.

Where there is nothing to justify the contrary construction, the general rule in regard to contracts wherein one party has the right to rescind or reject if dissatisfied is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation that he must act in good faith, and, if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him.

3. VENDOR AND PURCHASER ⟸84—CONSTRUCTIVE RIGHT TO RESCIND IF DISSATISFIED.

A clause in a contract of sale of land that, "if after completion of payments the buyer should be dissatisfied with the investment, the association stands ready * * * to buy back the land by paying the buyer the amount of the purchase price," permitted the buyer to exercise his option to require the seller to repurchase if he became dissatisfied with his investment, and such right was not dependent upon a failure in value of the property or a breach of any conditions of the contract.

4. VENDOR AND PURCHASER ⟸84—RIGHT TO EXERCISE OPTION TO RESCIND BASED ON GOOD FAITH.

In an action to require a vendor of land to repurchase under a dissatisfaction clause in the contract of sale, an allegation by purchaser that he became dissatisfied, which was pleaded and testified to, was sufficient, although it was incumbent on plaintiff to show good faith.

5. VENDOR AND PURCHASER ⟸84—OPTION TO RESCIND "BETWEEN THE FIFTH AND SIXTH YEAR FROM DATE."

Under a clause in a contract of sale of land to the effect that the purchaser could require the vendor to repurchase "between the fifth and sixth year from date" of planting, a demand that vendor repurchase, made on July 17, 1915, was made between the fifth and sixth year after planting, date of planting being July 28, 1910, a reasonable construction of such contract requiring that the clause be construed to mean during the sixth year.

6. VENDOR AND PURCHASER ⟸84—OPTION TO RESCIND DURING "SIXTH YEAR."

The term "sixth year" in a contract of sale of land providing that the purchaser could require the vendor to repurchase any time during the sixth year following the date of the contract, which was dated February 7, 1910, meant the year starting February 7, 1915, and ending February 7, 1916.

7. CONTRACTS ⟸154 — REASONABLE CONSTRUCTION FOLLOWED.

Where one construction of a contract would make the contract unreasonable, unfair, unusual, and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, the latter construction will be adopted.

8. CONTRACTS ⟸169—SURROUNDING CIRCUMSTANCES CONSIDERED IN CONSTRUCTION OF CONTRACT.

Where a contract is ambiguous, the circumstances surrounding and known to both parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Harry S. Van Demark against the California Home Extension Association and M. V. Hartranft. Judgment for plaintiff, and defendants appeal. Affirmed.

R. T. Quinn, of Los Angeles, for appellants.

Bowen & Bailie, of Los Angeles, for respondent.

SLOANE, J. The only questions on this appeal arise on the construction and application of provisions in a contract for the sale of land, whereby it is agreed that in the event of the purchaser becoming dissatisfied with the investment the seller shall buy back the land.

The complaint contained two causes of action, based on agreements to repurchase, under separate contracts for the sale of separate tracts, and judgment was against the defendants, appellants here. The repurchase clause in the first contract is as follows:

"Art. 10. If after completion of payments the buyer should be dissatisfied with the investment, the association stands ready at any

time between the fifth and sixth year from date of planting to buy back the land by paying the buyer the amount of the purchase price."

The second provides:

"Art. 6. If after completion of purchase the buyer should be dissatisfied with the investment, the association guarantees at any time during the sixth year following date of this contract * * * to buy back the land."

It will only be necessary to incidentally refer to any other subject-matter of these contracts, as no dispute exists on any other of the conditions pleaded.

The complaint also contains an allegation that within the period specified in the contracts plaintiff became dissatisfied with his investments, and so notified the defendant corporation, and demanded that the agreement to repurchase be fulfilled. No facts are stated as to reasons or grounds for dissatisfaction with the investment. Defendants urged on demurrer that without some showing of reasonable grounds for dissatisfaction the complaint does not state a cause of action, and the overruling of this demurrer is one of the alleged errors on appeal. It is claimed by respondent that certain facts set up in the answer gave substantial reasons for dissatisfaction with the investment, thus supplementing the complaint, and there was evidence introduced on this point; but the court found that the matters pleaded in the answer were not true, and, as no error is claimed as to such finding, the question is purely one of law as to whether under the terms of this agreement it was incumbent on the plaintiff to plead and prove facts constituting reasonable grounds for dissatisfaction with his investment.

[1, 2] The distinction is well recognized, though the line cannot always be very clearly drawn, in actions arising on these "dissatisfaction clauses," that where the right involved is one which is submitted to the taste or fancy, feelings, or judgment of the party in whose favor the option is given, it may be exercised without any practical or utilitarian reason; but, when it is apparent that the question of satisfaction relates to the commercial value or quality of the subject-matter of the contract, it must be shown that it is deficient or defective in these respects, and that the dissatisfaction is reasonable and well founded. "But where there is nothing to justify the contrary construction, the general rule is that the party to be satisfied is the judge of his own satisfaction, subject only to the limitation in most jurisdictions that he must act in good faith, and, if he does so act and is really dissatisfied, he may reject the work or the article on the ground that it is not satisfactory to him." Tiffany v. Pacific Sewer Pipe Co., 182 Pac. 428. Such construction of the rule has been applied to contracts for a suit of clothes, a portrait, a musical instrument, a carriage, a steam heater, a literary article for a magazine, horses, employment of a servant, dissatisfaction with a home furnished, and with security for performance of an obligation. 9 Cyc. 618, and citations; Singerly v. Thayer, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207; McCarren v. McNulty, 7 Gray (Mass.) 139; Brown v. Foster, 113 Mass. 136, 18 Am. Rep. 463; Zaliski v. Clark, 44 Conn. 218, 26 Am. Rep. 446; Moore v. Robinson, 92 Ill. 491. It has been held in California that an agreement to furnish title satisfactory to the purchaser was not met by a merely good and marketable title, if the purchaser himself was not satisfied. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21; Allen v. Pockwitz, 103 Cal. 85, 36 Pac. 1039, 42 Am. St. Rep. 99; Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207.

[3, 4] The contract considered under the decisions cited by appellant are for the most part clearly distinguishable from the contract under consideration here. They involve the quality or value of things in common use which have a fixed and recognized standard of fitness and worth, and concerning which it is fair and equitable to require a purchaser to be satisfied with the commonly accepted standard of excellence. And sometimes, too, the courts have been controlled in their rulings on this question by the equities involved in cases where the exercise of a captious and unreasonable feeling of dissatisfaction would involve the other party to the contract in serious loss or damage. Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422. We think it is clear in this case that the purpose of the agreement to repurchase in the event the buyer should become dissatisfied with his investment was to submit the matter to the personal option and judgment of the purchaser. The exercise of this right is not dependent upon a failure in value of the property, or a breach of any conditions of the contract. It was made a question alone of his dissatisfaction with the "investment"—with that particular disposition of his capital which tied it up in this California land—a matter which might develop into a condition of personal dissatisfaction entirely independent of values or quality. The fulfillment of the terms of the agreement, moreover, does not involve the loss of the vendor's property. It amounts only to a rescission. He gets his property back and refunds the purchase money with interest. It was probably incumbent on the plaintiff to show good faith, and that he was really dissatisfied; but an allegation that he did become dissatisfied, which was pleaded and testified to, was sufficient. Incidentally it appears by the plaintiff's evidence not only that he was

dissatisfied, but that he had grounds for his dissatisfaction, in that by reason of unseasonable frosts the growing eucalyptus trees on his land had been injured. The defendants pleaded by their answer that the injury to the premises resulting from the freeze was the fault of plaintiff, but the court found against this defense, and there was evidence to the contrary; but in any event the finding is not made an issue on this appeal.

[5] Appellants further contend that the exercise of the right to demand a repurchase under the "dissatisfied" clauses of the contracts came too late in the first instance, and too early in the second. It is argued that the obligation to buy back the land under the first contract "at any time between the fifth and sixth year from the date of planting" was limited to the infinitesimal period between the close of the last day of the fifth year and the beginning of the first day of the sixth year. It is agreed that the date of planting referred to was the 28th of July, 1910. The declaration of dissatisfaction and demand that defendant repurchase was made on July 17, 1915—about the middle of the sixth year after the date of planting. A literal and exact interpretation of the language used would sustain appellants' contention. But such an interpretation would be absurd and unreasonable. Inapt though the language may be, it means, in the common acceptance, the period between the last of the fifth and the last of the sixth year, or during the sixth year. As counsel for appellants admits in his brief, the contracts were doubtless drawn by and on forms prepared by the defendant corporation; and to permit the defeat of this contract by the refinement of construction here demanded would be a travesty on justice.

[6] The contention that the demand on the second contract was premature is even more untenable. It was there provided that the defendant corporation "guarantees at any time during the sixth year following the date of this contract to buy back the land." The date of the contract was February 7, 1910. It is not the sixth year after 1910, but the sixth year after February 7, 1910, that was specified. The first year after or following the date of the contract expired February 7, 1911; and the fifth year expired February 7, 1915. The declaration and demand by plaintiff was made on the 12th of August, 1915, which was during the sixth year.

[7, 8] Appellants' own guns may properly be turned against them in this connection by quoting their argument and citation on another point of construction, from another part of their brief:

"There is no better rule of construction than that laid down by this [Supreme] court in the case of Stein v. Archibald, 151 Cal. 220, [90 Pac. 536] where it is said: 'It is a well-settled principle applicable to the construction of contracts that where one construction would make the contract unreasonable, unfair, or unusual and extraordinary, and another construction, equally consistent with the language, would make it reasonable, fair, and just, that the latter construction is the one which must be adopted. It is also a principle of construction with respect to ambiguous contracts that the circumstances surrounding and known to both the parties at the time of the execution of the contract may be taken into consideration in determining the meaning intended to be conveyed.'"

It is apparent that it was the intention of the parties that if, for any reason not growing out of the wrong or fraud of the purchaser, he became dissatisfied with his investment under the first contract, the vendor would repurchase at any time during the sixth year after July 17, 1915, and, if he was dissatisfied after the completion of his purchase under the second contract, that the vendor would repurchase at any time during the sixth year after date of the contract. That he did become dissatisfied with these contracts and was entitled to exercise the option given him against the defendant corporation is sufficiently pleaded and proved.

The rulings and judgment of the court are supported by the pleadings, evidence, and findings.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

43 Cal. App. 751

STEWART v. BOWIE. (Civ. 2861.)

(District Court of Appeal, First District, Division 1, California. Oct. 24, 1919. Hearing Denied by Supreme Court Dec. 22, 1919.)

1. BROKERS ⟸64(1)—COMPENSATION NOT AFFECTED BY SUBSEQUENT DEFAULT OF PURCHASER.

Unless there is a provision in the contract to the contrary, a real estate broker earns his commission and it is payable when he produces a purchaser, and the broker cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or other terms of the contract not carried out.

2. BROKERS ⟸64(1) — AGREEMENT TO PAY COMPENSATION ENFORCEABLE THOUGH SALE NOT CONSUMMATED.

A contract containing a report signed by real estate brokers that they have sold certain property on certain terms, followed by a statement signed by the purchaser that he agrees to buy the property upon the terms specified, adding, however, that the sale is to be consummated in the office of the brokers, underneath which appears the words, "I hereby approve sale of the

within described property and agree to pay L. & H. (the brokers) on demand the sum of $1,500 for their services," *held* an agreement between the owner, the prospective purchaser and brokers, and that the owner's promise was addressed to the brokers, as well as to the purchaser, and the brokers were entitled to such compensation, although the sale was not finally consummated by a transfer of the property.

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by F. L. Stewart against Henry P. Bowie. Judgment for defendant, and plaintiff appeals. Reversed.

Randolph V. Whiting, of San Francisco, for appellant.

Arthur H. Redington, of San Francisco, for respondent.

KERRIGAN, J. This is an action to recover a commission on the sale of real estate. Judgment went for the defendant, and plaintiff appeals.

Briefly the facts of the case are these: On November 26, 1916, the defendant in writing appointed plaintiff's assignor, Lyon & Hoag, a corporation, his exclusive agent for the period of 20 days, to sell his home, situate in San Mateo county, for $80,000, said agent to receive a commission of 5 per cent. in the event that it effected a sale under said authorization. On the following day the agent secured from one Ralston Wilbur an offer in writing to purchase said property for the sum of $60,000, payable $6,000 cash in hand, and the balance in 60 days, or upon completion of the examination of title, the sale to be consummated in the office of the agent. This written offer was accepted by defendant by indorsing thereon the words:

"I hereby approve the sale of the within described property, and agree to pay Lyon & Hoag on demand the sum of $1,500 for their services."

The defendant performed his part of the agreement, and also extended the purchaser's time a period of 60 days in which to make payment of said balance; the title to the property was good; a deed conveying it was duly prepared, and was ready for tender and delivery to the vendee at the time and place appointed for the consummation of the transaction, but the vendee failed to perform his part of the agreement, and paid nothing further than the amount accompanying his offer to purchase.

[1] Unless there is a provision in the contract to the contrary, a real estate broker, employed to negotiate a sale of land, earns his commission, and it is payable when he produces, within the time allowed, a purchaser who is ready, willing, and able to take the property on the terms prescribed, or with whom the owner enters into a contract upon those or other terms satisfactory to him, and the broker cannot be deprived of the agreed compensation because deferred payments are not made by the purchaser, or other terms of the contract not carried out. Gunn v. Bank of California, 99 Cal. 352, 33 Pac. 1105; Jauman v. McCusick, 166 Cal. 522, 137 Pac. 254. That such is the general rule in this state is not disputed by the respondent, but he urges that the appellant's assignor has not brought himself within it for the reason that the promise of the defendant to pay the amount sued for, namely, $1,500, was not made to the broker, but to the proposed purchaser; and, as the purchaser did not in fact complete his contract by taking and paying for the property, the defendant's promise to pay the commission cannot be enforced. In making this contention the respondent relies upon a line of cases in which this court has held that where there has been no previous contract of employment with the broker, and the owner's promise to pay him a commission is found only in a contract entered into between the owner and a prospective purchaser of the property, if the latter should fail to carry out his undertaking to purchase, the owner is released from his promise to pay the broker's commission. Jennings v. Jordan, 31 Cal. App. 335, 160 Pac. 576; Brion v. Cahill, 34 Cal. App. 258, 165 Pac. 704. In such cases the broker, not having the protection of the ordinary broker's contract for compensation for services to be performed, must stand or fall by the contract actually entered into; and, if he has seen fit to allow the payment of his compensation to be dependent upon the performance of a contract made between other parties than himself, he cannot complain if through the nonperformance of that contract his own contingent rights be lost.

[2] The facts of the present case, however, bring it within the general rule above announced as to the right of a broker to his commission. There was a valid employment of the broker with an agreement for his compensation; the production by the broker of a prospective purchaser within the time limit of his employment, although at a lower price than specified, and an acceptance by the owner of such prospective purchaser on modified terms by a valid contract in writing. This contract as to its form is somewhat ambiguous. It contains, first, a statement or report signed by the broker that it has sold the defendant's property on certain terms, detailing them, to Ralston Wilbur. This is followed by a statement signed by Wilbur that he agrees to buy the property upon the terms specified in said statement or report, adding, however, that the sale is to be consummated in the office of the broker. Underneath this appears the following, signed by the defendant:

"I hereby approve sale of the within described property, and agree to pay Lyon & Hoag on demand the sum of $1,500 for their services."

We think it very questionable whether this writing can be construed as an agreement exclusively between the defendant and Wilbur. The major part of it is contained over the signature of the broker; and if the promise of the defendant therein contained, "I * * * agree to pay Lyon & Hoag on demand the sum of $1,500 for their services," is to be construed merely as a promise made to Wilbur, and not as being also addressed to the broker, it leaves the defendant in this dilemma: That his original agreement with the broker is unmodified, and, instead of being liable to pay him $1,500, his liability is measured by his original authorization, under which it would amount to the sum of $3,000, being 5 per cent. on $60,000. We think that the reasonable construction of the writing in question is that the owner, the prospective purchaser, and the broker were all parties to it, their respective obligations and rights being easily discoverable therefrom. The defendant's promise to pay the broker $1,500 was addressed to Lyon & Hoag, and his approval of the sale constituted an acceptance of the offer made by Wilbur. Thus construed, the defendant acknowledges his liability to pay the broker the sum of $1,500; and the fact that the sale was not finally consummated by a transfer of the defendant's property cannot be held to affect the broker's rights.

It follows from what we have said that the court was in error in denying the plaintiff's motion for a new trial and in rendering judgment in favor of the defendant.

The judgment is therefore reversed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 725

LAUZIER v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

(Civ. 3107.)

(District Court of Appeal, Second District, Division 1, California. Oct. 22, 1919.)

1. MASTER AND SERVANT ⊂=361—WORKMEN'S COMPENSATION ACT; RENTING HOUSES NOT A "BUSINESS" WITHIN THE ACT.

The provision of the Workmen's Compensation Act, as amended by St. 1917, p. 831, that "the words 'trade, business, profession or occupation of his employé,' shall be taken to include any undertaking actually engaged in by him with some degree of regularity," must be interpreted as though the word "business" immediately preceded the word "undertaking"; the amendment being intended to clarify the original terms of the enactment.

2. MASTER AND SERVANT ⊂=361—WORKMEN'S COMPENSATION ACT; OWNING AND RENTING OF HOUSES NOT A "BUSINESS."

The mere owning and renting of a house or houses for the purpose of investment, conceding that such owner has no particular or principal business, is not a "business" within the Workmen's Compensation Act as amended by St. 1917, p. 831.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Business.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by J. B. Wilson, opposed by Clotilde Lauzier, employer. The Industrial Accident Commission awarded compensation for injuries, and employer applied for certiorari. Award annulled.

Walter F. Dunn, of Monrovia, and John P. Dunn, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

JAMES, J. Petitioner was the housekeeper, living with her son-in-law and daughter, where she performed some service and for which she received, as expressed in her own language, her "board and upkeep." In addition to this she was given by a son the sum of $25 per month to assist in her support. At the same time she owned four small frame houses, which she rented to tenants, the net income from which, offsetting expenses, appears to have been, during the period immediately preceding the event concerned herein, no amount whatsoever. An agent attended to the renting of these houses and collected the rental thereof. This agent employed a carpenter to repair the roof of one of the houses; the time consumed was about one hour, and the charge made for the service 30 cents. While descending from the roof the carpenter fell and was injured. He afterwards prosecuted a claim against the petitioner under the Workmen's Compensation Act. The commissioners, by a majority decision, made an award against petitioner, requiring the payment of a considerable sum of money for hospital bills, physicians' charges and expenses, together with a weekly allowance to continue during disability. It is the contention of the petitioner that the award made to the applicant was without authority of law and should be annulled. The particular finding made by the commission the conclusions contained in which the petitioner contends are not justified by the evidence, was the following:

"The general and usual occupation of the defendant was that of housekeeper. She owned four houses which she rented for residence purposes, upon one of which houses the ap-

plicant was employed as aforesaid, to make certain repairs upon the roof. Such repairs could have been made within one day, and at a cost less than $100, and said employment was therefore casual. But the maintaining and renting of said houses was a trade, business, profession, or occupation of the employer, and the repair of said houses was a service tending toward the preservation, maintenance, or operation of the business premises or property of the employer, and therefore that at the time of said injury the employé was not engaged in any of the occupations or employments excluded by section 8 of the Workmen's Compensation Insurance and Safety Act of 1917 from the provisions of said act, and the employé and the employer were subject to the compensation provisions of said act and to the jurisdiction of this commission."

The case here turns altogether upon the question as to whether the owning and renting of the four small houses constituted a "business" within the meaning of the Compensation Act. That act, as amended in 1917 (Stats. 1917, p. 831, at 836), provides in part as follows:

"The phrase 'course of the trade, business, profession or occupation of his employer' shall be taken to include all services tending toward the preservation, maintenance or operation of the business, business premises or business property of the employer. The words 'trade, business, profession or occupation of his employer' shall be taken to include any undertaking actually engaged in by him with some degree of regularity, the trade-name, articles of incorporation or principal business of the employer to the contrary notwithstanding."

As we understood the argument of respondent, it is not contended that under the ordinary definition to be given to the terms "trade or business," the owning and renting of a house or houses by a person would bring such person within the terms of the Compensation Act. If the conclusion were otherwise, then it would be immaterial whether the individual owned 1 or 20 houses, so long as they were rented to other persons and an income derived therefrom. Under the English act, which has furnished the model and substance for many of the state enactments covering this subject, including our own (Fidelity, etc., Co. v. Industrial Accident Commission, 177 Cal. 614, 171 Pac. 429, L. R. A. 1918F, 856), it has been directly held that a landlord owning several houses and having an interest in others, all of which were let to tenants, was not engaged in "a trade or business" within the meaning of the law. Petitioner has cited to this point a pertinent decision, that being Bargewell v. Daniel, 98 Law Times Repts. 257, cited in Re Gaynor, 217 Mass. 86, 104 N. E. 339, L. R. A. 1916A, 363. Our own Supreme Court, in Miller & Lux, Inc., v. Industrial Accident Commission, 178 Pac. 960, made this observation:

"We should keep in mind the fact that the Compensation Act is held constitutional only because it imposes a charge not upon the individual employer, but upon the branch of industry in which he is engaged, and gives the employer opportunity of protecting himself by proper insurance."

[1, 2] It is argued, however, by respondent, in justification of the award made that the amendment to the act made in 1917 worked an extension of the ordinary definition to be applied to the terms "trade or business," and made appropriate the inclusion of conditions which the facts of this case disclose. Particular emphasis is placed upon the amendatory phrases that the words, "trade, business, profession or occupation of the employer," "shall be taken to include any undertaking actually engaged in by him with some degree of regularity." As we interpret that amendment, it is designed to have a clarifying effect only upon the original terms of the enactment. The use of the word "undertaking" we think of itself does not make less applicable the ordinary definition of the word "business," and we believe that that phrase should be read as though the word "business" immediately preceded the word "undertaking." Such seems to us to be the evident and plain meaning. It was no doubt the intention by the amendment to make it clear that the act should cover a business undertaking, whether the same was continually carried on or only engaged in at intervals. We do not intend to intimate it as our opinion that because the principal business of the petitioner was that of housekeeper, she might not, still within the meaning of the Compensation Act, be engaged in other business enterprises. We hold simply that the mere owning and renting of a house or houses by an individual for purposes of investment, conceding that such owner has no particular or principal business, does not come within the purview of the act.

The findings and award of the respondent commission are annulled.

We concur: CONREY, P. J.; SHAW, J.

43 Cal. App. 691

GREENLEAF v. PACIFIC TELEPHONE & TELEGRAPH CO. (Civ. 3015.)

(District Court of Appeal, Second District, Division 2, California. Oct. 20, 1919.)

1. NEGLIGENCE ⟸136(17) — CAUSE OF FIRE JURY QUESTION.

In action for damages from burning of plaintiff's building by fire set by negligent act of defendant's servant in depositing ashes in close proximity to building, question of cause of fire *held*, under the evidence, for the jury.

2. APPEAL AND ERROR ⟸882(12), 1064(1)—INSTRUCTION PREJUDICIAL ERROR AS REQUIRING TOO HIGH DEGREE OF PROOF.

In action for damages from fire negligently set by defendant's servant, instruction that "If the preponderance of the evidence fails to satisfy you that the fire was so caused, or leaves in your mind any doubt, confusion, or uncertainty as to the origin of the fire, your verdict should be for the defendant," *held* prejudicial error requiring too high a degree of proof, notwithstanding use of words "preponderance of the evidence," and notwithstanding plaintiff's requested instruction that facts must be established "by the preponderance of the probabilities" to the jurors' "satisfaction as reasonable men."

3. WITNESSES ⟸402—ADMISSIBILITY OF EVIDENCE CONTRADICTING OWN WITNESS.

In an action for the burning of a building by reason of the negligence of defendant's janitor in depositing ashes in a can near the building, where the janitor, called as plaintiff's witness, testified that he knew he had poured water on the ashes because he invariably wet them, it was error to exclude testimony of another witness showing that the janitor had sometimes omitted to wet the ashes, offered by plaintiff to rebut the janitor's testimony as to his custom.

4. WITNESSES ⟸388(4) — CONTRADICTORY STATEMENTS OF OWN WITNESS ON SHOWING OF SURPRISE.

Under Code Civ. Proc. § 2049, a party can introduce evidence of contradictory statements of its own witness, generally, only by showing as a foundation that it was taken by surprise by such testimony.

5. WITNESSES ⟸398(2) — CONTRADICTION OF OWN WITNESS ON SHOWING OF SURPRISE.

A party may introduce evidence in contradiction of the testimony of its own witness without a showing of surprise as a foundation therefor, under Code Civ. Proc. § 2049.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by T. A. Greenleaf against the Pacific Telephone & Telegraph Company. Judgment for defendant, and plaintiff appeals. Reversed.

S. V. Wright and Lamy & Putnam, all of San Luis Obispo, for appellant.

Pillsbury, Madison & Sutro, of San Francisco, and Paul M. Gregg, of San Luis Obispo, for respondent.

SLOANE, J. Plaintiff, the appellant here from a judgment against him in the superior court of San Luis Obispo county, charged in his complaint the burning of his warehouse and its contents by reason of the negligent act of defendant's servant in placing and leaving a can of hot ashes and coals against the rear end of the building.

[1] It is alleged that the rear wall of the structure, which was of boards standing up and down, was ignited by the hot and burning coals. The undisputed testimony established the fact that defendant's janitor was accustomed to depositing ashes from a heating stove in defendant's building in a can or container in close proximity to plaintiff's building, and that on the evening of the night of the fire the container was freshly filled with ashes from this stove, which had been burning throughout the day. Some time in the night the warehouse was discovered on fire. The evidence fairly indicates that the fire had originated at or near the point where the ash container was placed, and no other explanation of the fire than from these ashes is suggested. The wareroom contained cans and receptacles of gasoline, oils, and other inflammable liquid. The circumstances shown in evidence were such as to justify the submission of the cause of the fire to the jury, and we do not see how a verdict, either for or against the plaintiff, would be open to attack for insufficiency of the evidence.

The ground relied on by plaintiff on this appeal is alleged error of the court in giving and refusing instructions, and in its rulings excluding certain testimony in behalf of the plaintiff. There are only two specifications which we need to consider.

[2] After the jury was correctly informed that they could determine their verdict by a preponderance of the evidence, and were instructed as to what constituted preponderance of the evidence, the following instruction was given:

"Before you can find a verdict for the plaintiff the evidence must satisfy you that the fire was caused by the acts of the agent or employé of the defendant in placing hot ashes containing fire near or against plaintiff's warehouse; and if the preponderance of the evidence fails to satisfy you that the fire was so caused, *or leaves in your mind any doubt, confusion, or uncertainty as to the origin of the fire, your verdict should be for the defendant.*" (Italics ours.)

To what avail are the instructions as to the sufficiency of a preponderance of the evidence to support a verdict and as to its efficacy if it

produces unprejudiced conviction in their minds, when followed by the explicit direction that the degree of certainty indicated must not only be beyond a reasonable doubt, but must not admit of any doubt at all? Even in a criminal case, requiring the minds of the jurors to be satisfied beyond a reasonable doubt, this instruction would be erroneous.

That it must be considered prejudicial, under the state of the evidence here, there can be no question. The learned trial judge evidently recognized the vice of this instruction as submitted to him, and attempted to remedy it by inserting the words "preponderance of the evidence"; but the mere knowledge of the jurors that they might be governed by a preponderance of the evidence was not enough, when they were told that the effect of such preponderance must be such as to remove any doubt as to the origin of the fire. Respondent argues that the error, if any, in this instruction, was not prejudicial, for the reason that plaintiff had offered an instruction which was given by the court, and which laid down the same rule as that objected to as to the required weight of the evidence. We do not find it so. In plaintiff's instruction it was declared that in order to find for the plaintiff facts must be established "by the preponderance of the probabilities" to their "satisfaction as reasonable men," or, in effect, to their reasonable satisfaction. That is very different from an instruction that they cannot find for the plaintiff if a preponderance of the evidence "fails to satisfy you that the fire was so caused, or leaves in your mind any doubt, confusion, or uncertainty as to the origin of the fire."

[3] The second point of error which requires consideration is the ruling of the court excluding evidence bearing upon the custom of the janitor, Williams, in pouring water on the hot ashes before placing them in the container adjacent to plaintiff's building. The janitor testified that he knew that he had poured water on the ashes taken up on the evening preceding the fire, and gave as a reason for his certainty that he had wet them down on this particular night that he did it every night; in other words, that it was his invariable custom. The witness Walters, a former employé of the defendant and who had been subpœnaed on behalf of the defendant, being called to the stand by the plaintiff, stated that it was the habit of the janitor to wet down the ashes every evening. The question was asked by plaintiff's counsel:

"Was the habit a uniform habit, one strictly adhered to by him? A. Almost invariably. Q. Was it always?"

To this question the court sustained the objection that it was incompetent, irrelevant, and immaterial, and not proper direct examination.

"Q. Did you observe how frequently he didn't wet the ashes during the period, say a month next preceding the Greenleaf fire? A. He might have omitted once or twice in the course of a month to wet them. Q. You say he might have omitted once or twice; do you know whether he did or not?"

Objected to as incompetent, irrelevant, and immaterial, and objection sustained. There were other similar questions, objections, and rulings. We think the action of the court excluding this evidence was error.

The evidence sought to be elicited was not offered to prove an omission to wet down the ashes on the night of the fire by showing that such omission had occurred on previous occasions, but to rebut the janitor's statement that it was his invariable custom to pour water on them before depositing them in the container. He had given his "habit" in this matter as a reason for his certainty that the ashes were wet down on the night in question. Every instance of the failure of that habit to work would weaken by that much the ground of the witness's certainty as to the night of the fire. If there is any doubt as to the admissibility of this evidence, it arises on the objection that no foundation for its introduction was shown. The janitor, Williams, who had testified that he was satisfied that he had poured water on the ashes the evening preceding the fire because it was his invariable custom—that he did it every night—was plaintiff's witness. The attempt to show by the witness Walters that sometimes the janitor neglected to put water on the hot ashes before emptying them in the container was in contradiction of plaintiff's own witness.

[4] It is contended that while section 2049 of the Code of Civil Procedure permits a party calling a witness to contradict him by other evidence, or by showing that he had made at other times statements inconsistent with his present testimony, this cannot be done until it has been made to appear that the party calling the witness has been taken by surprise by the testimony he seeks to contradict or discredit. That surprise must be shown as a foundation for introducing evidence of contradictory statements of a witness is the general rule, and it is so held in construing section 2049 of the Code of Civil Procedure in People v. Johnson, 131 Cal. 511, 63 Pac. 842; People v. Creeks, 141 Cal. 529, 75 Pac. 101; and Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 93 Pac. 1049. But in the numerous cases holding under the common law that one may contradict his own witness by other testimony showing the facts to be different from those stated by the witness, we have failed to find one which suggests that such contradiction can only be made where surprise at the adverse testimony is shown. Greenleaf on Evidence, while recognizing the rule that surprise must be shown

as a condition of introducing contradictory statements of the witness, says (section 443), with regard to contradicting one's own witness:

"It is exceedingly clear that the party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony, in direct contradiction to what such witness may have testified, and this not only where it appears that the witness was innocently mistaken, but even when the evidence may collaterally have the effect of showing that he was generally unworthy of belief."

The same rule is stated in substantially the same way in 40 Cyc. 2766, with a multitude of citations from the federal courts and the courts of upwards of 30 states. The above quotation from Greenleaf on Evidence is cited and approved in Norwood v. Kenfield, 30 Cal. 394. Commenting upon this precise point, the Supreme Court of Maine, in Brown v. Osgood, 25 Me. 505, says:

"But, as to the matter of surprise, it is believed to be referable, legitimately, only to the question whether, when a party has produced a witness who testifies adversely, he shall be allowed to show that the witness had on a former occasion made a different statement."

[5] We believe that the excluded testimony was admissible under section 2049 of the Code of Civil Procedure. But, in any event, the palpably erroneous and misleading instructions justify the granting of a new trial.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

44 Cal. App. 1

ARMSTRONG v. SACRAMENTO VALLEY REALTY CO. et al. (Civ. 2057.)

(District Court of Appeal, Third District, California. Oct. 28, 1919.)

APPEAL AND ERROR ⊂=477—APPLICATION FOR SUPERSEDEAS TO BE MADE TO SUPREME COURT.

An application for writ of supersedeas to prevent plaintiff from enforcing a judgment should be made to the Supreme Court in which an appeal from the judgment is pending, and not to the District Court of Appeals.

Application for writ of supersedeas to prevent plaintiff from enforcing a judgment, in an action by W. S. Armstrong against the Sacramento Valley Realty Company and others. Application dismissed.

See, also, 178 Pac. 516.

George R. Freeman, of Corona, for plaintiff.

Claude Purkitt and W. T. Belieu, both of Willow, for petitioners.

PER CURIAM. This is an application for a writ of supersedeas to prevent plaintiff from taking any proceeding in the superior court of Glenn county in execution of a certain judgment rendered therein in favor of plaintiff and against the defendants.

The record shows that on the 14th day of July, 1919, a certain paper in said action, signed by the judge, was filed; the defendants presuming it to be a final judgment in the case, took an appeal therefrom to the Supreme Court of the state, and filed a bond in an amount sufficient to stay proceedings; thereafter, on the 22d day of September, 1919, the judge who tried said case signed and filed another paper purporting to be a final judgment in said action; from this action the defendants have also appealed and given a bond in the sum of $300, but no bond to stay execution.

The petitioners for the writ herein allege that the plaintiff is threatening to, and will, unless restrained, proceed by execution to enforce the alleged judgment filed on September 22, 1919. They also allege that the first judgment filed in said action was a final judgment and that the second document was a nullity, that the only judgment in the case that has any validity is the first document filed in said action, and that plaintiff should not be permitted to enforce said purported final judgment filed in said action on the ground that the same is a nullity.

We are of the opinion that the petitioners' application for a writ should be made to the court wherein such appeal is pending and not to this court. For this reason, we deem it unnecessary to discuss the merits of the application or determine the effect of the paper filed on September 22, 1919, as being a judgment in the case.

In the case of Southern Pacific Co. v. Superior Court, 167 Cal. 252, 139 Pac. 70, the Supreme Court said:

"The power to issue a writ of supersedeas is one of the powers incidental to a court of last resort. It exists in cases where the writ is necessary to preserve the status quo so that the rights involved in an appeal, when determined by the appellate court, may not be lost or prejudiced by reason of the intervening execution of the judgment or order appealed from, in cases where the statute regulating a stay of proceedings on appeal makes no provisions for such stay in the particular case. [Quoting cases.] Such writ may also be issued when it is necessary to stay or vacate proceedings below taken or attempted in defiance of a stay secured under the statute. [Quoting cases.] Under the practice in this state, in the rare cases where such a writ is issuable, it must be obtained, where cause exists and upon proper terms, by a motion or application to the court in which the appeal is pending. McAneny v. Superior Court. [150 Cal. 6, 87 Pac. 1020]."

The proper forum in which petitioners should make their application for the writ is the court in which the appeals are pending, namely, the Supreme Court of the state of California.

For these reasons, the application for a writ of supersedeas is dismissed.

43 Cal. App. 667

BURNS v. SOUTHERN PAC. CO. et al.

(Civ. 2040.)

(District Court of Appeal, Third District, California. Oct. 20, 1919. Hearing Denied by Supreme Court Dec. 18, 1919.)

1. MASTER AND SERVANT ⟸301(4) — TRUCK OWNER NOT LIABLE FOR NEGLIGENCE OF CHAUFFEUR UNDER CONTROL OF ANOTHER.

An owner of truck hired to another given exclusive control and management of truck and chauffeur are not liable for injuries caused by negligent operation.

2. MASTER AND SERVANT ⟸301(1)—PASSENGER ON AUTOMOBILE TRUCK NOT LIABLE FOR CHAUFFEUR'S NEGLIGENCE.

One riding on a truck as a passenger, neither exercising control nor giving any direction as to its movements, is not liable for injuries to a third person caused by chauffeur's negligence.

3. MASTER AND SERVANT ⟸356 — FELLOW SERVANT LAW NOT REPEALED BY WORKMEN'S COMPENSATION ACT IN CASE OF FARM LABORERS.

A farm employé who was injured by negligence of fellow servant is not precluded from recovering by Civ. Code, § 1970, making such negligence a good defense, but may recover under Roseberry Act 1911, § 1, specification No. 2, Workmen's Compensation Act of 1913 and amendments, excluding such defense, not having repealed Roseberry Act as to farm employés in view of Workmen's Compensation Act 1913, § 12, subd. c, and sections 14 and 90.

Appeal from Superior Court, Sutter County; John F. Ellison, Judge.

Action by W. F. Burns against the Southern Pacific Company, George H. Jackson, Jackson M. Diggs, W. G. McRoberts, and F. G. Prinderville. From judgment of nonsuit as to defendants Jackson, Diggs, and McRoberts, plaintiff appeals. Affirmed as to defendants Diggs and McRoberts, and reversed and remanded as to defendant Jackson.

L. T. Hatfield, Martin I. Welsh, and W. H. Hatfield, all of Sacramento, for appellant.

A. H. Hewitt, of Yuba City, and W. H. Carlin, of Marysville, for respondents.

PLUMMER, Presiding Judge, pro tem. On and prior to the 27th day of June, 1917, Emmans Franklin Burns, a son of the plaintiff, was in the employ of the defendant Jackson, picking fruit on his ranch in Sutter county. Defendant McRoberts was acting as superintendent for defendant Jackson in the management of the farm and orchard on which plaintiff's son was working. The defendant Prinderville was a chauffeur engaged in the driving of a truck belonging to the defendant Diggs, and was in the general employ of said defendant, but at the time in question both chauffeur and truck had been hired by defendant Diggs to defendant Jackson, and were under the exclusive control and direction of the latter.

In the afternoon of the day above mentioned, the defendant Prinderville was directed to take a load of apricots to a station named Oswald, on the line of the Southern Pacific Railway, and Emmans Burns, a son of the plaintiff, as aforesaid, was directed to accompany the defendant Prinderville and assist in unloading the apricots and in loading empty boxes on the truck, to be brought back on the return trip. The defendant McRoberts accompanied the truck to Oswald station, but does not appear to have had or exercised any control or direction over the chauffeur, defendant Prinderville. The trip to Oswald station was made safely, the apricots unloaded, and the truck reloaded with empty fruit boxes and started back toward the orchard. On the return trip, the defendant Prinderville had charge of the truck as its driver, the defendant McRoberts sat upon the same seat and to the right of the chauffeur, and Emmans Burns occupied a position on top of the boxes about three feet above the seat where the other two persons were sitting. In what direction Emmans Burns was facing, the evidence does not disclose. As the truck was proceeding in an easterly direction, and at a time when it was crossing the railroad tracks belonging to defendant Southern Pacific Company, a collision occurred between the truck and a gasoline motorcar then being operated on the tracks of the defendant company. In this collision Emmans Franklin Burns was killed, and the plaintiff prosecutes this action against all of the defendants above named to recover for the loss of his son so incurred.

At the conclusion of the plaintiff's testimony, the court granted a nonsuit as to the defendants Jackson, Diggs, and McRoberts. As to the other defendants, the cause proceeded to verdict and judgment, and plaintiff prevailed as against the defendant Prinderville.

From the judgment of the trial court granting a nonsuit as to the defendants Jackson, Diggs, and McRoberts, the plaintiff urges this appeal.

[1] The fact that Diggs was the owner of the truck, and that the defendant Prinderville was in his general employ as a chauf-

feur, appears to be the only cause for having joined him in this action; but, as the testimony shows without contradiction that at the time of the collision referred to both truck and chauffeur were under the control and management of the defendant Jackson, the correctness of the ruling of the court as to the defendant Diggs requires no further mention.

[2] It also appears from the testimony that the chauffeur had exclusive control and management of the truck at the time of the collision, was acting upon his own initiative, with full power to manage the same as to him might seem wise or expedient as the driver of a gasoline engine, and that McRoberts was only accompanying the truck as a passenger, neither exercising control nor giving any direction as to its movements. The correctness of the ruling of the court, in so far as it relates to the defendant McRoberts, would appear to be fully established.

While several questions have been discussed in the briefs submitted by counsel, the correctness of the ruling of the court as to the defendant Jackson depends upon one question, to wit: Has or has not the act of the Legislature approved April 8, 1911, commonly known as the "Roseberry Act," been repealed in so far as it relates to the cause of action set forth in plaintiff's complaint?

The judgment of nonsuit in favor of the defendant Jackson was entered on the theory that section 1970 of the Civil Code applies to and exclusively controls the determination of the issues tendered in this cause, and that the Roseberry Act (St. 1911, p. 796) has been entirely repealed. Two cases decided by this court are cited as authority, as follows: Brown v. Lemon Cove Ditch Co., 36 Cal. App. 94, 171 Pac. 705, and Reynolds v. Horst Co., 35 Cal. App. 711, 170 Pac. 1082.

In deciding the Brown Case, the court apparently sustains the contention of respondents, in using the following language: The contention of appellant is that it ignores the doctrine of comparative negligence, as provided in what is known as the Roseberry Act of 1911, but that law was repealed by the Workmen's Compensation Act of 1913, p. 279, and the accident herein occurred after the latter statute became operative.

In that action, as further appears, the plaintiff relied upon the gross negligence of the defendant. Upon this issue the verdict of the jury was against him, and the judgment was upheld on appeal.

An examination of the facts of that case will show that the language of the court in its application thereto, and in its holding that the Roseberry Act was repealed, was correct in so far as it applied to the issues then being determined.

In the Reynolds Case, supra, the court does not hold that the Roseberry Act is repealed, it being merely stated that—

"The point is made that [the Roseberry Act and section 1970, Civil Code] were repealed by the Workmen's Compensation Act of 1913, which went into effect before the commencement of this action. There is no question, though, that the accident happened before said act of 1913 became operative, and without following the argument of appellant in detail, we deem it apparent that section 91 of the act—'the compensation provisions of this act shall not apply to any injury sustained prior to the taking effect thereof'—constitutes a saving clause and continued in force, as far as this case is concerned, the said Roseberry law and said section of the Code."

The facts of the Brown Case and of the case now at bar are clearly distinguishable. One falls within, the other is excluded from, the act of 1913. Here the question is the applicability of specification No. 2 of section 1 of the Roseberry Act, which reads:

"It shall not be a defense that the injury or death was caused in whole or in part, by the want of ordinary or reasonable care of a fellow servant."

The actual repeal or nonrepeal of the Roseberry Act, or any part thereof, was not really involved in the decision of the Brown Case. The saving clause, found in section 91, and upon which the decision was based, eliminated such question.

The cause at bar is one specially exempted from the Compensation Act approved May 29, 1913, and the subsequent amendments thereto.

It must be borne in mind that the act of April 8, 1911, provided two methods for making compensation for injuries occurring to employés; one set forth in section 1 of the act; a second under the subsequent provisions thereof, which became the foundation of, and since incorporated into, the Workmen's Compensation Act. Section 12 of this act sets forth the circumstances and conditions under which it is applicable and to which its terms apply. Then, in subdivision C of the same section, it is specifically provided that—

"In all other cases where the conditions of compensation do not concur, the liability of the employer shall be the same as if this act had not been passed."

Following this, section 14 expressly excludes all persons engaged in farm, dairy, agricultural, viticultural, or horticultural labor, etc. After setting forth the manner and procedure for applying the provisions of said Compensation Act, section 90 is inserted, which reads as follows: "All acts, or parts of acts, inconsistent with this act, are hereby repealed." There is no mistaking the language of this section. It relates only to acts, and parts of acts, inconsistent with the provisions of the Workmen's Compensation Law, and extends no further. It does not repeal, modify, or change any act, or

part of act, of the Legislature which is outside of and excluded from the terms and provisions of the Workmen's Compensation Law.

By direct language the parties in the cause at bar, and all the law relating to them, are excluded from the act of May 26, 1913. The amendment to section 14, by act approved May 27, 1915, does not change the law in so far as it relates to farmers, horticulturists, etc.

In the case of Hackelberry v. Sherlock Land & Cattle Co., 180 Pac. 37, this court draws the distinction which is here being made, and held that the Employers' Liability Act of 1911 was not repealed by the act of 1913, save and except in so far as an inconsistency existed between the two acts; and further held that the act of 1911 was in full force and effect in so far as the Hackelberry Case was concerned. In that case, as in this case, the conditions of compensation referred to in the act of 1913 and the amendatory act of 1915 (page 1079), do not concur or affect the plaintiff or any of the defendants. Hence it follows that the liability shall be the same as if the act of 1913 had not been passed. This court also there held that the Roseberry Act lays down rules of substantive law governing the classes of employés excluded by the express terms of the Employers' Liability Act of 1913.

[3] From what appears from the foregoing examination of the Roseberry Act and the act of 1913, we conclude that the former has not been repealed in its provisions so far as they relate to the cause at bar. Without setting forth the evidence in detail, it is only necessary to say there was sufficient evidence to take the case to the jury as to the defendant Prinderville being an employé of the defendant Jackson, and also as to the negligence of the defendant Prinderville in his operation and management of the auto truck at the time of the collision.

For the reasons herein given, the judgment of nonsuit in favor of the defendants Diggs and McRoberts is hereby affirmed, and the judgment of nonsuit in favor of the defendant Jackson reversed, and the cause remanded for a new trial as to the defendant Jackson.

We concur: HART, J.; BURNETT, J.

43 Cal. App. 656

COOMBS et al. v. REYNOLDS et al.

(Civ. 3016.)

(District Court of Appeal, First District, Division 1, California. Oct. 20, 1919.)

WATERS AND WATER COURSES ⊂=119(1) — NO LIABILITY FOR FLOODING LOWER LANDOWNER BY DIVISION OF SURFACE WATER.

An upper landowner was not liable for damages to a lower landowner, caused by diversion of surface stormwaters from the course of their natural discharge and flow, so that they were concentrated upon the land of the lower landowner in an unnatural manner and quantity, where such flow of water was caused by plowing and back-furrowing, without any intention to damage the lower landowner, and not in a negligent manner.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by J. Ellsworth Coombs and another against B. L. Reynolds and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Davis, Kemp & Post, of Los Angeles, for appellants.

H. N. Wells, R. P. Jennings, Frank Belcher, and J. A. Visel, all of Los Angeles, Cal., for respondents.

BARDIN, Judge pro tem. The action was brought to recover damages claimed to have been suffered by the plaintiffs by reason of the alleged diversion by the defendants of certain surface stormwaters from the course of their natural discharge and flow, so that they were concentrated upon the land of the plaintiffs in an unnatural manner and quantity. In support of this appeal, it is the claim of the appellants that the court committed error in its charge to the jury: (1) In respect to the law as to the liability of an upper proprietor of lands for injuries suffered by a lower proprietor in respect to the discharge of surface stormwaters upon the lands of the latter; and (2) in respect to the charge of the court in definition of an act of God as applied to the special defense pleaded by the defendants in bar of recovery.

Counsel for the respective parties are in substantial agreement as to the facts of the case. The defendants Reynolds and Leisure were the upper owners of separate portions of a large tract of land lying eastward from the top of a bluff along the east side of what is known as San Dimas Wash, in the county of Los Angeles, Cal. The plaintiffs at the same time were the owners of a smaller tract of land, of considerably less elevation, planted to orange and lemon trees, the easterly boundary of which extended along the top of the bluff referred to, and contiguous to the lands of one Bright and of defendant Damerel (as to the latter of whom a motion for nonsuit was granted, of which no complaint is here made), but not contiguous to the lands of Leisure and Reynolds; the land of one Bright intervening.

From the evidence adduced at the trial it appears that the natural drainage of stormwaters passing from the lands of Reynolds and Leisure would not ordinarily be discharged upon the lands of the defendants, but would pass through natural depressions east-

erly from defendant's lands, and eventually pass into fixed water courses. The surface of defendants' lands is practically in a plane so far as could be readily discovered by the eye, with a gentle slope to the southwest. These lands were also planted to fruit trees, and were worked as one tract of land, notwithstanding they were in separate ownership. A short time before the plaintiffs suffered the injuries complained of, the defendant Reynolds had been engaged in plowing these lands, the furrows running from east to west. About February 20, 1914, a storm of great and unprecedented violence visited the locality referred to, attended by an extremely heavy precipitation of rain. The accumulated stormwaters gathered in great volume upon the lands of defendants, and in seeking lower levels seem to have followed, to a considerable extent, certain dead furrows caused by the cultivation referred to, so that a large amount of this surface stormwater was diverted westerly across the lands of defendants Reynolds and Leisure, thereby contributing to the volume of other stormwaters which passed over the lands of Bright and eventually broke over the bluff above plaintiffs' lands, resulting in the injuries complained of.

In response to one of the special issues submitted to the jury, it was found that the conduct of the defendants in the method used by them for the cultivation and improvement of their lands was not negligent. The general verdict was also for the defendants. The case seems not to have been tried upon the theory that there was a willful diversion or interference with the surface waters referred to, in the sense that any act of the defendants in the cultivation of their soil was done with the object of causing any stormwater which might thereafter accumulate to depart from the course of its usual flow, and particularly to be deflected in such a manner as to likely pass in unusual or unnatural manner upon the lands of the plaintiffs. Appellants' fundamental contention finds apt expression in the following quotation from their briefs:

"It is true, of course, that the defendants had a right to cultivate and use their land, and also had a right to plow their land; but they must see to it at their peril that the use and cultivation and plowing of the land results in no injury to another."

The respondents' claim, very briefly stated, is that the admitted right of the defendants to till and cultivate their lands is qualified only by the right to exercise such acts of husbandry in a careful and prudent manner. The learned trial judge in his charge to the jury prepared lengthy and very well considered instructions covering the question of the liability of an upper owner to a lower owner, where injury is suffered by the lower owner by reason of the unnatural flow of surface stormwaters brought about without negligence and in the course of usual methods of farming or other agricultural operations, and unattended by any acts amounting to willful diversion, concentration, or interference with the course of the flow of such waters. These instructions are claimed by the appellants to constitute error and to justify a reversal of the case. We cannot agree with counsel in the behalf claimed.

Among the instructions complained of, but which concisely express the principle which seems to us proper to apply to this controversy, are the following:

"It is also true that one has a right to utilize the land which he owns, and if an increased flow of water, or of surface water, from his land to a lower piece of land, comes from a proper use of his own land, from the cultivation of the same in a proper and useful manner, the lower landowner cannot complain of the increased flow caused by such use and ordinary cultivation or improvement of his land. It will be observed that any use of the land which is owned by the defendants herein, which might tend to increase the flow of water upon the land of the plaintiff, the mere fact that it does in some degree increase the flow does not of itself give the plaintiff the right to recover in this case; but you will have then to consider the nature of the improvements, the character of the cultivation and determine after consideration thereof the question of damage under the general instructions as given you by the court.

"The right to cultivate and improve his land carries with it the right to plow the land, so that the mere fact that the defendants in this case plowed their land would not give any right of recovery to the plaintiff. I shall submit to you, however, in this case, this question, whether or not in such cultivation the defendants were guilty of such negligence, or negligent conduct, that is to say, so negligently improved their land that they caused damage by stormwater, which a man of ordinary prudence might have anticipated would have been caused by such conduct. The court instructs you that, while a man has a right to improve and cultivate his land, this does not give the right to intentionally damage his neighbor. For illustration in this case, assuming an extreme condition that dead furrows were plowed all over defendants' land, and all pointing to the break in question, so that the inevitable effect of such plowing would be to concentrate the water at the point in question; if this sort of course was followed, done with the express intention or for the express purpose of damage to the plaintiff's land, then he would have a right to recover.

"Returning, then, to the proposition, the court again states to you that every owner of land has a right to cultivate it, to make use of it for the purposes for which it is best adapted, and in the course of such use to plow and cultivate such land. Such owner would only be responsible for injuries falling from such cultivation in the event that such cultivation was performed in a negligent manner."

The courts of this state are committed to the rule of the civil law respecting the law of surface or stormwaters. McDaniel v. Cummings, 83 Cal. 515, 23 Pac. 795, 8 L. R. A. 575; Los Angeles C. Assn. v. Los Angeles, 103 Cal. 461, 37 Pac. 375; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92. While the civil law protected a lower proprietor against an upper owner from the injuries resulting from sending surface waters down to the lower owner in a manner different from their natural flow, yet "there was, however, one act of man excepted, * * * and that was the tilling of the fields in the natural way." Kinney on Irr. and Water Rights (2d Ed.) § 560; Martin v. Jett, 12 La. 501, 32 Am. Dec. 120, and case note. In Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563, the court, in discussing a question akin to the present one, said:

"The very case now before the court was, as it appears to us, met and provided for by the laws of Justinian. The distinction seems to be between injuries occasioned by strictly agricultural operations, and those occasioned by works designed to reclaim or improve the land. In favor of agriculture, injuries by flowing water done to a neighbor, as the result of ordinary farming operations (as with the plow in raising crops), were not actionable. But if one, with the design and purpose of reclaiming and improving his land, makes ditches upon it, and thus, by an increased flow of water, or otherwise, causes an actual injury to the lower owner, he is liable therefor."

That there are exceptions to the general rule that the upper proprietor may not increase or change the burden of the lower proprietor relative to the duty of receiving surface stormwater, is recognized, although stated by way of dictum in Board of Trustees, etc., v. Rodley, 177 Pac. 175, where it is said:

"The principle does not apply to a gradual increase in drainage that may be caused by the cultivation of the soil according to the usual method."

To fail to approve the instructions complained of upon this particular subject would be to condemn to sterility vast acreages of agricultural lands situate in the state, where storms of violence occasionally attend, and where, because of the varying elevations of neighboring tracts, the run-off of stormwater is often torrential in character, causing temporary channels to be rapidly developed in unusual places and manner, and bringing about unexpected washes, and consequent deposits of both water and débris, and which the most careful and prudent husbandman could neither anticipate nor make adequate provision for.

Several California cases have been called to our attention, which it is claimed establish the inflexible rule that the upper owner is liable in damages for any unnatural diversion or concentration of stormwaters which result in injury to the lower owner. The cases cited do not meet the situation presented by the record now before us, but relate to or contemplate cases where the injury complained of has been produced by affirmative acts of the party at fault, brought about by a deliberate interference with the natural flow of surface waters, usually by the construction of drainage systems, dams, dykes, ditches, and kindred obstructions and works. The fundamental question involved in this case seems not to have before been directly passed on by any of the appellate courts of this state.

The instructions adverted to were not believed by the trial judge to be hostile to the line of decisions which finds concise expression in the case of Heier v. Krull, 160 Cal. 441, 117 Pac. 530; and we share in that belief. Considered with the other harmonious instructions given upon the same subject, they form a lucid exposition of just and equitable principles for the determination of the issues before the lower court.

The views we have expressed upon this subject render it unnecessary to determine whether or not the court erred in its charge to the jury upon the subject of the special defense that the alleged injury complained of was brought about by the act of God.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

43 Cal. App. 729

ROSSBACH v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3103.)

(District Court of Appeal, Second District, Division 1, California. Oct. 22, 1919.)

1. DEPOSITIONS ⟸7—RIGHT OF PLAINTIFF TO TAKE AFTER SUSTAINING OF GENERAL DEMURRER TO COMPLAINT.

Under Code Civ. Proc. § 2021, providing for the taking of depositions at any time after service of summons, etc., plaintiff is entitled to take defendant's deposition after a general demurrer had been sustained to the complaint, and before an amended complaint had been filed, for there is no provision that a deposition may not be taken before an issue of fact has been raised.

2. ACTION ⟸64—FILING OF COMPLAINT COMMENCEMENT OF ACTION.

Under Code Civ. Proc. § 405, the filing of a complaint constitutes the bringing of an action, though a general demurrer is thereafter sustained.

Petition by Victor A. Rossbach for a writ of prohibition to be directed to the Superior

Court of Los Angeles County and Grant Jackson, Judge thereof, to prevent a proceeding for contempt. Alternative writ discharged, and proceeding dismissed.

Byran D. Seaver and George L. Greer, both of Los Angeles, for petitioner.

Edward Winterer, of Los Angeles, for respondents.

SHAW, J. Prohibition. Has the superior court jurisdiction to adjudge a defendant in an action guilty of contempt for his refusal to answer interrogatories in a proceeding regularly instituted by the plaintiff to take his deposition under the provisions of section 2021, Code Civ. Proc., after the sustaining of a general demurrer to the complaint, with leave to file an amended complaint, the time within which to file the same not having expired and prior to the exercise by plaintiff of such right?

As appears from the petition, a general demurrer was sustained to the complaint, with leave to amend, after which, and before plaintiff had exercised her right under an order of court granting her leave to file an amended complaint, the proceedings for the taking of the deposition of defendant were instituted. Defendant appeared, was duly sworn, and upon the advice of his attorney refused to answer certain questions propounded to him. Whereupon he was cited to appear before the court and show cause why he should not be adjudged guilty of contempt for such refusal. Upon the hearing of the matter it was ordered that he appear before the notary and give answers to the questions so propounded; otherwise, the court would adjudge him guilty of contempt and punish him therefor.

[1] The contention of petitioner is that the court had upon general demurrer held the complaint insufficient, and in the absence of any sufficient complaint on file there was no pleading under which the defendant could be required to give his deposition. We are not in accord with this contention. Section 2021, Code of Civil Procedure, is broad and comprehensive. It provides:

"The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases"

—when he is a party to the action. It conclusively appears that the witness whose deposition was sought to be taken was a party to an action as distinguished from a special proceeding, and that he had appeared therein, and the statute in plain and explicit terms provides that the testimony of such witness may be taken by deposition in an action at any time after his appearance. In the case of San Francisco Gas, etc., Co. v. Superior Court, 155 Cal. 30, 99 Pac. 359, 17 Ann. Cas. 933, it was claimed there was no issue as to which depositions could be taken, for the reason that the case had been tried and was then pending on appeal in the supreme court. In discussing the point, the court, speaking through the late Chief Justice Beatty, said:

"It may be answered to this objection that, in case of an action, it is not requisite that an issue of fact should have arisen in order to authorize the taking of depositions. As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint, or upon the allegation of new matter in the answer, and there is perhaps some significance in the distinction made by the statute in this particular between actions and special proceedings. Clearly, therefore, the existence of an actual, as distinguished from a potential, issue of fact, is not, by the terms of the statute, made a conclusive test of the right to take depositions de bene esse."

To like effect is Kibele v. Superior Court, 17 Cal. App. 720, 121 Pac. 412, upholding the right to take a deposition before issue joined by answer; and California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593, where it is said:

"There is no provision or rule of law to the effect that a deposition may not be taken before an issue of fact has been raised."

[2] The filing of the complaint constituted the bringing of the action (section 405, Code Civ. Proc.), and plaintiff's right to have defendant's deposition depends not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file. San Francisco Gas, etc., Co. v. Superior Court, supra.

Moreover, the ruling of the court in sustaining the general demurrer to the complaint might, on an appeal by plaintiff, be reversed, thus bringing the case within the facts considered in the case last cited, upholding the right to have a deposition taken for use in a possible new trial granted on an appeal from an order denying a motion therefor.

To sustain petitioner's contention would not only nullify the plain provisions of section 2021, but destroy the right given by statute for the perpetuation of testimony, as in neither case could a witness be required to testify against his will.

The alternative writ heretofore granted is discharged, and the proceeding dismissed.

We concur: CONREY, P. J.; JAMES, J.

43 Cal. App. 638

PEOPLE v. PECK. (Cr. 482.)

(District Court of Appeal, Third District, California. Oct. 18, 1919.)

1. EXTORTION ⟸4—DEFINITION AT COMMON LAW.

At common law, "extortion" was confined to the unlawful taking by any officer, by color of his office, of any money or thing of value not due him, or more than his due, or before it was due, but, under the statute, may be committed by any person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extortion.]

2. THREATS ⟸1(1) — STATUTORY DEFINITION OF EXTORTION.

Under Pen. Code, § 518, "extortion," may be committed by any person, but it is essential that the property be taken with the consent of the person from whom it is obtained; such fact distinguishing the crime from robbery, defined by section 211.

3. THREATS ⟸7—SUFFICIENCY OF EVIDENCE.

Evidence *held* to justify finding that the crime of extortion had been committed by defendant through frightening the prosecuting witness into giving up his money in order to be left in peace, with the intention on defendant's part to retain such money.

4. CRIMINAL LAW ⟸450—QUESTION CALLING FOR CONCLUSION.

In a prosecution for extortion, objection was properly sustained to defendant's question to the prosecuting witness whether the money was taken by defendant without the witness' consent; the question calling for the conclusion of the witness upon a question to be determined by the jury.

5. THREATS ⟸1(1) — GIVING MONEY WITH "CONSENT."

Money or property is obtained from a person by extortion with his "consent" if he gives it up with apparent willingness to the party obtaining it, with the understanding that he is thus to save himself from some personal calamity or injury, though within himself he may still protest against the circumstances requiring him to dispose of the money in such way.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consent.]

6. CRIMINAL LAW ⟸1170(3)—ERROR IN SUSTAINING OBJECTION TO EVIDENCE AFTER ADMISSION.

In a prosecution for extortion, contention that trial court erred in sustaining the district attorney's objection to the admission in evidence of the first complaint, charging robbery and sworn to by the prosecuting witness against defendant, after the document had gone into the record and before the jury, *held* to be without merit, since the defendant got the full benefit of the evidence.

7. WITNESSES ⟸387—CROSS-EXAMINATION AS TO INCONSISTENT STATEMENTS.

Cross-examination as to whether witness made a certain remark to the victim of alleged extortion, counteracting the effect of the witness' testimony that the whole transaction was a joke, *held* proper.

8. CRIMINAL LAW ⟸417(2) — DECLARATIONS OF ANOTHER PERSON.

Declarations concerning a criminal or unlawful act, not made in the presence of the one charged with and on trial for the crime, cannot be used against or bind the latter.

9. CRIMINAL LAW ⟸824(8)—REQUEST NECESSARY FOR INSTRUCTIONS ON EFFECT OF IMPEACHING TESTIMONY.

The party against whose interests testimony impeaching witnesses is given should request the trial court to explain to the jury in its charge that such testimony is to be limited in its effect to the specific purpose of impeachment for which it is allowed, and that the jury are likewise to be restricted in their consideration of it.

10. CRIMINAL LAW ⟸824(1)—DUTY OF COURT TO GIVE AND DEFENDANT TO REQUEST INSTRUCTIONS.

It is the duty of a court in criminal cases to give of its own motion, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to the case; but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, such as the legal scope of impeaching testimony, unless such instructions are requested by the party desiring them.

11. CRIMINAL LAW ⟸1044—OBJECTIONABLE QUESTION NOT REVIEWABLE ON FAILURE TO MOVE TO STRIKE OUT.

Counsel for defendant should have moved the trial court to strike out the district attorney's impeaching question to a witness claimed to be improper, also the answer thereto, and have specifically requested the court to instruct the jury not to consider such matters in determining defendant's guilt or innocence, and such failure of defendant's counsel leaves defendant in no position to complain on appeal.

12. WITNESSES ⟸390—IMPEACHING TESTIMONY IN PROSECUTION FOR EXTORTION.

In a prosecution for extortion, defendant claiming he had taken the money in course of a joke, answer of a witness, to a question as to why defendant asked for the money, that he (the witness) supposed that he (defendant) thought the prosecuting witness would tell on him, and perhaps defendant's holding the money would keep him from telling, *held* admissible to show that the witness' conception of the nature of the transaction was less favorable to defendant in reality than he attempted to make it appear on trial.

13. CRIMINAL LAW ⟸723(4)—ARGUMENT OF DISTRICT ATTORNEY NOT THREATENING JURY.

In prosecution for extortion, defendant claiming he had taken the money in course of a joke, statement of the district attorney in argument that he would make the same kind of complaint against defendant or any other citizen that perpetrated the same kind of joke, and would keep on doing it until the county treasury was empty, *held* not improper as a threat to the jury in case they did not convict.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

George W. Peck was convicted of extortion, and from the judgment, and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

M. C. Kerr, of Quincy, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, jointly with one Elton Frazier, was charged with the crime of extortion. He demanded and received a separate trial, was found guilty by the jury, and was sentenced to state's prison, and now prosecutes this appeal from the judgment.

On January 27, 1919, the prosecuting witness, Louis Wing, was living on a farm near Crescent Mills, in Plumas county. He testified that he had known the defendant Peck for 15 or 20 years and the defendant Frazier for about 3 years; that, at about five minutes to 3, on the morning of January 27, 1919, the defendants came to his house, knocked at the door and asked to come in. Peck said he was cold and asked Wing to build a fire, which he did. As to what then occurred, Wing testified:

"Peck says, 'Take a chair and sit down and be sociable,' which I did in my underclothes, and he says to me, 'Will you dance to my fiddling?' I says, 'I have, George, and I guess I can again,' and he says, 'Well, you are going to, now.' I looked up, he had a gun stuck in my face. I asked him what he would do. He says he was going to kill me. I asked him what I had done. There was a rock put in some grain at the ranch when he was thrashing there and the grain didn't belong to me, but it didn't do any harm. The rock was found before it went into the machine. He said I knew how it got in there and I was going to tell him. I told him I was just as innocent as a newborn baby and I didn't know who put it in there. * * * And he kept on going to make me tell."

There was some further conversation in which Frazier said Wing had called him a slacker, which the latter denied. The witness testified that Peck said:

"You know very well if we go away and leave you here you will get me arrested."

Wing said:

"I promised him faithfully that I would not if he would let me go. At that time he ordered Elton Frazier to pull that gun, and he did; but he never pointed it at me. * * * George Peck wanted me to put up something to keep my mouth shut after I faithfully promised him I wouldn't get him arrested, which I did; I put up $62.25. It was $63.25, and I asked him for one dollar back, and he gave me a dollar and took the $62.25 away with them when they left the house."

It appeared that the money was in Wing's pants pocket in his bedroom. He testified:

"Peck ordered Frazier to go and get it, and Frazier went and got it and counted it out on the table, and I asked him for this dollar back, and he gave it to me, and he shut the purse up and handed it to Peck, and that is the last I see of the money until I went back from here and it was given to me by different parties."

Asked why he permitted the defendants to take the money, Wing said:

"Through fear, I had to give it up to them. I would give them anything I got for to get them to stop."

He said he told them where the money was and made no objection to their taking it. He was asked if defendants gave any reason for taking the money, and answered:

"It was put up as a forfeit so I wouldn't get them arrested for pulling those guns on me and threatening my life."

It further appears that on the afternoon of the 27th day of January, the defendant was at the home of his brother, Jos. Peck, residing a short distance from the house occupied by Wing and in which the trouble occurred. Mrs. Peck, the wife of Joseph, remarked to the defendant that she saw Wing and the "Stampfli bunch" (the Stampflis were residents of the Crescent Mills section and friends of Wing), going towards Quincy (the county seat of Plumas county), and, she said, "I wondered what they were going for," and the defendant replied, "I guess he was going over to have me arrested." Mrs. Peck asked defendant what reason Wing had for having him arrested, and the accused explained the episode occurring at Wing's house early that morning, but said it was all merely a joke or "done for fun." The defendant then left his brother's house and within a few minutes thereafter Glen Peck, son of Joseph and Mrs. Peck, appeared at the latter's home, gave his mother Wing's purse and the money taken from Wing by defendant and Frazier, and requested her to deliver the purse and its contents to Wing. Mrs. Peck took the purse and the money to Wing's house and placed them on a table in one of the rooms. Wing, on returning home, found the purse and the full amount of money taken from him as above explained.

It is first contended by appellant that the crime committed, if any, was robbery and not extortion. This question was first raised by a motion made by defendant that the court instruct the jury to bring in a verdict of not guilty, after the district attorney, in his opening statement, had told the jury that the defendant had taken the money from Wing by putting him in fear of bodily injury because of the display of firearms.

[1] 1. At the common law, "extortion" was confined to the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than

is due or before it is due, and it is so defined. In most of the states the crime of extortion is defined by statutes which are substantially declaratory of the common-law offense. 8 R. C. L. p. 315. In some instances, however, the statutory definitions have extended the scope of the offense beyond that of the common law, and include the unlawful taking of money or thing of value of another, by any person, whether a public officer or a private individual, and this is so in California, as will be observed from the language of section 518 of the Penal Code, which reads as follows:

"Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

[2, 3] Thus, it will be noted, in this state the crime may be committed by any person, but, to constitute the crime of extortion in any case, the taking of the property must be with the consent of the person from whom it is obtained; and it is the fact that the property taken must be with the consent of the person from whom it is obtained that distinguishes the crime of extortion from that of robbery, the latter crime being defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Pen. Code, § 211.

From the evidence, the jury were warranted in finding these facts, as impliedly they did: That the defendant assaulted and threatened to inflict bodily injury upon Wing upon the pretext that the latter had said some unkind things about the accused; that Wing was very much frightened and was possessed of a fear that the defendant and his companion, Frazier, had called at his house with the intention of injuring him and that they intended to do so; that, after Wing explained and protested that he had not made the statements about the defendant attributed to him by the latter, the accused asked Wing to promise him that he (Wing) would not institute a proceeding in the courts against him for assault; that Wing promised not to do so if the defendant would not injure him, and that thereupon the defendant asked Wing if he had any money in his possession, to which Wing replied affirmatively, stating the amount; that the defendant then demanded of Wing a delivery to him of the money, to be held by him (defendant) as an earnest of Wing's good faith in the agreement that he would not prosecute the accused; that Wing believed that that was the purpose for which the accused wanted the money and, being in fear that the defendant would inflict bodily injury upon him, if, indeed, not take his life, and to save himself from injury, willingly told Frazier where to get the money; and that Frazier obtained it and turned it over to the accused with the consent of Wing, who then believed that the money would be returned to him by the accused if he (Wing) should make no complaint against Peck for the assault. The jury were further warranted in finding that, as a matter of fact, it was the original intention of the defendant to retain, steal, and appropriate the money so obtained to his own use, and that he would have done so but for the fact that later in the day of the visit of himself and Frazier to Wing's house he had been informed by his sister-in-law that she had seen Wing and some of his friends going in the direction of the county seat of Plumas county, from which circumstance he surmised and expressed the conjecture that Wing's purpose in going to the county seat was to swear to a complaint against him, and that, actuated by the fear that he would be arrested and prosecuted for taking the money, he caused the money to be returned to Wing. Upon these facts, which we repeat are clearly deducible from the evidence, the jury were justified in concluding and finding that the crime of extortion had been committed. In brief, thus they were justified in finding, if they believed the evidence, as manifestly they did, that the money was obtained by the defendant from Wing with the latter's consent, "induced by a wrongful use of fear."

[4, 5] 2. Defendant's counsel asked the prosecuting witness upon cross-examination whether the money was taken by defendant "without his (the said witness') consent." To that question an objection by the district attorney on the usual grounds and on the special ground that it called for the conclusion of the witness was sustained by the court.

We can see no legal objection to the ruling. Whether the money was obtained from Wing with or without his consent was a question to be determined by the jury from the circumstances, as shown by the evidence, under which the transaction occurred. Besides, it would be a difficult question for a lay witness to answer so that a jury of laymen would understand the answer. Wing could under the circumstances have consented to the taking of the money by Peck, and yet protest in his own heart against his money being taken for that purpose. A man, under certain circumstances, may loan another a small sum of money, knowing to a moral certainty at the time he loaned it that he would never get it back and so mentally reserve a "kick" or a protest against disposing of his money in that way. Thus he would consent to parting with his money, but under protest with himself or not with that free consent or willingness that he would pay out money to satisfy an obligation or to subserve some charitable or useful public purpose. It is more than probable

that such was Wing's attitude of mind with reference to the transaction; but, if he had attempted thus to explain it on the witness stand, he would most likely not only himself have become confused and given an unintelligible representation of the fact, but would have so beclouded the issue as to that element of the offense as to have made it difficult for laymen to decide. In a legal sense, in a case of this kind, money or property is obtained from a person with his consent if he with apparent willingness gives it to the party obtaining it with the understanding that thus he is to save himself from some personal calamity or injury, notwithstanding that within himself he may still protest against the circumstances requiring him to dispose of his money in that way or for such a purpose. Wing repeatedly testified that the money was delivered to the defendant as "a forfeit"—that is, as a guaranty that he would not institute criminal proceedings against Peck for the assault the latter made upon him with a deadly weapon—and that the money was to be returned to him; that, in other words, he put the money up as "a forfeit" for the purpose of averting injury to himself at the hands of the defendant, the same to be returned to him if he did not prosecute Peck. Indeed, he said that he would readily have done anything he could do to save himself from being injured. With this evidence before them and the enlightenment imparted to them by the court upon the law of the case, the jury themselves were abundantly able to decide the question intelligently and justly. Hence it was eminently proper in this case for the court to sustain the objection and so leave entirely to the jury the determination, under its instructions, of the question whether the money was obtained by the defendant with or without the consent of Wing. It may be suggested, however, that had counsel asked Wing whether he had given his consent to the defendant to take the money, the question would then have been in a form which would the more likely have elicited in the answer of the witness the statement of a fact.

[6] 3. For the purposes of impeachment, counsel for the defendant, having first elicited from Wing the admission that he had, prior to the filing of the charge of extortion against Peck, sworn to a complaint, based upon the transaction upon which the charge here was founded, charging the defendant with the crime of robbery, offered the complaint charging the latter crime in evidence. Counsel then read before the jury and into the record the robbery complaint. Thereupon an objection by the district attorney was interposed to the admission in evidence of said complaint. Before the court ruled on the objection, defendant's counsel again asked that the complaint be allowed to stand in the record, to be designated or marked as "defendant's Exhibit 1 for this case." The court then ordered that it "be marked as offered as defendant's Exhibit 1 in this case," but sustained the objection of the district attorney. Defendant's counsel then asked Wing if he swore to "that complaint in the justice's court," and to that question the court sustained the people's objection, saying to defendant's counsel:

"I think you have sufficient record now for that, Mr. Kerr, and we will not go into it further."

The witness Wing had previously, without objection, been allowed to say in response to a question by defendant's counsel that he swore to the complaint in the justice's court and that he recognized his signature to the document. No motion was made to strike the complaint from the record after defendant's counsel read it into the record, and from the court's language in ruling against further inquiry into the matter it is evident that the court considered and understood that the complaint was in the record. At any rate, it having been read to the jury and not stricken out and the jury not having been instructed to disregard it, it was in the record for all practical purposes. Hence the point sought to be maintained here that the court erred in sustaining the district attorney's objection to the admission of the complaint after that document had gone into the record and before the jury does not appear to us as possessing much force. The defendant got the full benefit of the evidence, and we cannot see what more he could have obtained had the court not sustained the objection.

[7] 4. Elton Frazier, who accompanied the defendant to Wing's house and was present when the occurrences above narrated took place, testifying for the defendant, said that, when he and defendant reached a point a short distance from the house of Wing, they stopped for a moment and the defendant then "said something about having a little fun with Wing." Frazier also said that Peck, while talking to Wing, was sometimes rather rough in his language and at other times "he was laughing and joking about it"—that is, about the entire transaction, both Frazier and defendant claiming that the money was obtained as a loan and that Wing so understood it. On cross-examination, the district attorney asked Frazier this question:

"While you were down at the corral talking to Wing after leaving the house and while Peck was still in the house, did you say anything to Wing, that you thought perhaps that it was a good thing that you came there and that you might have saved his life?"

Over an objection by defendant that the question was not pertinent cross-examination, irrelevant, incompetent, and immaterial,

and "not said in the presence of the defendant," and therefore not binding upon him, the court permitted an answer to be returned thereto. The witness answered:

"Wing said he thought I saved his life, and I told him I thought that it was a good thing that I came over there. That is the way I said it."

It is now argued that the ruling involved error highly prejudicial to the rights of the accused.

[8-10] The question was obviously for impeachment purposes and to lay the foundation for counteracting the effect of the testimony of the witness, Frazier, tending to indicate that the defendant had in mind no criminal purpose in going to Wing's house but went there merely to have "some fun" at Wing's expense, and we think that the question was proper cross-examination for that purpose. The general trend of Frazier's testimony was that the whole matter was intended by the defendant as a joke, while the statement which the district attorney undertook to make him admit that he made to Wing after the trouble had ended would show, if he made it, that he regarded the episode as more than a joke—as, indeed, so serious that, in his opinion, but for his presence in the house at the time the defendant might have taken the life of or seriously injured Wing. Of course, the testimony called for by the question could not be used as substantive proof of the defendant's guilt, for manifestly declarations of a party concerning a criminal or unlawful act not made in the presence of one charged with and on trial for the crime cannot be used against or bind the latter. But it frequently happens (and necessarily so when there is occasion for it) that testimony bearing upon the crime and the connection of the defendant with it, which would be incompetent and inadmissible as substantive proof of the crime, is nevertheless allowed under the rule authorizing the impeachment of the testimony of witnesses by thus showing that they had previously made statements contradictory to and inconsistent with their testimony. The proper practice in such a case is for the party against whose interests such impeaching testimony is given to request the court to explain to the jury in its charge that such testimony is to be limited in its effect to the specific purpose for which it is allowed, and that the jury are likewise to be restricted in their consideration of it. No such instruction was given in this case, nor did the defendant propose such an instruction, for which dereliction he appears on this appeal without a legal reason for complaining against a failure of the court so to instruct the jury. It is the duty of a court in criminal cases to give, sua sponte, where they are not proposed or presented in writing by the parties themselves, instructions on the general principles of law pertinent to such cases; but it is not its duty to give instructions on specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them. This rule is so well settled that authorities need not be cited herein in support of the statement thereof.

[11, 12] 5. The district attorney called to the stand one Meyer, by whom he proposed to contradict or impeach certain portions of the testimony of the witness Frazier; said Meyer having been present and heard a conversation held on the day succeeding that of the episode in the Wing house, and which was taken down by a stenographer, between Frazier and the district attorney, as to what took place at Wing's house between the defendant and Wing. The district attorney's interrogation of Meyer was based upon the written report of such conversation, and, among other questions, Meyer was asked by the prosecutor (reading from the said report) if, in that conversation, Frazier was not asked this question by the district attorney and thereto returned the answer as here given:

"Q. Why did George ask for the money? A. I suppose he thought Wing would tell on him and perhaps that would keep him from telling."

The court sustained the objection of counsel for the defendant to the question. It is here contended that the question to and the answer of Frazier in said conversation, so brought before the jury, although not confirmed by the witness Meyer, were prejudicial to the defendant, and that the court should have instructed the jury to disregard them. The first answer to this proposition is that counsel should have moved the court to strike out the question and the answer thereto and have specifically requested the court to instruct or admonish the jury not to consider them in determining the question of the guilt or innocence of the accused, and that his failure to take that course leaves him in no position to complain here. There was no objection that a proper foundation was not laid for the testimony so sought to be brought into the record, and we may therefore assume that a proper foundation was laid for it. But the question as put during the course of the conversation did not call for the conclusion of the witness, as is the contention here, but, while the answer then and there given appears to have involved the opinion of the witness as to the reason the defendant asked Wing for the money, it was, in our opinion, perfectly proper to prove at the trial that Frazier extrajudicially made such a statement in reply to the question, not for the purpose of proving a substantive fact against the defendant, but to show that his conception of the nature of

the transaction was different at the time of said conversation and less favorable to the accused than as he attempted to make it appear at the trial.

[13] 6. The defendant complains of the following language used by the district attorney in his address to the jury and declares that it was without justification in the record:

"I will make the same kind of a complaint against that defendant, or any other citizen of Plumas county, that perpetrates the same kind of a joke, and I will keep on doing it until the treasury of this county is empty."

Counsel for the defendant excepted to the foregoing remarks, assigning them as prejudicial to the rights of the defendant, in that they involved "a threat to the jury as to what will take place if they don't convict this defendant."

There was, as we have shown, a statement by the witness Frazier that tended to indicate that the defendant's conduct with and toward Wing was intended merely as a joke, and it is perhaps that testimony which furnished the motive for the remarks of the district attorney complained of here. We perceive nothing in the language referred to which is objectionable. It involved a mere ironical reference to a claim which might be predicated upon the inference from Frazier's testimony that the affair at the Wing house was only a joke. And it would require a long stretch of the imagination to see in that language a threat of any character or anything calculated unjustly to influence the jury against the defendant.

We have now considered all the points urged against the result arrived at below, in none of which, as is manifest, have we found any justification for disturbing either the judgment or the order.

Accordingly, the judgment and the order are affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

43 Cal. App. 762

PEOPLE v. FRAZIER. (Cr. 481.)

(District Court of Appeal, Third District, California. Oct. 24, 1919.)

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Elton Frazier was convicted of extortion, and he appeals. Affirmed.

M. C. Kerr, of Quincy, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. This is a companion case to People v. Peck, decided by this court on October 18, 1919, and reported in 185 Pac. 881. On a separate trial this defendant was convicted and sentenced to the penitentiary for an indeterminate period. The appeal is from said judgment. No argument, either oral or written, has been submitted in this court in behalf of appellant. His counsel appeared at the time set for the hearing, but declined to make any argument. We have, nevertheless, examined the record and have found abundant evidence to support the verdict. It may be stated further that we know discovered no prejudicial error, and we knew of no reason why we should disturb the conclusion reached in the trial court.

The judgment is affirmed.

181 Cal. 584

In re WATERS' ESTATE.

BURRITT v. SANTA BARBARA TRUST CO.

(L. A. 6136.)

(Supreme Court of California. Nov. 28, 1919. On Rehearing, Dec. 22, 1919.)

1. APPEAL AND ERROR ⟸442 — COLLATERAL PROCEEDINGS BY LOWER COURT NOT DIVESTED BY APPEAL.

Generally, a duly perfected appeal divests trial court of further jurisdiction in the cause, but does not divest court of jurisdiction to hear and determine questions arising in proceedings independent of and collateral to the proceeding wherein the judgment or order appealed from was rendered.

2. WILLS ⟸368 — JURISDICTION OF COURT AFTER APPEAL FROM DENIAL OF PROBATE OF WILL.

Under Code Civ. Proc. §§ 963, 1312, providing for appeal from order on motion for new trial in will contest on ground of incompetency of testator, perfection of appeal from order denying probate on such ground did not divest lower court of jurisdiction to hear and determine motion for new trial.

On Rehearing.

3. APPEAL AND ERROR ⟸438—APPEAL FROM JUDGMENT DOES NOT PREVENT LOWER COURT FROM DETERMINING MOTION FOR NEW TRIAL.

That an appeal has been taken from a judgment in no case operates to divest trial court of power to entertain and determine motion for new trial in the matter in which the judgment was given, notwithstanding Code Civ. Proc. §§ 658–660, 939, 956, 963, as amended in 1915.

Department 2.

Appeal from Superior Court, Santa Barbara County; John L. Hudner, Judge.

In the matter of the estate of William G. Waters, deceased. Proceeding to probate will by Santa Barbara Trust Company, contested by Edith Scott Burritt. Order denying probate, and from a subsequent order granting new trial, contestant appeals. Affirmed.

R. H. Cross, of San Francisco, for appellant.

Wm. G. Griffith and Harry W. T. Ross, both of Santa Barbara, for respondent.

LENNON, J. This is an appeal from an order granting a new trial after verdict in favor of contestant in a will contest.

Respondent herein offered for probate a document purporting to be the last will and testament of William G. Waters, deceased. Appellant appeared to oppose the probate of

the document, alleging that at the time of its execution the said William G. Waters was of unsound mind. The issue as to the capacity of the deceased to make a will was tried before a jury, which rendered its verdict in favor of appellant. The court thereupon entered its order denying the probate of the document offered by respondent. Within ten days after the entry of this order respondent filed its notice of intention to move for a new trial, stating that the motion would be made upon the minutes of the court. Within 60 days after the entry of the order, and before the motion for a new trial had been brought on for hearing, respondent perfected an appeal to this court from the order in question. Thereafter, and while the appeal from the order was still pending, it brought the motion for a new trial on for hearing. After argument the matter was submitted, and the court made its order granting the motion and ordering a new trial on the ground of insufficiency of the evidence. The appeal herein is from this order, and the sole ground of the appeal is that the perfection of respondent's appeal from the order denying probate to the purported will divested the trial court of further jurisdiction in the cause.

[1] The general rule is that a duly perfected appeal divests the trial court of further jurisdiction in the cause. It is also true that this rule does not operate to divest the court of jurisdiction to hear and determine questions arising in proceedings independent of and collateral to the proceeding wherein the judgment or order appealed from was rendered. The single question presented for our consideration is whether or not the motion for a new trial in the instant case was an independent and collateral proceeding.

At common law the motion for a new trial was made before the rendition of the judgment. It was in direct line of the judgment, and was in no sense an independent and collateral proceeding. The provisions of the Code, as they stood before the amendments of 1915, indicated a fundamental change from the common-law system. Provision was made for the making of the motion for a new trial after the rendition of the judgment. There was no provision fixing the time within which the motion was to be heard and determined. The only limitation in this regard was the general one, applicable to all proceedings, that it must be prosecuted with due diligence. An appeal from the order granting or denying the motion was provided for. Code Civ. Proc. (Ed. 1909) §§ 657, 658, 659, 660, 963. On the other hand, the time within which to appeal from judgments was fixed at definite periods, and wholly without reference to the pendency of a motion for a new trial. It was, moreover, provided that only the verdict or decision and intermediate orders could be reviewed on an appeal from the judgment. Code Civ. Proc. (Ed. of 1909) §§ 939, 941a, 941b, 956. These provisions of the Code clearly evidenced an intent on the part of the Legislature to make the motion for a new trial wholly independent of and collateral to the main proceeding, in effect a new action in the nature of a writ of error brought to reverse the judgment in the lower court. Knowles v. Thompson, 133 Cal. 245, 247, 65 Pac. 469; Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, 154, 86 Pac. 178.

The system of new trial and appeal established by the Code sections above cited was found to be anomalous, complicated, and unsatisfactory. To remedy the obvious defects of the system, and Code was amended in 1915. Under the Code, as amended, the motion for a new trial must be made upon affidavits or upon the minutes of the court within 10 days after the entry of the judgment or order, and the limit so fixed cannot be extended by order or stipulation. The hearing and disposition of the motion take precedence over all matters except criminal cases, probate matters, and matters actually on trial, and, if no action is taken within 3 months after the entry of the judgment or order in the principal proceeding, the motion is deemed denied. Separate appeals from orders granting new trials can be had only in those cases where a jury trial has been had as a matter of right. Code Civ. Proc. (Ed. of 1915) §§ 658, 659, 660, 963. The time within which to appeal is extended 30 days beyond the time of the entry of the order determining a motion for a new trial, and upon the appeal from the judgment the order made on motion for a new trial may be reviewed. Code Civ. Proc. §§ 939, 956.

The question presented in the briefs is whether or not the sections as amended evidence an intent on the part of the Legislature to reintegrate the proceeding on motion for a new trial with the principal proceeding in the case. Assuming, without undertaking to decide the point, that in those cases where a separate appeal from an order on a motion for a new trial is denied the proceeding based on the motion and the principal proceeding in the case are merged and integrated to such an extent that it can no longer be said that the proceeding on the motion constitutes in effect a new and independent action, it is not, we think, open to question that in those cases where a separate appeal from the order is expressly provided for the proceeding on the motion must of necessity be considered independent of and collateral to the principal proceeding. Where, therefore, a separate appeal from an order on a motion for a new trial is authorized, the perfection of an appeal from the judgment or order in the main proceeding

does not divest the court of jurisdiction to hear and determine the motion.

[2] Section 1312 of the Code of Civil Procedure provides that where a will is contested, and the petitioner files an answer traversing or otherwise obviating or avoiding the contestant's objection—

"any issues of fact thus raised, involving: 1. The competency of the decedent to make a last will and testament * * * must, on request of either party in writing (filed at least ten days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined."

It therefore appears that the issues in the principal proceeding in the instant case were such that a jury trial was a matter of right. It further appears that a jury trial was in fact had, and that an order was entered granting a new trial. Section 963 of the Code of Civil Procedure provides that—

"An appeal may be taken from a superior court in the following cases: * * * 2. From an order granting a new trial in an action or proceeding tried by a jury where such trial by jury is a matter of right. * * *"

It follows that a separate appeal from the order granting a new trial is authorized by the Code in the instant case. The proceeding on the motion is therefore, in this instance, distinct from and independent of the principal proceeding. The perfection of the appeal from the order denying the probate of the purported will of William G. Waters did not, therefore, divest the court of jurisdiction to hear and determine the motion.

No question on the merits being presented, the order granting a new trial must be affirmed.

We concur: WILBUR, J.; MELVIN, J.

On Rehearing.

PER CURIAM. [3] In denying a rehearing we deem it proper to say that we are entirely satisfied that in no case does the fact that an appeal has been taken from a judgment operate to divest the trial court of power to entertain and determine a motion for a new trial in the matter in which the judgment was given. The amendments of 1915 have in no respect changed our established law in this regard. The opinion in department was correct in holding that this is true, at least in so far as cases in which a separate appeal from the order is expressly provided are concerned. The exigencies of this case were not such as to require the court to go further, but in order that the practice in trial courts may not be thrown into confusion by a possible distinction as between cases in which a separate appeal from the order is provided, and other cases, we feel that this statement of our views should be made.

The application for a rehearing is denied.

ANGELLOTTI, C. J., and SHAW, WILBUR, LENNON, and OLNEY, JJ., concur.

181 Cal. 550

WORSWICK STREET PAVING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, v. SAME.

(S. F. 9106, 9109.)

(Supreme Court of California. Nov. 21, 1919.)

1. MASTER AND SERVANT ⟸405(2)—WORKMEN'S COMPENSATION; EVIDENCE SHOWING EMPLOYMENT BY SUBCONTRACTOR.

Evidence *held* to support the finding of the Industrial Accident Commission that the deceased was, at the time of his injury, an employé of a subcontractor company doing excavation work at cost.

2. MASTER AND SERVANT ⟸383—WORKMEN'S COMPENSATION; LABOR NOT WITHIN SCOPE OF POLICY.

Workmen's compensation insurance policy issued by an indemnity company to a paving company *held* not to cover the liability of the latter to pay compensation to the dependents of a deceased workman, injured in excavating a sewer, work expressly excepted from the policy.

3. INSURANCE ⟸146(3) — CONSTRUCTION OF AMBIGUOUS CONTRACT AGAINST INSURER.

Where provisions of a contract of insurance are not free from uncertainty, they are to be construed most strongly against the insurer, who has framed the contract and caused the uncertainty to exist.

4. MASTER AND SERVANT ⟸383 — POWER OF ACCIDENT COMMISSION TO MAKE NEW CONTRACT OF INSURANCE.

The Industrial Accident Commission was without power to make a new contract between an employer and its workmen's compensation insurer.

5. MASTER AND SERVANT ⟸347—WORKMEN'S COMPENSATION; AWARD UNAUTHORIZED AGAINST ONE OTHER THAN EMPLOYER OR INSURER.

Workmen's Compensation Act of 1917, § 25, in so far as it purports to authorize the Industrial Accident Commission to make any award on account of injury to an employé other than against his immediate employer, or the insurance carrier of his immediate employer,

is invalid as without constitutional sanction under Const. art. 20, §§ 17½ and 21, as amended.

6. CONSTITUTIONAL LAW ⊂=23 — WORKMEN'S COMPENSATION; AMENDMENT NOT APPLICABLE TO PRIOR ACCIDENT.

The amendment of November, 1918, to Const. art. 20, § 21, authorizing workmen's compensation legislation, is inapplicable to an accident which happened some months before its adoption.

In Bank.

Proceeding under the Workmen's Compensation Act by the dependents of Selso Morales, opposed by the Worswick Street Paving Company, the employer, and the Employer's Liability Assurance Corporation, Limited, of London, England, the insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and insurer apply for certiorari. Award annulled in part and affirmed in part.

Everts & Ewing, of Fresno (W. E. Simpson, of Fresno, of counsel), for petitioner Worswick Street Paving Co.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

Redman & Alexander, of San Francisco, for Employers' Liability Assurance Corporation.

Duke Stone, of Los Angeles, for Western Indemnity Co.

ANGELLOTTI, C. J. These are proceedings in review by different parties assailing an award in favor of dependents of one Selso Morales, who on April 9, 1918, was fatally injured while in the course of his employment; his injuries resulting in death the same day. He and several others were engaged in excavating a trench, when one side thereof caved in, crushing him and three other workmen. It is not disputed that the injury arose out of and in the course of employment and was proximately caused thereby. Nor is there any question as to the correctness of the award in so far as amount and beneficiaries are concerned. The only questions are as to who is liable for the payment thereof.

The award was made against the Worswick Street Paving Company and the Employers' Liability Assurance Corporation; execution against the latter being stayed until execution against the former is returned unsatisfied. The findings of the commission upon which such award was made were, so far as material to the questions here presented, substantially as follows: The Fresno Natatorium Company entered into a contract with one W. W. Taft, under which the latter was to construct for the company a conduit for the drainage of an indoor swimming tank of the company in the city of Fresno. Taft sublet to the Worswick Street Paving Company the work of excavation, refilling, and resurfacing of the trench necessary for the construction of the conduit, thus making such Worswick Company the subcontractor for such work. On reaching the depth required by said contractor of a portion of said trench, it was found necessary to make the same deeper, and this extra work the Worswick Company agreed to do for Taft at the actual cost of the labor necessary therefor. While this extra work was being done by the Worswick Company the accident occurred. The deceased, Morales, was engaged in this work as an employé of the Worswick Company. The insurance carrier of the Worswick Company was the Western Indemnity Company, but the policy of insurance expressly excluded all employés engaged in sewer construction, and the conduit was a sewer, with the result that the insurance carrier was not liable, and the Worswick Company, the immediate employer of deceased, not insured against liability as to this accident. The petitioner Employers' Liability Assurance Corporation was the insurance carrier for the original contractor, W. W. Taft, and liable for any sum for which Taft might be liable on account of said accident. The theory of the award, upon these findings, was that the Worswick Company, as immediate employer, was primarily liable, and that, inasmuch as such company did not maintain compensation insurance covering the liability, the insurance carrier of the original contractor, Taft, viz. the Employers' Liability Assurance Corporation, was also liable, in view of the provisions of section 25 of the Compensation Act (St. 1917, p. 853). Assuming the findings to be supported by the evidence, the award thus made was in strict conformity with the provisions of section 25 of the Compensation Act. As against the Employers' Liability Assurance Corporation the award rests wholly on the provisions of said section purporting to authorize under certain circumstances an award against others than the immediate employer and his insurance carrier.

The award is assailed by the Worswick Company upon two grounds, the first being that the deceased employé was not the employé of said company at the time he was injured, and the second being that, assuming he was such employé, its insurance policy issued to it by the Western Indemnity Company covered the liability, with the result that the award should have been against the insurance company, its insurance carrier, instead of against the Worswick Company.

[1] As to the first ground, consideration of the record discloses no warrant for holding that the finding of the commission is without

sufficient support in the evidence. As we have seen, Taft, the original contractor, sublet the excavation work for the trench to the Worswick Company. There was a written contract providing for the doing of this work according to the plans, which showed the depth of the proposed trench at all points. After the excavation had been fully made, according to these plans, for a portion of the way only, and before the excavation had been completed the whole distance, it was discovered that as to the portion already completed a sufficient depth had not been provided by the plans, and that a lower depth must be reached. This necessitated additional work not embraced in the existing contract between Taft and the Worswick Company, and it was in the doing of this work that the accident occurred, and the claim of the Worswick Company is that Taft himself did this work with employés of the company loaned to him for the purpose, and that he was consequently the immediate employer with reference to such work. Taft took the matter of this work up with Mr. Bader, the president and manager of the Worswick Company. There was ample testimony to support a conclusion that it was then orally agreed between them that the Worswick Company would do this extra work for Taft for the exact cost to it of the labor employed thereon, and that the work was being done under this agreement, by the Worswick Company alone, by its own employés, at the time of the accident. The contention to the contrary appears to us to be without any substantial basis. Taft's testimony is clear and explicit to the effect that Mr. Bader said he would have to have extra pay for the extra excavation, that he (Taft) assented, and that the agreement was then made and the work proceeded with thereunder, he having nothing to do therewith except that he gave to the company's foreman the figures showing the changes in the grade. In the last analysis the claim of the Worswick Company appears to be based on the fact that for the extra work the company was to charge, and did charge, only for the cost of the labor furnished, without any percentage or profit, which, under the circumstances, appears to us to be an entirely immaterial factor. As to this, Mr. Bader was asked why he did that extra excavation at cost, and said, "Well, for the first reason, it was a hazardous piece of work, and I didn't know how much it would cost, and I would rather do that work without any profit than to take a chance on it to make some money." Being then asked, "I don't quite understand what you mean by 'taking a chance'; what chances were there to take?" he said, "Because it was digging in the hardpan on the bottom of the ditch, and it was pretty hard to figure what that would cost." All of the work, original and extra, was done by employés of the Worswick Company, under the immediate direction and control of Mr. Lobdall, the foreman of the Worswick Company, under the supervision of Mr. Bader, and apparently Mr. Taft exercised no supervision whatever in the matter, over either men or work, and did not have the right to exercise any such supervision, except that he did furnish what were, in effect, the revised plans for the work, just as he had furnished the original plans. The extra work undertaken by the Worswick Company was to further excavate the trench to the depth shown by the revised plans, and Taft had nothing whatever to do with the method used in reaching this result. The case is apparently simply one of a subcontractor undertaking to do certain extra work for a specified consideration; the consideration in this case being fixed as the exact cost of the work.

[2] As to the second ground of attack, viz. that the insurance policy issued by the Western Indemnity Company covered the liability of the Worswick Company arising from this accident: The question thus raised is simply one as to the proper construction of a written contract between the Western Indemnity Company and the Worswick Company. So far as material here, the insurance policy provided as follows, italics wherever used being ours: The indemnity company agreed to assume and perform all obligations imposed upon the employer "named and described in item 1 of the schedule of statements forming part hereof" by the Workmen's Compensation Insurance and Safety Act, "for or on account of bodily injuries, including death, resulting therefrom suffered while this policy is in force by any employé of the assured * * * *in and during the operation of the trade, business, or work herein described.*" The schedule of statements referred to and constituting a part of the policy contained several items. Item 1 gave the name of the assured as the Worswick Street Paving Company, its address as Fresno, Cal., and described it as a corporation. Item 2 declared that "the description of the assured's trade, business or work, place where such work is carried on, and estimated pay roll of all employés for the period of the policy are given in the following table," and in the table, except for the place of work, referred for particulars to an indorsement attached. The indorsement originally attached when the policy was issued was similar, in so far as designation of the trade or business of the Worswick Street Paving Company is concerned, to an indorsement subsequently attached, dated November 12, 1917, and accepted and countersigned December 4, 1917, for the purpose of correcting the rates to conform with new schedule of rates approved by the insurance commissioner. The second indorsement was as follows:

"INDORSEMENT

"Date November 12, 1917.

"In accordance with indorsement previously attached to undermentioned policy, the rates are hereby corrected to conform with a new schedule of rates approved by the insurance commissioner of the state of California, and from and after November 12, 1917, item No. 2 of the undermentioned policy shall read as follows:

Assured's Trade or Business.	Rate per $100 of Pay Roll.
"State or municipal road or street making—including culverts not exceeding 10 ft. span:	
#6042—All operations except quarrying and blasting The first classification above includes the setting up and taking down of road-making equipment and appliances at the place of work, and the operation of road-making machinery or vehicles, with or without horses, or other draft animals, also the operation of trucks, traction engines, and steam rollers or other vehicles in connection with the work of transporting material, merchandise, and equipment to and from the place of work; for compensation coverage, the wages of all drivers and helpers, chauffeurs and their helpers, and others engaged in connection therewith to be included in the pay roll and subjected to the rates. If teams are hired by contract, including drivers, then 50 per cent. of the contract price of the teams shall be accepted in lieu of drivers' wages, and if automobile trucks are hired by contract, including chauffeurs, then 25 per cent. of the contract price of the automobile trucks shall be accepted in lieu of chauffeurs' wages.	2 99
#1621—Quarrying	6 84
#6280—Blasting	21 65
#5503—Asphalt laying—street or sidewalk (including shop and yard) (not available for division of pay roll in connection with state or municipal road or street making)—no grading, scraping or laying of concrete.....	1 99
#4745—Asphalt works (shop and yard only)—manual rate, 3 93; merit rate.....	3 905
#5502—Concrete work—floors or pavements of artificial stone or concrete, not reinforced or self-bearing.....	1 99
#5500—Paving—not otherwise classified (including yards) (not available for division of pay roll in connection with state or municipal road or street making; surfacing or resurfacing streets—no grading, scraping or laying of concrete.).....	1 99
#5210—Concrete work—piers, or abutments for bridges (not concrete bridges), retaining walls, water conduits (no tunneling) and other structures (no buildings, bridges, or dams.) Pay roll to include those engaged in making, setting up, and taking down forms, scaffolds, false work and concrete distributing apparatus, excluding all work in tunnels, subways or caissons, for which use proper classifications and rates.....	4 53
#9078—Commissary work—cooks, waiters and other employés engaged in furnishing board for employés in connection with manufacturing lumbering or contracting risks (not exposed to mechanical hazard of such risks)....	1 45
#8810—Clerical office force.....	11

"Premium to be adjusted in accordance with terms of policy.

"All other terms and conditions remaining unchanged.

"Accepted: Worswick Street Paving Co., Assured, F. Bader, Pres.

"Attached to and forming a part (when countersigned and dated by an authorized agent) of policy No. CC-12153 issued by the Western Indemnity Company, Dallas, Texas, to Worswick Street Paving Co. of Fresno, California.

"Countersigned this 4th day of December, 1917, E. R. Long, Secretary.

"E. Edwards, Agent."

A section of the policy styled therein variously as a "clause," "condition," and "paragraph," being denominated "F," was as follows:

"(F) It is understood and agreed that if during the policy period there shall be any change in, or extension of trade, business, profession or occupation of the assured as set forth in the schedule of statements of the policy, or if the assured make any structural alterations, additions or repairs to his plant or buildings, or enter into any contract for the performance of any part of such work, or in case the assured shall procure any work to be done wholly or in part by a contractor, and by or through him, by a subcontractor, then this policy shall cover such operations, and the liability of the assured under section 30 of said chapter 176 as respects such work, and the assured shall be liable for and pay to the company the premium on account thereof calculated in the manner provided in paragraph G of the policy, at the company's rate or rates applicable to such work. The assured shall furnish the company a statement of the wages expended on account of such work, as is provided in paragraph H of the policy, and in the event of his failure to do so one-third of the contract price of such work shall be deemed as wages earned by employés, and the assured shall pay the premium thereon computed in the manner above specified, unless and until the assured shall furnish proof satisfactory to the company that all contractors engaged thereon were fully protected by compensation insurance in an insurance carrier covering their full liability under the said compensation act or law, on all such work performed by the assured while this policy was in force: Provided, however, that this clause shall not cover the operation of vessels, construction of sewers, tuneling, erection of structural steel or iron, and/or wrecking, and/or blasting."

It is manifest from the foregoing that the work being done was not covered by the policy, unless by force of the provisions of paragraph or clause F relative to a change in or extension of the trade, etc., of the assured as set forth in the schedule of statements of the policy. Except as affected by this paragraph or clause, the policy was limited to injuries suffered by employés "in and during the operation of the trade, business, or work herein described." That "trade, business, or work" was described as "state or municipal road or street making—including culverts not exceeding 10 ft. span." There is no warrant whatever for holding that the work being done by the Worswick Company under its

contracts with the Fresno Natatorium Company was in any sense of the words "road or street making," or in any way incidental to such work. We entertain no doubt that, except for paragraph or clause F, the policy must be construed as limited to operations in the trade, business, or work of road or street making, and that the specifications other than this general specification in the indorsement are simply specifications of various classes of work incidental to such road or street making; the object thereof being to prescribe the premium rates applicable to the various classes. In other words, the work specified in these subspecifications is covered by the policy only when done in the prosecution of the business or work of road or street making. But even if this were not the case, none of these specifications includes such work as the Worswick Company was doing here. The particular specification relied on, which includes among other items the one of "water conduits," is confined to "concrete work"; the designations thereunder being simply of various kinds of "concrete work."

Coming then to a consideration of paragraph of clause F, we are satisfied that it could fairly be held sufficiently broad in its terms to include the work the Worswick Company was doing, although the same was not done in road or street making, were it not for the proviso at the end thereof which expressly excepts certain kinds of work from the effect of the paragraph or clause. This proviso is:

"Provided, however, that this clause shall not cover the operation of vessels, construction of sewers, tunneling, erection of structural steel or iron, and/or wrecking, and/or blasting."

There is no force in the claim that the work in which the company was engaged was not the work of constructing a sewer. The conclusion of the Industrial Accident Commission on this point was undoubtedly correct. Nor can we see any foundation for the claim that the proviso is limited in its application to the latter portion of the general paragraph or clause F. This claim is founded on the use of the words "that this clause"; it being urged that the term "clause" does not include the whole of F, or at least that the provision may be reasonably so construed. We think that a consideration of the policy shows no other possible reasonable construction of the term "clause" in the connection in which it is used than as meaning the whole of the part of the policy designated as F. It may properly be noted that such portion is designated as "clause F" in the very next paragraph, or clause (G), as is G so designated in the very first line of the policy. It seems to us also that any other construction would render the proviso practically without point. The clear intention of the whole paragraph, clause, or condition designated F was to so enlarge the coverage of the policy as to include any change in or extension of the business described in the policy, provided always that such enlargement should not in any event be held to include work expressly specified as excepted.

[3, 4] We have had in mind in considering this policy the well-settled rule to the effect that, where provisions of such a contract are not free from uncertainty, they are to be construed most strongly against an insurer who has framed the contract and caused the uncertainty to exist. But we are satisfied that it must be held that there is no ambiguity or uncertainty in the policy before us with relation to the matters we have discussed. The provisions involved are plain and unambiguous, and susceptible to only one reasonable construction. The Industrial Accident Commission was without the power to make a new contract for the parties, and its conclusion that the work being done by the Worswick Company was not covered by the policy was correct.

[5, 6] The Employers' Liability Assurance Corporation, found to be the insurance carrier of the general contractor, Taft, assails the award in so far as it runs against it, upon the ground, among others, that in so far as section 25 of the Compensation Act purports to authorize the Industrial Accident Commission to make any award on account of injury to an employé against any person other than his immediate employer, or the insurance carrier of his immediate employer, it is invalid as being without constitutional sanction. It is conceded by learned counsel for the commission that this court has so held in the recent case of Pacific Gas & Electric Co. v. Industrial Accident Commission, 181 Pac. 788, decided June 5, 1919, but he asks for a reconsideration of the questions involved. It had previously been held many times that a substantially similar provision in the Compensation Act of 1913 (page 294, § 30) was invalid, in that the constitutional provision relative to the enactment of workmen's compensation laws (section 21, art. 20) did not contemplate a law authorizing an award of compensation by the Industrial Accident Commission against some other person than the employer. Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218; Sturdivant v. Pillsbury, 172 Cal. 581, 158 Pac. 222; Western Indemnity Co. v. Industrial Accident Commission, 172 Cal. 766, 158 Pac. 1033; First Christian Church v. Industrial Accident Commission, 173 Cal. 552, 160 Pac. 675. The later case of Pacific Gas & Electric Co. v. Industrial Accident Commission, supra, involved the question whether the change in phraseology of the section of the Compensation Act (old section 30, now section 25) made in the act of 1917 overcame the constitutional objection, and it

was held that it did not "for the reason that the terms 'employer,' 'employés' and 'employment' as used in section 21, art. 20, of the Constitution, as amended in October, 1911, must be construed in the light of their meaning at the time of the adoption of the amendment and cannot be extended by legislative definition, for such extension would, in effect, be an amendment of the Constitution, if accepted as authoritative." See, also, Flickenger v. Industrial Accident Commission, 184 Pac. 851. We can see no reason to doubt the correctness of this conclusion. The cause further involved, as does this case, the question whether the legislative power in this regard had been enlarged in this respect by the addition of section 17½, art. 20, to the Constitution, by an amendment adopted November 3, 1914, and it was held that the new provision had no such effect. The matter was then thoroughly considered, and we see no reason to doubt the correctness of the conclusion reached. Attention is also called by learned counsel for respondent to an amendment of section 21, art. 20, of the Constitution, adopted in November, 1918, some months subsequent to the happening of the accident here involved. The inapplicability of this amendment to any question involved in the case at bar is fully shown by what is said in discussing the amendment in Pacific Gas & Electric Co. v. Industrial Accident Commission, supra, and we reaffirm what was thus said. It follows from the foregoing that the award against the Employers' Liability Assurance Company has no proper support in the record.

In so far as the award of the commission runs against the Employers' Liability Assurance Corporation, it is annulled. In all other respects said award is affirmed.

We concur: SHAW, J.; MELVIN, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; OLNEY, J.

181 Cal. 784

WORSWICK STREET PAVING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, v. SAME.

(S. F. 9103, 9104.)

(Supreme Court of California. Nov. 21, 1919.)

In Bank.

Proceedings under the Workmen's Compensation Act by Maria Cervantes, a minor, by her guardian ad litem and trustee, Stella Lewis, and others, opposed by the Worswick Street Paving Company, and the Employers' Liability Assurance Corporation, Limited, of London, England, the insurer. Compensation for death was awarded by the Industrial Accident Commission, and the employer and insurer apply for certiorari to review its order. Award annulled in part and affirmed in part.

Everts & Ewing, of Fresno (W. E. Simpson, of Fresno, of counsel), for petitioner Worswick Street Paving Co.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

Redman & Alexander, of San Francisco, for Employers' Liability Assur. Corporation.

Duke Stone, of Los Angeles, for Western Indemnity Co.

PER CURIAM. These are proceedings in review by different parties assailing an award in favor of dependents of one Louis Cervantes, who on April 9, 1918, was fatally injured while in the course of his employment; his injury resulting in death the same day.

The work in which he was engaged at the time of his injuries is described in the opinion this day filed in Worswick Street Paving Co., a Corporation, v. Industrial Accident Commission of the State of California, Fortunata Selso Morales, et al. (S. F. No. 9106) and Employers' Liability Assurance Corporation, etc., v. Industrial Accident Commission of the State of California and Fortunata Selso Morales et al. (S. F. No. 9109) 185 Pac. 953; the deceased being a coworker with Selso Morales in the work therein described. The questions presented for determination are the same as those presented in the case referred to. The decision in those cases controls here.

It is ordered that the award of the commission be annulled in so far as it is against the Employers' Liability Assurance Corporation, and that in all other respects the said award be, and the same is hereby, affirmed.

All concur.

181 Cal. 785

WORSWICK STREET PAVING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, v. SAME.

(S. F. 9105, 9111.)

(Supreme Court of California. Nov. 21, 1919.)

In Bank.

Proceedings by Ynez Aragon and others under the Workmen's Compensation Act (St. 1917, p. 831), opposed by the Worswick Street Paving Company, the employer, and the Employers' Liability Assurance Corporation, Limited, of London, England, the insurer. Compensation was awarded by the Industrial Accident Commission, and the employer and insurer apply for certiorari to review its order. Award annulled in part and affirmed in part.

Everts & Ewing, of Fresno (W. E. Simpson, of Fresno, of counsel), for petitioner Worswick Street Paving Company.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

Redman & Alexander, of San Francisco, for Employers' Liability Assur. Corporation.

Duke Stone, of Los Angeles, for Western Indemnity Co.

PER CURIAM. These are proceedings in review by different parties assailing an award in favor of one Ynez Aragon, who on April 9, 1918, was injured while in the course of his employment.

The work in which he was engaged at the time of his injuries is described in the opinion this day filed in Worswick Street Paving Co., a Corporation, v. Industrial Accident Commission of the State of California, Fortunata Selso Morales, et al. (S. F. No. 9106) and Employers' Liability Assurance Corporation, etc., v. Industrial Accident Commission of the State of California and Fortunata Selso Morales et al. (S. F. No. 9109) 185 Pac. 953; he being a coworker with Selso Morales in the work therein described. The questions presented for determination are the same as those presented in the case referred to. The decision in those cases controls here.

It is ordered that the award of the commission be annulled in so far as it is against the Employers' Liability Assurance Corporation, and that in all other respects the said award be, and the same hereby is, affirmed.

All concur.

181 Cal. 787

WORSWICK STREET PAVING CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, v. SAME.

(S. F. 9107, 9110.)

(Supreme Court of California. Nov. 21, 1919.)

In Bank.

Proceedings under the Workmen's Compensation Act by Mari Jesus Aguilar and others, opposed by the Worswick Street Paving Company, the employer, and the Employers' Liability Assurance Corporation, Limited, of London, England, the insurer. Compensation for death was awarded by the Industrial Accident Commission, and the employer and insurer apply for certiorari to review its order. Award annulled in part and affirmed in part.

Everts & Ewing, of Fresno (W. E. Simpson, of Fresno, of counsel), for petitioner Worswick Street Paving Co.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

Redman & Alexander, of San Francisco, for Employers' Liability Assur. Corporation.

Duke Stone, of Los Angeles, for Western Indemnity Co.

PER CURIAM. These are proceedings in review by different parties assailing an award in favor of dependents of one Jose Aguilar, who on April 9, 1918, was fatally injured while in the course of his employment; his injury resulting in death the same day.

The work in which he was engaged at the time of his injuries is described in the opinion this day filed in Worswick Street Paving Co., a Corporation, v. Industrial Accident Commission of the State of California, Fortunata Selso Morales, et al. (S. F. No. 9106) and Employers' Liability Assurance Corporation, etc., v. Industrial Accident Commission of the State of California and Fortunata Selso Morales et al. (S. F. No. 9109) 185 Pac. 953; the deceased being a coworker with Selso Morales in the work therein described. The questions presented for determination are the same as those presented in the case referred to. The decision in those cases controls here.

It is ordered that the award of the commission be annulled in so far as it is against the Employers' Liability Assurance Corporation, and that in all other respects the said award be, and the same hereby is, affirmed.

All concur.

181 Cal. 620

OSWALD v. SCHWARTZ, Treasurer of San Diego County (GRANGER et al., Interveners) (two cases). (L. A. 5905, 5606.)

(Supreme Court of California. Dec. 1, 1919. On application for rehearing, Dec. 29, 1919.)

1. ASSIGNMENTS ⊜88—RIGHT TO BONDS ASSIGNED AS SECURITY BY SUBCONTRACTOR.

Where company notified county of its assignment before one to whom subcontractor assigned as security his rights to bonds issued by county for road improvement bid, *held* claim of former to bonds is superior to that of latter; the principal contractor not being the debtor upon whom notice of assignment was required to be served.

2. ASSIGNMENTS ⊜34—ORAL ASSIGNMENT BY SUBCONTRACTOR.

Assignment by subcontractor as security of his contract and his right to bonds, which contractor was to receive under his contract with county for road improvement, to one who was to advance and did advance money to enable subcontractor to perform his contract, *held* valid though oral.

3. ASSIGNMENTS ⊜137—EVIDENCE SHOWING ASSIGNMENT BY SUBCONTRACTOR OF RIGHT TO HIGHWAY BONDS.

Evidence *held* to support finding of oral assignment as security by subcontractor of his contract and his right to bonds which contractor was to receive under his contract with county for road improvement.

4. ESTOPPEL ⊜90(1)—ESTOPPEL OF CONTRACTOR BY PARTICIPATION IN ASSIGNMENT BY SUBCONTRACTOR.

Contractor's participation in and knowledge of whole transaction *held* to estop him from questioning assignment by subcontractor as

security of his contract and his right to bonds which contractor was to receive under his contract with county for road improvement.

5. ASSIGNMENTS ⊂=88—VALIDITY OF ASSIGNMENT BY SUBCONTRACTOR AGAINST SUBSEQUENT INDEBTEDNESS.

Where subcontractor with knowledge of contractor assigned as security his contract and right to bonds before beginning work, any indebtedness subsequently incurred by him could not be urged by the contractor as a claim against the bonds to the detriment of the assignee.

In Bank.

Appeals from Superior Court, San Diego County; W. A. Sloane, Judge.

Suit in mandamus by George H. Oswald against John F. Schwartz, Treasurer of the County of San Diego, in which Ralph Granger and the Pacific Metal Products Company intervened. From the whole of the judgment, which was adverse to him, and also from an order denying his motion to set aside the judgment and to enter a different judgment upon the findings, Oswald appeals, and from that portion of the judgment which awarded bonds to the Pacific Metal Products Company intervener Granger appeals. Affirmed.

Crouch & Chambers, of San Diego, for appellant Oswald.

Ray M. Harris, of San Diego, for appellant Granger.

W. F. Schuermeyer, Dist. Atty., of San Diego, for defendant Schwartz.

Clifford C. Pease, of San Diego, for respondent Pacific Metal Products Co.

PER CURIAM. In so far as the appeal of appellant Oswald is concerned we are entirely satisfied with the opinion filed by the District Court of Appeal of the Second Appellate District, Division 1, and adopt the same as the opinion of this court.

[1] As far as the appeal of appellant Granger, involving the rights of the Pacific Metal Products Company, is concerned, we are satisfied that the judgment of the superior court was correct; in other words, that as Granger had not notified the county of his assignment, and as the Pacific Metal Products Company had given such notice, the claim of the latter became superior to that of Granger. Under the circumstances Oswald was not the debtor upon whom notice of assignment was required to be served. In this respect the case is within the doctrine declared in Adamson v. Paonessa, L. A. 4627, 179 Pac. 880.

The judgment of the superior court and the order denying the motion of plaintiff Oswald to vacate the judgment are in all respects affirmed.

All concur, except MELVIN, J., absent.

The following is the per curiam opinion of the District Court of Appeal:

In the year 1912 the board of supervisors of San Diego county determined to do certain road improvement work under an act of the Legislature, the terms of which are not in question here. By that act bonds were authorized to be issued to cover the cost of the work. Appellant Oswald was awarded a contract to make the improvements, in consideration of the doing of which it was contracted that he should receive bonds of the par value of $315,260.96. The work was completed as contracted for and bonds in the amount mentioned came into the hands of respondent Schwartz, treasurer of said San Diego county, to be delivered to the persons entitled thereto. Upon completion of the work the treasurer, with the consent of Oswald, delivered to intervener Granger 98 bonds of the par value of $98,950. He delivered to Oswald bonds of the par value of $149,760.89. There then remained in his hands bonds of the par value of $66,550 as to which there were conflicting claims as between Oswald, Granger, and the Pacific Metal Products Company. Claiming to be entitled to all of the bonds remaining in the hands of the county treasurer, Oswald brought this suit in mandamus to compel that officer to deliver the bonds to him. Whereupon petitions in intervention were filed by Granger and Pacific Metal Products Company. The trial judgment determined that Oswald was entitled to bonds of the value of $38,889.16, that Granger was entitled to bonds of the par value of $23,160.84, and that Pacific Metal Products Company was entitled to bonds in the amount of $4,500, par value. Oswald appealed from the whole of the judgment, which was adverse to him, and also from an order denying his motion to set aside the judgment and to enter a different judgment upon the findings. Intervener Granger appealed only from that portion of the judgment which awarded bonds to Pacific Metal Products Company; his appeal being presented upon the judgment roll alone.

This controversy as to the right to possession of the bonds arose by reason of the following facts: After the contract for the doing of the improvement work was awarded to Oswald, he desired to sublet a portion of the work and entered into a contract with one Knight for the doing of certain grading, surfacing, and excavating. The compensation of Knight was agreed to be made by delivering to him a portion of the bonds which Oswald was to receive under the terms of the main contract. The provision of the Knight contract relative to the payment to be made was as follows: "Payment for said work is to be made by the party of the first part (Oswald) to the party of the second part when bonds are issued by the county treasurer of said county in payment for the performance of his said contract with the said county, the party of the second part (Knight) taking the said bonds at par, and the party of the first part hereby sells and assigns to the party of the second part sufficient of said bonds to pay for the doing of the work herein agreed to be done by second party, the amount thereof being approximately one hundred and twenty-two

thousand dollars ($122,000.00)." In the course of the negotiation between Oswald and Knight which led up to the making of the subcontract, it appeared that Knight had not sufficient money with which to cover the necessary outlay incidental to the doing of the work. He, therefore, consulted the Merchants' National Bank of San Diego, of which intervener Granger was president and one Rogers cashier. He represented to the bank and Granger that if he could obtain the necessary money to enable him to carry through the work which Oswald desired him to do, the contract could be performed at a large profit. He offered to assign any contract that he might be given, also the right to the bonds which would accrue thereunder, to the bank if the bank would advance to him the necessary money. He produced Oswald to the bank, and Oswald was present during the principal negotiations which led to the agreement made for the advancing of the funds of the bank and Granger. Granger was brought into the transaction because of the fact that it was the bank's position that the law would not permit it to loan on such an account to exceed the sum of $30,000. This amount Knight anticipated would not be sufficient, although he thought, and so stated, that an additional $20,000 would carry him through. It was then agreed that Granger should individually advance to Knight such sums of money as might be necessary over and above the $30,000, which the bank was to and did advance to Knight. Whereupon Oswald executed the contract with Knight, and the contract was delivered over to the bank on September 13, 1912, together with an assignment of the bonds referred to therein, and which were to be received by Knight in compensation for the work. Oswald was present at the time the written assignment was made, and was present at the time of the agreement made by Granger to supplement the bank's advances. At that time no formal written assignment was made on behalf of Granger. Referring to that transaction, Mr. Granger testified as follows: "The contract that Mr. Knight got from Mr. Oswald was deposited with us. Mr. Knight said, 'I will put this up as security, and give you an order for these bonds for your security,' and I asked him about what security I would have if I had to put up extra. * * * Mr. Knight says, 'This contract and these bonds; you will keep this contract, and nobody will have a prior claim to you, and whatever money you put up, you will collect these bonds; you will get these bonds when they are issued, and you will hold out any money you will put up, and I will leave up the whole thing as security.'" At another point in his testimony the witness said: "Mr. Wadham and Mr. Oswald and myself went into my private room, and there is where Mr. Oswald repeated again what I have said, and said, 'Granger, why can't you put this money up; you have got the money, and why can't you put it up?' He said, 'You can't lose anything on this, and I will guarantee that you will never lose anything on these bonds.'" The money that was in fact advanced by the bank and Granger to Knight amounted to the sum of $129,370.76. So that it appears, assuming that Granger was protected by a valid assignment of the bonds earned by Knight, and made on September 13, 1912, and assuming there was no other intervening superior claim, that the judgment as between Oswald and Granger should not be disturbed. And upon the same assumption, and assuming that the apportionment to Pacific Metal Products Company was improperly made, then the bonds so apportioned to the latter should also be awarded to Granger. There are some questions affecting this latter matter, which are argued in Granger's appeal, which will be considered at a later point in the opinion.

[2-5] Taking up first the appeal of Oswald: The principal contentions made are that the alleged oral assignment by Knight in favor of Granger, claimed to have been made on September 13th, was invalid, and, if not invalid by reason of there having been no writing evidencing the same, that the evidence was insufficient to support the finding of even an oral assignment. That an assignment of a chose in action may be orally made seems to be beyond question. Puterbaugh v. McCray, 25 Cal. App. 469, 144 Pac. 149; 2 R. C. L. p. 615. The particular terms of the transaction had with the bank under which it was agreed that Granger was to advance money in excess of that to be loaned by the bank, and that he was to have the benefit of the security which the bonds to be issued to Knight would afford, were fully understood by Oswald and, in fact, as appears from the testimony, Oswald was active in bringing about the consent of the bank and Granger to make the advances to Knight. That there is ample evidence in the record to support the conclusion that it was the full understanding of the parties that an assignment of the contract and bonds had been made for the benefit of both the bank and Granger on September 13th we are well satisfied. The cashier of the bank explained that his failure to make a writing in favor of Granger, as was done in favor of the bank, was an omission on his part. He stated further that later on, in May of 1913, having in mind that there should perhaps be a writing evidencing such assignment to Granger, he had one drawn, and Knight signed it. On Oswald's part it is claimed that this written assignment to Granger was the first valid assignment made, but, as has already been stated, we think that the oral transaction which was consummated on September 13th was sufficient to create an assignment in Granger's favor. The importance which these dates bear to the controversy on Oswald's appeal is apparent from the fact that Oswald claims the right to offset the charge of a considerable sum of money against Knight on account of mules, etc., sold to Knight during the progress of the work. If these offsets occurred prior to any valid assignment to Granger, then Oswald's contentions on the appeal would be valid. It seemed to be the opinion of the trial judge, as expressed in his findings, and one in which we concur, that assuming the invalidity of the alleged oral assignment to Granger, Oswald, by reason of his participation in and knowledge of the whole transaction, should be estopped from questioning the fact of an assignment made to Granger on September 13, 1912. It is unnecessary, however, to pass upon the question as to whether the findings sufficiently show the facts which the evidence discloses pertinent to the matter of estoppel, for we have already de-

termined that the oral assignment was valid. At the time this assignment was made Knight had not begun work on the job; hence any indebtedness of Knight subsequently incurred could not be urged as a claim against the bonds to the detriment of Granger.

Referring now particularly to the award made to Pacific Metal Products Company: The trial judge evidently based the award made to this company upon the proposition that as Granger had not notified the county or its treasurer of his assignment, and as the Pacific Metal Products Company did give such a notice, the latter's claim became superior to that of Granger. The assignment made in the first instance to Granger carried the equitable right to the bonds when issued, even if it did not pass legal title thereto. Assuming that the assignment was nothing more than an agreement to create a lien upon the bonds and one requiring notice to be given to the debtor of Knight in order to shut off the demands of other claimants, it is our opinion that Oswald, and not the board of supervisors or the county, was the debtor to whom this notice was required to be given. The Road District Improvement Act of 1907 (Stats. 1907, p. 806; Deering's 1915 Ed. Gen. Laws, Act 1465), provides for the issuance of bonds, collectible by means of special assessments upon land within a prescribed road district for the benefit of the road district fund, out of which fund the bonds shall be paid. The obligations thus created do not constitute a debt of the county or its officers. The debtor of Knight, and the only debtor to whom the right of notice could have accrued, was Oswald, the person with whom Knight made the contract under which his right to the bonds was acquired. In view of what has been stated in the foregoing, the conclusion of the court is apparent.

There was, we think, sufficient evidence to sustain all of the material findings made by the trial judge.

The judgment as against plaintiff, Oswald, is affirmed. The order made denying the motion of plaintiff, Oswald, to vacate the judgment is affirmed. The judgment in favor of Pacific Metal Products Company is reversed, with direction to the trial court, upon the findings as made, to enter judgment awarding to intervener Granger bonds of the par value of $4,500, in addition to the award heretofore made by the judgment; said intervener Granger to have his costs.

On Application for Rehearing.

PER CURIAM. Complaint is made in a petition for rehearing filed on behalf of appellant Granger that, in view of the fact that Oswald had a right of set-off *against Knight* as to a portion of the Knight bonds going to Granger and the Pacific Metal Products Company, the right of the latter (the Metal Products Company) is extinguished to the amount of the set-off, which is more in amount than the value of the bonds going to the company, and Granger is entitled by virtue of his prior assignment to the bonds given to the company. There is no force in this claim, in view of what is shown in that portion of the District Court of Appeal opinion which we have approved. By reason of the fact that Granger did *not* give notice of his assignment to the county, and that the company did give notice of its assignment, the company's assignment became superior to that of Granger, and its claim must first be satisfied. Hence, if there is any offset to be considered, it would have to come out of Granger's share in the bonds remaining after the company's claim is satisfied. So no error has been made in favor of the company as against Granger. The opinion of the District Court of Appeal sufficiently shows why Oswald cannot urge this claim of set-off as *against Granger*, and so no error has been made in regard to Oswald's rights.

The petition for a rehearing is denied.

All concur.

181 Cal. 640

CITY STREET IMPROVEMENT CO. v. PEARSON. (S. F. 8621.)

(Supreme Court of California. Dec. 8, 1919.)

1. MUNICIPAL CORPORATIONS ⇐473—STREET IMPROVEMENT ASSESSMENT MUST PROVIDE FOR INSTALLMENT PAYMENTS.

Under San Francisco City Charter, art. 6, c. 2, § 33, as amended by St. 1913, p. 1623, an assessment for a street improvement in excess of 50 per cent. of the assessed value of the property was improper, where the procedure ordinance of the supervisors made no provision for installment payments.

2. MUNICIPAL CORPORATIONS ⇐493(1) — STREET IMPROVEMENT; CURE OF DEFECTIVE ASSESSMENT ON APPEAL.

Defect that assessment for a street improvement was in excess of half the assessed value of the property, without provision by the supervisors' procedure ordinance, under San Francisco City Charter, art. 6, c. 2, § 33, as amended by St. 1913, § 1623, for payment in installments, *held* not curable on appeal to the board of supervisors.

3. MUNICIPAL CORPORATIONS ⇐493(1) — STREET IMPROVEMENT; CURATIVE PROVISIONS.

Curative provisions in a law relative to street improvements in cities may cure any defect that does not go to the jurisdiction of the particular board, as the board of supervisors, over the proceeding, and may cure any defect arising from the omission of any step in the proceeding which the Legislature itself might have omitted from the law, if something not essential to due process, or other constitutional prerequisite.

4. MUNICIPAL CORPORATIONS ⇐493(1) — STREET IMPROVEMENTS; CURATIVE PROVISIONS OF ORDINANCE.

Curative provisions in ordinance relative to street improvements in cities are not to be considered as intended to apply to any of the preliminary steps which the ordinance itself requires to be taken, whereby jurisdiction of the

proceeding is to be acquired by the local board or body in charge, unless such intent is declared or necessarily appears.

5. MUNICIPAL CORPORATIONS ⟸586 — CHARACTER OF CLAIM OF STREET IMPROVEMENT CONTRACTOR.

Even if the claim of a street improvement contractor against property had constituted a valid lien, it would not have been a personal obligation of the owner, but a mere lien on his property, enforceable only by foreclosure.

6. BILLS AND NOTES ⟸92(3)—FORBEARANCE ON UNENFORCEABLE DEMAND AS CONSIDERATION.

Where the owner of land, subject to a lien for street improvements void as for more than half the assessed value, while not payable in installments, gave the contractor a note for half the amount of the assessment, paying the rest in cash, in consideration of the contractor's forbearing to foreclose the lien for 90 days, such note was unsupported by consideration; there having been no compromise of a doubtful right.

7. CONTRACTS ⟸72 — FORBEARANCE ON UNFOUNDED CLAIM AS CONSIDERATION.

Forbearance to sue on or extension of time for payment of a baseless demand is not sufficient consideration for a contract.

Olney and Lawlor, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by the City Street Improvement Company against F. E. Pearson. From a judgment for defendant, plaintiff appeals. Affirmed.

Adams & Adams, of San Francisco, for appellant.

Jesse A. Mueller and Hugo D. Newhouse, both of San Francisco, for respondent.

SHAW, J. The plaintiff sued to recover upon a promissory note for $612.77. Defendant answered, alleging want of consideration for the note. The court found that it was wholly without consideration, and gave judgment for the defendant. Plaintiff appeals.

Plaintiff made certain improvements of the street in front of the defendant's property in San Francisco, under a contract with the board of public works executed in pursuance of the proceedings taken for that purpose. An assessment for the cost thereof was issued to plaintiff. The amount assessed against defendant's property was $1,225.54. Plaintiff demanded payment and threatened to foreclose the assessment if payment was not made. Defendant asked for an extension of time, and after some negotiation an agreement was reached whereby defendant paid $612.77, being one-half of the assessment, and executed to the plaintiff the note in suit, payable in 90 days, for the remaining half. The lien of the assessment was not formally released, but plaintiff agreed not to foreclose during the time covered by the note. Both parties at that time believed that the assessment was valid, and that it constitued a valid lien on defendant's property, and in that belief the note was given and accepted.

Two questions are presented: (1) Was the assessment void? (2) If it was void, was the note based on a lawful and valuable consideration?

[1] 1. The proceedings for the street improvement were taken under an ordinance of the board of supervisors of San Francisco, providing the procedure therefor, under the authority of section 33, chapter 2 of article 6, added to the city charter by the amendment of 1913. This section authorizes the board of supervisors to adopt an ordinance providing a method of procedure for the improvement of streets and for an assessment upon private property to defray the expense thereof. It contains the following additional provision:

"In such ordinance if said board deems it expedient, provision may be made for the payment of any assessment levied in pursuance of the provisions thereof in annual installments covering a term not to exceed ten years upon [such] conditions as to said board may seem reasonable and just, the rate of interest to be paid on such payments not to exceed seven per cent. per annum. In any proceeding for the improvement of streets wherein provision is made for the payment of any assessment in annual installments, the amount of such assessment shall not be limited by the provisions contained in subdivision 3 of section 8 of this chapter." Stats. 1913, p. 1623.

The provisions of subdivision 3 of section 8, referred to in the foregoing quotation, are as follows:

"No assessment shall be levied upon any property, which, together with all assessments for street improvements that may have been levied upon the same property during the year next preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed upon the last preceding assessment book of the city and county." Stats. 1899, p. 297.

In pursuance of the authority given by section 33 aforesaid, the board of supervisors of the city and county of San Francisco, on October 27, 1913, adopted an ordinance providing a procedure to be followed in San Francisco in making improvements upon streets and assessing the expense thereof upon private property. The proceedings in question were taken under this ordinance, and the question to be determined is whether or not they were valid under the ordinance and the aforesaid provisions of the charter. The proceedings for the street improvement were begun by a resolution of expediency

adopted by the board of public works on May 20, 1914. The work was completed on March 11, 1915, and the assessment was issued on May 5, 1915. The assessed value of the property of the defendant for the year 1914, that being the year in which the contract for the improvement was let, was $2,260. One-half of this sum, $1,130, was the limit of the amount which the city authorities had power to assess against defendant's property, unless provision was made for the payment thereof in annual installments, as provided in section 33 aforesaid. The objection to the assessment is that no such provision was made, and that in consequence thereof the assessment is void. The plaintiff, in answer to this proposition, contends that this defect in the proceeding is not jurisdictional; that it could have been cured by the appeal to the board of supervisors provided for in section 21 of the ordinance fixing the procedure. For the understanding of this question it will be necessary to state in some detail the provisions of said ordinance.

It is first provided that the board of public works, deeming that public convenience requires a street improvement, the expense of which should be assessed upon private property, shall by resolution declare such expediency, briefly describing the improvement, and cause plans and specifications therefor to be prepared (section 3); that after such plans and specifications are prepared the board "shall pass a resolution of its intention to recommend to the supervisors that said improvements be ordered to be made," referring therein to the plans and specifications and fixing a day for taking action upon the matter, of which day notice shall be given (section 4); that at the time fixed in the notice, if no objections are made, the board of public works shall "pass a resolution recommending to the supervisors that they order such improvements to be made" (section 7); that the supervisors may, in their discretion, order that not exceeding one-half of the expense of the work may be paid out of the city treasury (section 7); that the improvement so proposed may be ordered by the board of supervisors by ordinance adopted in the manner provided by chapter I, article 2, of the charter (section 7). When the improvements are thus ordered, bids shall be advertised and the contract for the work let to the lowest bidder. Section 16 of the ordinance contains a provision as follows:

"No assessment shall be levied upon any property, which, together with all assessments for street improvement that may have been levied upon the same property during the year last preceding, will amount to a sum greater than fifty per centum of the value at which said property was assessed, exclusive of improvements thereon, upon the assessment book of the city and county current at the date of the passage of the resolution of intention, except, however, as in this ordinance hereinafter provided."

Section 18 provides that if, at the time street work is done, none of the methods provided in the ordinance is sufficient to authorize the board of public works to make an assessment to pay for the expense thereof, the board, before it passes "a resolution of its intention to recommend the ordering of said work or improvement," shall establish by resolution a method by means of which such assessment shall be made, and that when the work is done the assessment shall be made according to the method so established. The ordinance provides in the usual manner for the issuance of an assessment and warrant to the contractor for the expense upon the completion of the work to the satisfaction of the board of public works. Section 28 is as follows:

"Any assessment imposed under the provisions of this ordinance may be paid in annual installments, not exceeding 10 in number, whenever the board of public works shall so determine and declare in the resolution of intention or whenever the board of supervisors shall so determine and declare in the ordinance ordering the work, and it shall be mandatory for the board of public works to so determine and declare in every case when the amount of the assessment imposed will exceed one-half of the assessed value of the lot or parcel of land against which such assessment is imposed. Such resolution or ordinance shall state the number of installments in which the assessment may be paid, and the rate of interest to be charged on all deferred payments, which rate of interest shall not exceed 7 per centum per annum."

The ordinance further provides that any person aggrieved by any act of the board of public works in the matter, or who claims that the work has not been properly performed, or having any objection to the correctness or legality of the assessment, shall, within 30 days after the date of the warrant appeal to the supervisors and that upon such appeal the supervisors may remedy and correct any error in the acts of the board of public works or in the assessment and cause said board to correct the warrant assessment or diagram in any particular so as to conform to their decision upon the appeal; that the decisions of the supervisors on such appeal "shall be final and conclusive upon all persons entitled to appeal under the provisions of this section as to all errors, informalities, and irregularities which the supervisors might have avoided or have remedied during the progress of the proceedings or which they can at that time remedy"; and that "no assessment * * * and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the board of public works to recommend to the supervisors the ordering of the improvement has been actually published and posted and the notices of improve-

ment posted as in this ordinance provided." Section 21.

The proceedings for this assessment did not conform to the provisions of this ordinance regarding cases in which the assessment amounts to more than half of the assessed value of the property for general taxation for the current year, as was the case here. Neither the resolution of intention of the board of public works to recommend the making of the improvement nor the ordinance of the board of supervisors ordering the work to be done, nor any resolution, order, or ordinance of either body, declared or provided that the assessment should be paid in installments, or made any provision on that subject. The consequence was that the entire assessment, under the terms of the ordinance, became due and payable immediately upon the issuance of the warrant, and a suit to foreclose the same could have been begun at the expiration of 35 days thereafter. Section 19 and section 22. If the proceedings had been valid, the contractor would have had the right to insist upon this date of maturity.

The above-quoted provision of section 8, chapter 2, article 6, of the charter forbids the making of such an assessment in such a case. Section 33, above quoted, qualifies this prohibition so far as to allow an assessment of that amount to be made under a method of procedure ordained by the board of supervisors, if provision is made in the proceeding for the payment of the assessment in installments, but not otherwise. The provision for installment payments can only be made in the manner prescribed in the procedure ordinance. The board of supervisors and the board of public works, in making improvements and levying assessments under the provisions of an ordinance adopted under section 33 aforesaid, are acting as agents under a special power, and they cannot lawfully act at all except as authorized by the terms of the law under which they act. They are as much limited by the terms of the ordinance of the supervisors providing the procedure as they would be if they were acting under some street improvement act enacted by the Legislature. The ordinance declares that, in order to authorize installment payments, the board of public works must "so determine and declare in the resolution of intention," or, as an alternative thereto, the board of supervisors must "so determine and declare in the ordinance ordering the work." It is declared to be mandatory that the resolution thus referred to shall so state whenever "the amount of the assessment imposed will exceed one-half of the assessed value of the lot or parcel of land" to be assessed. Section 28. Furthermore, the provisions of section 18 above mentioned require that the board of public works, if none of the methods provided in the ordinance is sufficient to authorize an assessment to pay for the expenses of an improvement, shall, before it passes the resolution of its intention to recommend the ordering of the work, establish an adequate method for making the assessment. It is difficult to give this section any meaning, unless it was intended to require the board of works to look into the matter at the beginning and provide for installments if it found that the assessment was likely to exceed one-half of the tax valuation on the properties.

[2] The contention that this departure from the authorized procedure could have been lawfully cured or corrected on appeal to the board of supervisors, had such appeal been taken, cannot be sustained. Section 28 of the procedure ordinance, it will be noted, provides that, in every case where the assessment will exceed one-half the tax valuation, "it shall be mandatory" that the board of public works shall first determine, and then declare in its resolution of intention, that payment of the assessments may be made in annual installments. Section 18 of that ordinance, if we interpret it aright, also requires such preliminary determination. And sections 8 and 33 of chapter 2 of article 6 of the charter withhold entirely from the two boards the power to make such an assessment, unless it is made in the manner to be prescribed by the procedure ordinance which section 33 authorizes the supervisors to adopt. Under that ordinance, the resolution of intention of the board of public works, together with the notices to be given of the time of taking action thereon, comprise the mode, and the only mode, whereby either of said boards can obtain jurisdiction of such a proceeding or power to make any assessment. It is very clear from all these provisions that, in a case where the necessary assessment for the work will exceed one-half of the assessed value of the land for the current year, they cannot obtain such jurisdiction or power, except by determining to make the assessment payable in annual installments and inserting in the resolution of intention of the board of public works a declaration to that effect. This of course, could not be done by the supervisors in deciding the appeal. It could not lawfully be done at all after the contract was let, for the contractor would then have a contractual right to immediate payment upon the completion of the work.

[3] Curative provisions in a law of this character may cure any defect that does not go to the jurisdiction of the board over the proceeding. It has been said that they may cure any defect arising from the omission of any step in the proceeding which the Legislature might have itself omitted from the law, if it be a thing not essential to due process of law, or necessary to comply with some other constitutional prerequisite. Ramish v. Hartwell, 126 Cal. 443, 58 Pac. 920;

Chase v. Trout, 146 Cal. 359, 80 Pac. 81. As a general proposition this is a correct statement of the law. The difficulty with its application to the present case is that here the charter, with respect to the powers of the board of supervisors to adopt a procedure ordinance, stands in the place of a Constitution; indeed, it is more stringent, for its provisions on this subject constitute a specific grant of power, and not a limitation upon powers included in a general grant. The charter says that an assessment for this amount shall not be made, except it be payable in annual installments. The curative provision of the ordinance, if allowed the effect contended for, would, in effect, declare that a valid assessment for this excessive amount can be made, although payable immediately and not in installments, provided no objection thereto is made until after the work is done. The prohibition of the charter against such assessments would thus be evaded and defeated.

[4] We think the general rule of construction with regard to curative provisions of this character is that they are not to be considered as intended to apply to any one of those preliminary steps in the proceeding which the statute itself requires to be taken whereby jurisdiction of the proceeding is to be acquired by the local board or body in charge thereof, unless such intent is expressly declared, or appears by necessary implication. Of course, it could in no case excuse or cure a want of due process of law. And where several material acts are prescribed for obtaining jurisdiction and are adapted to that purpose, it is difficult to perceive how a general curative clause can be held to apply to any of them. For if it could be applied in one case to excuse the want of one of such acts, it could in another case be made to dispense with another, and so all of them would, one by one, be declared unimportant, and a compliance with any one of them would be sufficient in any case. With respect to the curative provision here involved, we think it must be held that it was not intended to allow a disregard of the jurisdictional acts which the ordinance itself expressly declares shall be mandatory. Our conclusion is that the assessment against the property of Pearson was void. This brings us to the second question.

[5, 6] 2. There was no dispute or difference between the parties concerning the existence or nonexistence of any fact, nor regarding the validity or invalidity of the claim of the plaintiff. Both parties acted with the belief, or upon the tacit assumption, that it was a valid demand and an enforceable lien upon the property. So far as the evidence shows, neither party knew the amount of the tax valuation for the current year. Even if the claim had constituted a valid lien against the property, it would not have been a personal obligation of the defendant, but a mere lien upon his property, enforceable only by foreclosure. Taylor v. Palmer, 31 Cal. 254. It does not appear that the plaintiff asserted that Pearson was personally liable for the claim. The asserted lien was not released, and there was no agreement or understanding that it should be released. The fact that the assessment was more than 50 per cent. of the tax valuation was a matter which appears of record, and could not be, and was not, disputed by either party. There was therefore no consideration whatever for the note, other than the extension of time to the defendant wherein to pay a claim that he was under no obligation to pay at all, and the corresponding forbearance of plaintiff for 90 days to forclose the claim of lien which was of no validity, and which, if foreclosed and the land sold thereunder, would have given the purchaser no title thereto.

[7] On behalf of the plaintiff it is contended that a promise given in consideration of an extension of time to pay a demand, and a corresponding forbearance to sue during the time allowed, is based upon a good consideration, even if it appears that the demand was of no legal validity, and there was no doubt or dispute concerning the facts upon which it was founded. In support of this proposition a number of decisions are cited. Upon examination we find that each of them comes within the well-established rule that a promise given in consideration of the settlement or compromise of a dispute or controversy, the event of which is uncertain or doubtful, or even in consideration of the forbearance to sue upon or the extension of time of payment of a lawful demand, is founded upon a sufficient consideration. Of the cases cited, the nearest in analogy to the case at bar is Young v. French, 35 Wis. 111. In that case the defendant was in possession of logs, with power to sell them on commission. His sales depended upon his continued possession. The plaintiff claimed a lien against the logs for a demand against the owner, and threatened to file such lien. Defendant promised plaintiff to pay his demand if he would refrain from filing the lien, which the plaintiff thereupon did; defendant holding possession of the logs by means of his promise. The decision was expressly put on the ground that the defendant had thus retained possession of the logs, and was enabled to exercise his right to sell them on commission, and that plaintiff had relinquished his right to file a claim of lien, and that these respective concessions and benefits were sufficient consideration for the promise. It was said that under these circumstances it was immaterial whether the plaintiff's claim to a lien was valid or not.

The decision was correct, but it is not applicable here. Where there has been a compromise of doubtful claims, or concessions

and benefits given and received in good faith, as consideration for a promise, the actual validity of the claims is immaterial; otherwise, as remarked by Mr. Wharton:

"There could be no compromise of litigation, since there is no litigation in which one or the other party, if the case be pressed to judgment, does not fail to make out his case." Wharton on Contracts, § 533; McClure v. McClure, 100 Cal. 343, 34 Pac. 822.

But in the same section that author states that—

"a promise to compromise a claim utterly unfounded will not be regarded as a valuable consideration."

In Elliott on Contracts, vol. 1, § 235, it is said:

"If the claim threatened to be enforced is invalid or worthless, a promise not to attempt to enforce or to refrain from making trouble concerning it is not a consideration recognized by the law as valuable."

In 8 Corpus Juris, at page 238, the rule is stated thus:

"The actual forbearance or the promise to forbear to prosecute a claim on which one has a right to sue is a sufficient consideration; but such forbearance is no consideration, if it is clear that no action would lie."

Other writers state the same doctrine. 1 Beach, Cont. § 176; Bishop, Cont. § 70; 1 Chitty, Cont. § 39; 1 Parsons, Cont. § 441. An examination of the cases cited by these writers shows that the text is fully supported. There has been no decision of this court precisely on the point involved, but it was presented to the District Court of Appeal in Pacific, etc., Co. v. Carr, 29 Cal. App. 722, 157 Pac. 529. There the plaintiff presented to defendant a claim against a corporation in which the defendant was the principal stockholder. The claim against the corporation was invalid. The defendant agreed to assume the claimed indebtedness and executed a note therefor, and upon its maturity she executed another note in renewal. The action was upon the last note. The court said:

"The consideration for her note was the purported obligation of the company upon this contract; but there was no obligation, either express or implied. This being true, it cannot be said there was any consideration for the execution of the note sued upon. Clearly, if suit had been brought upon the contract against the Amritam Company, no recovery could have been had thereon upon a showing of the facts here presented. And if there was nothing upon which to base an action against the Amritam Company, it must follow that plaintiff, in releasing the company from liability which did not exist, suffered no prejudice by reason thereof."

And it was said that, unless there was some uncertainty or doubt concerning the validity of the claim for which the note was given, it did not come within the category of a compromise of a doubtful or disputed claim, and there was no consideration for the new promise. We cite a few of the many cases establishing this doctrine. Nicholson v. Neary, 77 Wash. 294, 137 Pac. 492; Daniel v. Hughes, 196 Ala. 368, 72 South. 23; Ernst v. Hollis, 86 Ala. 513, 6 South. 85; Smith v. Easton, 54 Md. 147, 39 Am. Rep. 355; Foster v. Metts, 55 Miss. 82, 30 Am. Rep. 504.

In this case there was no disputed claim, no compromise of a doubtful right, no release of the lien of the plaintiff, and there was no valid claim against the defendant in existence. The claimed lien was wholly without foundation and absolutely void, and it constituted no consideration for a promise to pay the demand or any part thereof.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.; MELVIN, J.

We dissent: OLNEY, J.; LAWLOR, J.

181 Cal. 607

McLAREN v. FLEISCHER. (L. A. 4736.)

(Supreme Court of California. Dec. 1, 1919. Rehearing Denied Dec. 29, 1919.)

1. PUBLIC LANDS ⟸106(2)—COURT'S JURISDICTION OVER RULINGS OF LAND DEPARTMENT.

The decisions of the federal Land Department are subject to review by the courts only where the department has committed an error of law and denied rights under the Constitution and laws of the United States.

2. PLEADING ⟸214(1)—ADMISSION BY DEMURRER.

Facts alleged by complaint must stand as true upon general demurrer.

3. QUIETING TITLE ⟸10(2)—RIGHT OF ENTRYMAN ON PUBLIC LAND TO MAINTAIN ACTION.

One who has made the affidavit required by United States R. S. § 2290 (U. S. Comp. St. § 4531), and who has paid the amount necessary to enter the quantity of land applied for is vested with an equitable title entitling him to maintain action to quiet title, and to compel conveyance.

4. PUBLIC LANDS ⟸35(2) — CERTIFICATE AS NECESSARY TO COMPLETE ENTRY.

One who has made application and filed the affidavit required by Rev. St. U. S. § 2290 (U. S. Comp. St. § 4531), and who has paid the amount necessary to enter the quantity of land applied for, stood in the relation of an entryman upon a homestead claim; the execution of certificate of entry being unnecessary.

5. STATUTES ⟸219 — PRACTICAL CONSTRUCTION BY LAND DEPARTMENT.

The construction placed upon an act of Congress by the Land Department with respect

to the disposition of public lands, and its practical application thereof, is given great weight by the courts in construing the law, and is followed if it is at all reasonable.

6. PUBLIC LANDS ⟸102—WHEN SUCCESSFUL CONTESTANT MUST MAKE ENTRY AFTER CANCELLATION.

Under Act Cong. May 14, 1880 (U. S. Comp. St. §§ 4536–4538), giving claimant, who has been successful in having land entry canceled, 30 days from notice of cancellation in which to make entry, successful contestant, who received notice of cancellation after land had been withdrawn from entry, had 30 days from restoration to entry in which to enter upon land, in view of Reclamation Act, § 10 (U. S. Comp. St. § 4708).

Department 1.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by John McLaren against L. G. Fleischer. Judgment of dismissal. Plaintiff appeals. Affirmed.

Henry M. Willis, of Los Angeles, and J. O. Phillips, of Blythe, for appellant.

Duke Stone, of Los Angeles, for respondent.

Leonard, Surr & Hellyer, of San Bernardino, amici curiæ.

LAWLOR, J. This appeal was taken from a judgment of the superior court of Riverside county, dismissing plaintiff's complaint after a general demurrer was sustained and the plaintiff refused to amend.

The action was brought by the plaintiff against the defendant to procure a decree in equity declaring that the defendant holds the title to a certain quarter section of land in trust for the plaintiff, requiring the defendant to convey title to the plaintiff, and for the value of the use of the land for the period set forth in the complaint. The prayer of the complaint is based on allegations to the effect that the plaintiff was wrongfully, through mistake of law, deprived of such title, or the acquiring of such title, and the defendant was wrongfully, and by mistake of law, granted such title by the Land Department of the United States. There is no claim of fraud, either actual or constructive.

[1] Before proceeding to a consideration of the points involved in this appeal, it is proper to point out that the rule is well settled that the courts cannot exercise direct jurisdiction over the rulings of the officers of the Land Department of the United States, nor are the courts authorized to reverse or correct such rulings in collateral proceedings between private parties, but that the decisions of the Land Department are subject to review by the courts only where it appears that the Land Department has committed an error of law and denied to the parties the rights to which they are entitled under the Constitution and the laws of the United States. Under such circumstances the courts can in a proper proceeding interfere and refuse to give effect to the action of the Land Department. In Quimby v. Conlan, 104 U. S. 420, 26 L. Ed. 800, it was said:

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled" (citing cases).

In Gage v. Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141, this court declared:

"If however, in making such determinations of fact, that tribunal [the Land Department of the United States] has disregarded the law applicable thereto, or has erred in its construction of the law, or by reason of mistake has issued to one person a patent for the land, which upon undisputed facts should have been issued to another who has contested his claim and has shown himself entitled to the patent, the person in whose favor the patent was issued will be held to hold the land for the benefit of the one to whom it should have issued. Proceedings for this purpose are, however, to be taken in a court of equity, and are to be governed by the rules of equity procedure."

[2] The following facts are taken from the complaint and must stand as true: On February 9, 1903, the southeast quarter of section 12, T. 7 S., R. 22 E., S. B. M., in the Palo Verde valley, Riverside county, was open to public entry under the land laws of the United States, and on that day one Charles W. Rider made his homestead entry on said land by filing his application in the land office at Los Angeles. This quarter section, along with other lands, was withdrawn from all forms of entry on September 8, 1903, by order of the Land Department, under and by virtue of the act of Congress approved June 17, 1902, and known as the Reclamation Act (32 Stat. 388, c. 1093 [U. S. Comp. St. §§ 4700–4708]); such withdrawal being what is commonly known as "first form withdrawals," during the existence of which no lands embraced therein can be entered, selected, or located in any manner.

On February 18, 1908, while these lands were still withdrawn from public entry, L. G. Fleischer, defendant and respondent here-

in, filed a contest of the Rider entry before the register and receiver of the local land office at Los Angeles, who sustained the contest and recommended to the Commissioner of the General Land Office that the Rider entry be canceled. The Commissioner approved the recommendation, and on January 26, 1909, canceled the entry, and directed the register and receiver to advise all parties in interest. The defendant was notified by the register and receiver of the cancellation of the entry on February 11, 1909, and at the same time was notified by the register and receiver that he had been awarded a preference right to enter upon the said quarter section within 30 days after the said land had been restored to public entry. An order of the Secretary of the Interior, dated January 10, 1910, restored the quarter section, along with other lands, to public settlement on April 18, 1910, and to public entry on May 18, 1910.

On the day that the land was restored to public settlement, April 18, 1910, the plaintiff, "being in all ways qualified under the laws to do so," made actual settlement on the quarter section hereinbefore mentioned, with the intention of claiming the land under the homestead laws of the United States. And on May 18, 1910, he filed his homestead application, as such settler, in the local land office at Los Angeles, paid the fees required by law, continued thereafter to reside upon and improve the land, and—

"in fact complied with all the laws and requirements of the laws of the United States, and all the rules and regulations of the Land Department of the United States, relating to homesteads, except as prevented or prohibited by the officers of said Land Department, until he was ejected from said premises by judgment of the superior court of the state of California in and for the county of Riverside, entered April 24, 1915."

The defendant, on May 18, 1910, made his application for entry on the same quarter section, but subsequent to the application of the plaintiff, claiming a preference right to make such entry, under and by virtue of the preference right awarded him by the provisions of the act of May 14, 1880, hereinafter set forth. On the same day all the entries on this quarter section and certain other land were suspended, pending the settlement of a contest between the state of California and the United States as to the character and disposition of these lands. On May 22, 1912, the lands were again restored to public entry, subject to the applications already made. Some time later, namely, on June 3, 1912, the register and receiver of the local land office at Los Angeles rejected the application of the plaintiff and allowed that of the defendant, "on the sole ground that the said defendant had acquired a preference right * * * by reason of the successful termination" of his contest of the Rider entry. Plaintiff appealed, but the Commissioner of the Land Office affirmed the decision of the register and receiver. In pursuance of this decision a patent for the said quarter section was issued to the defendant on January 15, 1915.

From the date of his settlement on the land, April 18, 1910, until he was ejected under the judgment of the superior court above mentioned, the plaintiff lived on the land with his family, and the complaint alleges that he has been always qualified, under the laws of the United States, to make the proposed homestead entry, and has complied with all the requirements of said laws and all the rules and regulations of the Land Department of the United States relating to homesteads, except as prevented or prohibited by the officers of the Land Department.

[3] The point is raised in the brief of amici curiæ that the "plaintiff has not connected himself with the government, or shown that he is vested with the equitable title, so as to enable him to maintain this action." There is clearly no merit in this contention. Section 2290 of the Revised Statutes of the United States (U. S. Comp. St. § 4531), provides:

"That any person applying to enter land * * * shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, * * * except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified."

What constitutes an entry was laid down in Hastings, etc., Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363; Mr. Justice Lamar writing the opinion:

"Under the homestead law three things are needed to be done in order to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitled him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered."

See, also, Whittaker v. Pendola, 78 Cal. 296, 20 Pac. 680; Northern Pac. R. Co. v. Nelson, 22 Wash. 521, 61 Pac. 703.

[4] The case of Chapman v. Quinn, 56 Cal. 266, is relied on to support the contention that the plaintiff has not connected himself with the government title sufficiently to entitle him to maintain the present action to declare the defendant trustee of the title for

his benefit. This decision, however, is not in point. In that case the court was considering the pre-emption statute, which provided that before an entry could be made under that section it must be established to the satisfaction of the register and receiver that the applicant had settled upon and improved the land he sought to enter. Page 274. Section 2290, it will be observed, does not require the applicant to do anything more than the plaintiff herein had done in order to enter the land; that is to say, to make, subscribe, and file in the proper land office the affidavit required by that section, and to pay the amount of money necessary to enter the quantity of land he applies for. When this is done his right is complete. The statement in the opinion of Mr. Justice Lamar which seems to imply that the entry is not complete until the officials execute a certificate of entry to him is not warranted by the statute. The applicant has put himself in privity with the government when he has done all he could do in the matter. He is then in a position to compel the officials to do their duty toward him, and to assert his right against others claiming a similar right from the government. The plaintiff in this case had complied in all respects with the law, and stood in the relation of an entryman upon a homestead claim. In Chapman v. Quinn, under a lawful rule of the Land Department, Quinn had not been allowed to file any application or make any proof. The two cases are clearly distinct and different.

The only question presented and decided in the Land Department was whether the plaintiff or the defendant had the better or prior right to enter the land. This question was decided in favor of the defendant on the single ground that he had been granted a preference right. The sole question, therefore, which is presented for decision here, is whether the officers of the Land Department made a mistake of law in granting the defendant a preference right, in the recognition of which it became necessary to cancel plaintiff's entry.

A preference right is authorized by the act of Congress of May 14, 1880 (21 Stat. 140, c. 89 [U. S. Comp. St. §§ 4536–4538]), which reads in part as follows:

"Sec. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

At the time this act of 1880 was passed the Reclamation Act had not been enacted. It is obvious that the act of 1880 is based on the assumption that when the entry of one claimant was canceled the successful party could immediately enter the land. It contemplates land which would remain subject to entry during the contest. The provision that the successful claimant should be allowed 30 days within which to enter the land after he was notified by the land office of the cancellation of his adversary's entry, was intended and supposed to give him 30 days, during the whole of which time he could complete his own entry. It cannot be conceived that the Congress intended to start the time of his preference running before it was possible for him to exercise his right thereto. The law gives the preferred right absolutely, and the provisions regarding the giving of notice of necessity imply that the land shall be subject to entry at the time the notice is received, and that it must be subject to entry before the notice can become effective to start the time running. The notice which the act contemplates shall be given must be understood to be a notice which would give effect to the right intended to be preserved, and not a notice that would defeat it.

In this case the land was not subject to entry at the time the contest was terminated and Rider's entry canceled. The register and receiver apparently so interpreted the effect of the act of 1880 when they sent the notice, for it informed the defendant that his preference right to enter the land would continue for 30 days after the land was restored to entry. The notice they gave must be construed as a notice to take effect on the restoration to entry of lands involved and not before. If this construction is not given, the object of the act of 1880 would be utterly defeated in all cases such as the one at bar. The Land Department itself has so understood and construed the act. Section 10 of the Reclamation Act gives to the Secretary of the Interior authority to make such rules and regulations as may be necessary and proper to carry its provisions into effect. These provisions include his order restoring the land to entry after its withdrawal. As evidence of the departmental construction of the act of 1880, certain regulations were promulgated on June 6, 1905, of which No. 7 provides that—

"Any contestant who gains a preferred right to enter any such lands may exercise that right at any time within 30 days from notice that the lands involved have been released from such withdrawal and made subject to entry."

[5] The Land Department with regard to lands so withdrawn, has consistently held to the proposition that the preference right to enter given to the successful contestant by the act of 1880 does not begin to run until the land is again restored to entry, regardless of the time when he receives the official notice of cancellation of his adversary's entry. The construction placed upon an act of Congress by the Land Department, with respect to the

disposition of public lands, and its practical application thereof, is always given great weight by the courts in construing the law and is followed if it is at all reasonable.

[6] We are satisfied that the Land Department correctly construed the act in the present case in its decision that the time within which the defendant could exercise his preference right, after the cancellation of the other entry, did not begin to run against him until the time of the restoration of the land to public entry. This occurred on May 18, 1910. This was in effect decided by the Land Department in the case of Fairchild v. Eby, 37 Land Dec. 362. Referring to the department regulations aforesaid, and to the preference right allowed by the act of 1880, Secretary of the Interior there said:

"It was thus contemplated that the preference right allowed by the sixth section [of the regulations] should remain suspended, if the land was not subject to entry at the date of the cancellation, but that the preference right so acquired might be exercised whenever the land was restored."

The sixth section refers to the preference right accruing under the act of 1880 aforesaid. To the same effect see Wright v. Francis, 36 Land Dec. 499; Beach v. Hanson, 40 Land Dec. 607; Wells v. Bodkin, 42 Land Dec. 340; Edwards v. Bodkin, 42 Land Dec. 172.

Appellant relies upon Edwards v. Bodkin, 249 Fed. 562, 161 C. C. A. 488, in support of his claim that the preference right was awarded to the respondent through a mistake of law. The decision there was not to the effect that the contestant was by mistake of law given the preference right. It was there held that the Commissioner of the General Land Office had mistaken the law in declaring that the settler had abandoned his homestead claim. In discussing the question the court remarked that the Reclamation Act did not confer authority "upon the Secretary of the Interior to so extend the limitation of the act of May 14, 1880." This is the statement relied upon. It is unnecessary to determine in this case whether the Reclamation Act gave or could give legislative authority to the Secretary of the Interior. It is enough for the purpose of this case to say that he may construe the act of 1880 in connection with the Reclamation Act, and if the construction he adopts is reasonable it will be upheld and followed by the courts.

For these reasons we are of the opinion that the preferred right of the defendant to complete his entry and thereupon occupy the land for the purpose of acquiring a homestead patent did not begin to run until the time of the restoration of the land to entry, when for the first time it became possible for him to exercise the right given by the statute. The demurrer was properly sustained.

The judgment is affirmed.

We concur: SHAW, J.; OLNEY, J.

181 Cal. 788

CULPEPPER v. OCHELTREE. (L. A. 4962.)

(Supreme Court of California. Dec. 1, 1919. Rehearing Denied Dec. 29, 1919.)

PUBLIC LANDS ⊂⊃102—SUCCESSFUL CONTESTANT MUST ENTER LAND WITHIN THIRTY DAYS AFTER CANCELLATION OF ENTRY.

Contestant, who has been successful in having entry canceled, and who has received notice thereof at a time when land has been withdrawn from entry, was entitled to preference right to enter land within 30 days after restoration of land to entry, regardless of whether notice was received while Rules and Regulations of Land Department of June 6, 1905, § 7, or Rules and Regulations of January 19, 1909, § 6, was in force, since the time of receipt of notice is immaterial; the 30-day period beginning with restoration of land to entry.

Department 1.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Robert L. Culpepper against James M. Ocheltree. Judgment of dismissal, and plaintiff appeals. Affirmed.

Henry M. Willis, of Los Angeles, and J. O. Phillips, of Blythe, for appellant.

Duke Stone, of Los Angeles, for respondent.

Leonard, Surr & Hellyer, of San Bernadino, amici curiæ.

PER CURIAM. The appeal herein was taken from a judgment of the superior court of Riverside county, dismissing plaintiff's complaint after demurrer sustained, and plaintiff refused to amend. This case was submitted on the briefs filed in McLaren v. Fleischer (L. A. No. 4736) 185 Pac. 967, this day decided.

The only difference between the two cases is that the defendant herein received notice on January 13, 1909, that he had been successful in his contest and was awarded a preference right to enter the land within 30 days after it should be restored to entry. The defendant in McLaren v. Fleischer received a similar notice on February 11, 1909—the former notice coming within the time section 7 of the rules and regulations of the land department of June 6, 1905, were in force and the latter after section 7 had been superseded by section 6 of the rules and regulations of January 19, 1909.

In view of what we have said in Mc-

Laren v. Fleischer, this difference in the time of receipt of notice is immaterial, and therefore, upon the authority of that case, the demurrer herein is sustained.

Judgment affirmed.

181 Cal. 631

PERCIVAL v. NATIONAL DRAMA CORPORATION. (L. A. 5214.)

(Supreme Court of California. Dec. 5, 1919.)

1. MASTER AND SERVANT ⟹80(11)—RECOVERY IN ACTIONS FOR COMPENSATION.

In the absence of proof of a discharge and that it was wrongful, an employé is entitled to recover only the amount of salary due him at the time the action was brought, and not his full salary for the entire term of his contract of employment.

2. PRINCIPAL AND AGENT ⟹102(1)—AUTHORITY OF AGENT TO DISCHARGE EMPLOYÉ.

One left by a film company in charge of its properties and the adjustment of disputes regarding a lease, the company having decided not to produce films and having removed its offices to New York, did not have any authority, real or ostensible, to discharge an employé under contract with the company, or to make any admissions binding on the company as to its intentions on that subject, although he paid the employé's salary for some time.

3. MASTER AND SERVANT ⟹40(3)—LETTER NO EVIDENCE OF DISCHARGE OF EMPLOYÉ.

A letter by a master to plaintiff employé reciting that several officers of the master had resigned, and were receiving no salary, and that the master was not going to start up in business at all, but was going out of business and had no further use for the employé, and offering the employé a certain amount of money if he would release the master from the contract, concluding with the statement that, if the employé did not accept the offer, the master would pay him his salary as per contract, did not constitute any evidence of discharge of the employé.

4. ACTION ⟹65—RIGHTS DEPENDENT ON CONDITIONS AT COMMENCEMENT OF ACTION.

In an action by a servant for compensation based on an alleged wrongful discharge, the rights of the parties must be judged by the conditions existing at the time that the action was begun.

5. MASTER AND SERVANT ⟹40(3) — FAILURE TO PAY EMPLOYÉ NOT EVIDENCE OF DISCHARGE.

Mere failure of master to pay compensation is not sufficient evidence on which to base a finding that an employé was discharged.

6. MASTER AND SERVANT ⟹31 — NO DISCHARGE OF EMPLOYÉ EFFECTED BY UNDISCLOSED INTENTION.

A discharge of a servant cannot be effected by a secret undisclosed intention on the part of the master, but must be done by some act or word communicated to the servant.

7. MASTER AND SERVANT ⟹31—DISCHARGE OF SERVANT.

Any words or acts which show a clear intention on the part of a master to dispense with a servant's services, and which are equivalent to a declaration to the servant that his services will be no longer required or accepted, are sufficient to constitute a discharge of the servant.

8. MASTER AND SERVANT ⟹68 — EFFECT OF FAILURE TO PAY EMPLOYÉ.

Failure or refusal of a master to pay salary merely gives a servant the option of quitting his employment and the right to sue for the salary then due and unpaid, or of continuing in the service with the corresponding right to require and enforce payment of the salary as it accrues.

9. MASTER AND SERVANT ⟹31—NO DISCHARGE OF EMPLOYÉ SHOWN.

Refusal to pay a servant his salary, accompanied by a refusal to permit the servant to perform duties, does not show a discharge of the servant, especially where the servant was employed under a contract assigning him no specific duties, but binding him to render only such services as should be required of him.

10. MASTER AND SERVANT ⟹31—CLOSING OF PLACE OF BUSINESS NOT DISCHARGE OF SERVANT.

The mere closing up of the employer's place of business does not amount to the discharge of an employé, as there must be some affirmative act or declaration in addition manifesting a discharge.

11. MASTER AND SERVANT ⟹31—FAILURE TO ANSWER TELEGRAM NOT DISCHARGE OF EMPLOYÉ.

Failure of master to pay compensation due employé and failure to answer a telegram of the servant asking him as to whether or not he was discharged did not show a discharge of the servant.

Department 1.

Appeal from Superior Court, Los Angeles County; E. P. Shortall, Judge.

Action by George H. Percival against the National Drama Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

G. C. De Garmo, of Los Angeles, for respondent.

SHAW, J. The complaint sets forth a cause of action based on a written contract dated April 21, 1916, whereby the defendant engaged the plaintiff to render to it "such services as may be required of him" from April 21, 1916, to September 1, 1917. Plaintiff also agreed to give his exclusive services to the defendant and that he would not "render services at any other place or to any other firm in the United States or Can-

ada from the date of this contract until it is closed, except under the management" of the defendant. It was also agreed that the defendant should have the right, if it so desired, to have the plaintiff work for other firms or corporations, but only in the capacity of art director. The nature of the services to be rendered to defendant was not described in the contract. Plaintiff's compensation was to be $50 per week until September 1, 1916, and thereafter $60 per week. It is alleged that the plaintiff entered into the service of the defendant and continued therein until September 30, 1916, and that the defendant then, without cause or justification, wrongfully discharged the plaintiff, and ever since has refused to permit plaintiff to perform services under the contract. Damages were demanded for the full balance unpaid that would have become due him under the contract up to the end of the term specified. The answer denied that the defendant had discharged the plaintiff. The court made findings to the effect that the defendant wrongfully discharged the plaintiff as alleged in the complaint and gave judgment for the full amount demanded. In support of the appeal the defendant contends that the finding that there was a discharge is not supported by the evidence.

[1] Plaintiff's action was begun on October 20, 1916, less than three weeks after the alleged discharge and more than ten months before the expiration of the contract. In the absence of proof of a discharge and that it was wrongful, plaintiff would be entitled to recover only the amount of salary due him at the time the action was brought instead of his full salary for the entire term. Winsor v. Silica Brick Co., 31 Cal. App. 89, 159 Pac. 877.

The evidence shows that the defendant's business was the production of photoplays. At the time the present contract was made defendant was not actively engaged in production, but expected to be engaged therein. In fact, it never did resume such production, but went out of business. It was a New York corporation. Its office was in New York City, but its producing plant was at Los Angeles, and it had an office at the plant, at which the principal officers were stationed during the time prior to the making of the contract when it was engaged in production. The contract was made in Los Angeles. Thomas Dixon, director general of the defendant, was the only officer of the corporation who had authority to hire and discharge employés. Plaintiff's contract was signed in defendant's behalf by W. C. Burns, its treasurer, but he acted under specific instructions from Dixon, who had left Los Angeles for New York just before the contract was signed. About July 13, 1916, defendant rented its plant to the Fox Film Corporation and removed its officers and headquarters to New York, leaving at Los Angeles some of its property and retaining an office at the plant, which was occupied by Jordan Dixon, son of Thomas Dixon, who was left behind by defendant as custodian of the property and paymaster of the plaintiff and one or two other employés of defendant who remained at Los Angeles.

Plaintiff, up to this time, had taken an inventory of defendant's property, which occupied him for a part of the time for about two weeks, and was the only service defendant had required of him. After defendant removed to New York plaintiff was not called on to render any further services, but continued to report to defendant's office in Los Angeles for duty and was regularly paid his weekly salary by Jordan Dixon, up to and including September 30, 1916. No further payments were made. The last six or seven installments of salary paid to the plaintiff were advanced by Jordan Dixon out of his own funds. Said Dixon was notified by the defendant that after September 30, 1916, any further payments made by him on its account, without its authority, would be on his own responsibility, but this was not communicated to plaintiff.

For proof of a discharge plaintiff relies on testimony of certain conversations had with Jordan Dixon, on evidence of efforts of the defendant to obtain a rescission of the contract, of the defendant's failure to pay his salary, of its lease of its plant to the Fox Film Corporation, and of its failure to answer a certain telegram sent by the plaintiff.

When Jordan Dixon paid plaintiff his salary for September 30, 1916, he told plaintiff he had no more money. Plaintiff then said: "Won't I get my money next week?" To which Jordan Dixon replied: "I don't think so, unless they answer some of my communications, and they have not been answering them." On October 7, 1916, another weekly payment of salary became due, and it was not paid. Plaintiff then asked Jordan Dixon what the intentions of the defendant were about paying plaintiff any more salary, to which Dixon replied that he did not know, but thought they were of the worst. The plaintiff then said: "What will I do; will I sue for my money?" Dixon answered: "I guess you might as well." On or soon after September 30th Dixon told the plaintiff, in response to the plaintiff's request for information whether he was to consider himself discharged, that he, Jordan Dixon, had no authority to pay the plaintiff or to dismiss him or anything else.

[2] The evidence shows that this statement of Jordan Dixon as to his want of authority was correct, except, perhaps, as to the matter of payment. Defendant's pay rolls and testimony of several of its officers show that authority to employ and dis-

charge employés was vested in Thomas Dixon, director general, and that Jordan Dixon's authority, such as he had, was conferred on him by Thomas Dixon. The latter testified that he authorized Jordan Dixon to serve as custodian of defendant's property and as paymaster of its employés, but gave him no authority to employ or discharge any one, and instructed him to report all matters of importance to New York for decision. The plaintiff's evidence on this point goes no further than to show that Jordan Dixon took charge of the adjustment of disputes regarding the lease and had something to do with the exhibition of defendant's picture when it was in Los Angeles, and that he paid plaintiff's salary until September 30, 1916. The defendant did not, by directing or permitting Jordan Dixon to exercise these powers, confer upon him any authority, real or ostensible, to discharge the plaintiff, or to make any admissions binding on the defendant as to its intentions on that subject. I view of this lack of authority in Jordan Dixon, of which plaintiff was informed as aforesaid, the various statements made by said Dixon to plaintiff do not afford any support for the finding that the plaintiff was discharged. Furthermore, even if he had authority to discharge the plaintiff, his statements did not purport to amount to a discharge. They were mere expressions of his views as to defendant's intention, given in response to plaintiff's inquiries, and not a declaration or consummation of that intention. The plaintiff's question as to suing for his money did not necessarily mean anything more than a suit for the salary then due, and the answer made to it, even if made with authority, would amount to nothing more than a refusal or neglect to pay what was due.

[3] In regard to the matter of a release from the contract, the plaintiff testified that Burns, the defendant's treasurer, before he left for New York, which happened on July 13th, asked the plaintiff if he was going to hold the defendant to the contract and gave the plaintiff to understand that he would not relish the idea of paying plaintiff the salary. Late in September Jordan Dixon showed plaintiff a letter from the defendant's New York office, which, after saying, "Show this to Mr. Percival," went on to state that several officers of the defendant had resigned and were receiving no salary, and that defendant was not going to start up at all, but was going out of business and had no further use for an art director, and then offered plaintiff $200 and his fare to New York if he would release defendant from the contract, concluding with the statement that, if the plaintiff did not accept the offer, the defendant would pay him his salary as per contract. Upon this plaintiff told Jordan Dixon that he would accept his salary according to the contract. This was the last communication had from any one authorized to speak for the defendant in the matter. These negotiations for a rescission, especially in view of the final conclusion just stated, cannot be construed as any evidence of a discharge. Pinet v. Montague, 103 Mich. 521, 61 N. W. 876; 1 Labatt on Master and Servant (2d Ed.) vol. 1, p. 586. They tend to show that there was no discharge; for the letter unequivocally declared defendant's intention to comply with the contract, and the plaintiff accepted that proposition.

[4-8] The nonpayment of salary shown does not amount to a discharge. It appears that when he brought this suit only two weekly installments thereof were due and unpaid, and that no statement of the reasons for such nonpayment, or of the intention of the defendant in that behalf, had been made to the plaintiff by any one authorized to act for the defendant. Thomas Dixon, general director, testified that before leaving Los Angeles he had ordered the suspension of plaintiff's salary because of failure to perform certain duties which he said had been assigned to the plaintiff, but further that "we have never dismissed him from our service, simply suspended payment of his salary because of the failure to perform duties assigned to him." Plaintiff denied that the duties mentioned had been assigned to him. The testimony of Thomas Dixon therefore amounts only to the statement that the defendant had suspended payment of plaintiff's salary, but had not dismissed him from its service. He further stated that, owing to his neglect of duty aforesaid, he felt under no obligation to continue to pay the salary. This testimony is not sufficient to warrant the finding that plaintiff was thereby discharged. Possibly a refusal to pay a servant's salary, if declared to the servant by the master, and based on an asserted reason that is false, would be sufficient evidence to justify an inference that there had been a discharge. But that question does not arise here. The rights of the parties must be judged by the conditions existing at the time the action was begun. Neither Thomas Dixon's reasons for suspending the plaintiff's salary nor his feeling that he was under no obligation to pay the plaintiff was communicated to the plaintiff, nor does it appear that the defendant took any action on account of these reasons or this feeling, except to suspend payment. A discharge cannot be effected by a secret, undisclosed intention on the part of the master. It must be done, by some word or act communicated to the servant. "No set form of words is necessary; but any words or acts which show a clear intention on the part of the master to dispense with the servant's services, and which are equivalent to a dec-

laration to the servant that his services will be no longer accepted, are sufficient." 26 Cyc. 987. In this case nothing was communicated to the plaintiff beyond the bare fact that his salary for two weeks was unpaid. No authority is cited by plaintiff, and we have found none, that this fact alone amounts to a discharge. On the contrary, the authorities declare that mere failure of the master to pay wages to the servant does not amount to a discharge. 1 Labatt on Master and Servant (2d Ed.) p. 590; 20 Am. & Eng. Ency. of Law, 26; Wheaton v. Higgins (Sup.) 90 N. Y. Supp. 1041; Barnett v. Cohen (Sup.) 110 N. Y. Supp. 835. Such failure or refusal to pay merely gives the servant the option of quitting his employment and the right to sue for the salary then due and unpaid, or of continuing in the service, with the corresponding right to require and enforce payment of the salary as it accrues.

[9] Even when the refusal to pay is accompanied by a refusal to permit the servant to perform the duties it has been held that no discharge was shown. Stone v. Bancroft, 139 Cal. 83, 70 Pac. 1017, 72 Pac. 717. Stone v. Bancroft, 112 Cal. 657, 44 Pac. 1069; Winsor v. Silica Brick Co., supra. The evidence here does not show that the defendant refused to permit the plaintiff to render any services. The most that can be said of it is that defendant did not require any services of plaintiff. This fact, unless accompanied by some affirmative act indicating a discharge, is not sufficient proof thereof. Winsor v. Silica Brick Co., supra; Berg v. Carroll (Com. Pl.) 9 N. Y. Supp. 511. Under the conditions of this contract it is entitled to no weight at all. The contract assigned no specific duties to plaintiff and bound him to render only such services as should be required of him. It imposed on the defendant no obligation to provide for the rendition of any service by the plaintiff. According to the plaintiff's testimony, the defendant had nothing for him to do, either when the contract was made, or thereafter, except the trifling matter of making an inventory of its property, as above stated. The terms of the contract as a whole, and the attending circumstances, indicate that it was not expected that the plaintiff would be continuously engaged in service, and that his salary was to go on just the same.

[10] Plaintiff lays some stress in his argument on the fact that defendant closed up its plant at Los Angeles and went out of business. But this occurred a long time before the alleged discharge. Defendant was practically out of business when the contract was made, and plaintiff undoubtedly entered into it knowing that defendant would have little, if anything, for him to do unless and until it should resume production. These circumstances show that the defendant had a motive for discharging the plaintiff; but proof of motive cannot take the place of substantive proof of the act which is to be accomplished. The mere closing up of the employer's place of business does not amount to the discharge of an employé. There must be some affirmative act or declaration in addition, manifesting such discharge. Webster v. Wade, 19 Cal. 291, 79 Am. Dec. 218.

[11] On October 11, 1916, after defendant had defaulted in payment of one week's salary to plaintiff, he sent a telegram, addressed to the defendant in New York, as follows:

"Oct. 11, 1916.

"National Drama Corporation, 1480 Broadway, New York City: My salary due Saturday October 7th not paid. Jordan Dixon states nothing further to be paid me. Am I discharged and what are your intentions as to paying my wages now due and to become due? I am at your services. Wire fully. Saratoga Hotel, Los Angeles. G. H. Percival."

This telegram was not prepaid by plaintiff, and when it reached the defendant's New York office the defendant learned from the telegraph company that it was a telegram signed by the plaintiff, and thereupon it declined to receive or pay for it and returned it to the telegraph company unopened. The next day the plaintiff was notified of this refusal, and thereupon paid the charges on the telegram. He never received any answer to it. The defendant's witnesses denied that defendant had received the telegram or that it was read by the persons in the office. There is no evidence to the contrary, unless a redelivery of the telegram can be inferred from the plaintiff's payment of the charges. No evidence was given that it was the custom of the telegraph company to make a redelivery in such a case. It is not necessary to determine whether the court will take judicial notice of such custom so that the inference would arise that the ordinary course of business had been followed. Code Civ. Proc. § 1963, subd. 20. Even if the telegram had been delivered and read, the mere failure of the defendant to answer could not be construed as a discharge of the plaintiff.

Plaintiff was asking for information as to whether he was discharged and, as he received no answer, he was left with no more information than he had before, but no further effect can be given to the defendant's silence on the subject.

No other evidence of the discharge is presented by the record, and we are therefore of the opinion that the court erred in finding that the plaintiff was discharged. As a reversal is necessary for this reason, the other points presented regarding the insuf-

ficiency of the evidence need not be considered.

The judgment is reversed.

We concur: OLNEY, J.; LAWLOR, J.

(181 Cal. 652)

WILLETT & BURR v. ALPERT et al. (two cases). (S. F. 8630, 8631.)

(Supreme Court of California. Dec. 8, 1919. Rehearing Denied Jan. 5, 1920.)

1. ATTACHMENT ⟸5—WRIT WILL NOT LIE IN ACTION BY BUYER FOR SELLERS' FAILURE TO DELIVER FULL QUANTITY.

Action by the buyer of personalty against the sellers for damages from failure to deliver the full contract quantity, delivery of part having been made, and the buyer having paid the full price, is not such that attachment will lie under Code Civ. Proc. § 537, subd. 1, and section 538, subd. 1, there being no express contract for direct payment of the money, and no implied contract, while such an action will not be permitted in such case where there is an express contract to do something other than pay money, and damages are sought because of failure.

2. APPEAL AND ERROR ⟸451—APPEAL AS TO ONE DEFENDANT DOES NOT PRECLUDE HEARING OF MOTION OF CODEFENDANT.

Though plaintiff took and perfected appeal from order dissolving attachment as to one defendant, the court still had jurisdiction to entertain the motion of another defendant to dissolve the writ as to him.

3. ATTACHMENT ⟸238—MOTION TO DISSOLVE BY EACH DEFENDANT.

Each defendant can move to discharge an attachment irregularly or improperly issued as to him.

4. ATTACHMENT ⟸246—AFFIDAVIT OF MERITS SUPPORTING MOTION TO DISSOLVE.

Where a defendant, in support of his motion to dissolve attachment as to him, filed affidavit in which he set forth that he was a resident of the state, and that the money attached belonged to him, there was a sufficient affidavit of merits, since, in view of Code Civ. Proc. § 557, the motion might have been made without any affidavit.

5. ATTACHMENT ⟸241 — GENERAL APPEARANCE NOT NECESSARY TO MOTION TO DISSOLVE.

Under Code Civ. Proc. § 556, despite section 554, general appearance is not necessary before defendant can make his motion to dissolve attachment.

6. ATTACHMENT ⟸244 — SUFFICIENT NOTICE OF MOTION TO DISSOLVE.

Notice of motion to dissolve attachment on the ground it was improperly issued, in that the alleged cause of action set forth in the complaint and affidavit in support of the attachment was insufficient to bring the alleged claim sued on within Code Civ. Proc. §§ 537, 538, and on the ground the writ was irregularly issued, in that the claim was not for an indebtedness on a contract, express or implied, for the direct payment of money, was sufficient.

7. APPEAL AND ERROR ⟸854(2)—ORDER DISSOLVING ATTACHMENT SUSTAINABLE ON GROUND NOT ALLEGED.

If order dissolving attachment can be upheld on any ground alleged, appellate court will not interfere, so that it cannot be said the trial court erred in granting motion to dissolve attachment which recited it was irregularly and improperly issued, though attaching plaintiff contends there was no irregularity in issuance of writ.

8. APPEAL AND ERROR ⟸190(1) — RESERVATION OF GROUNDS OF OBJECTION TO DISSOLUTION OF ATTACHMENT.

The objection that notice of motion to dissolve attachment was not filed in proper time, in that an order provided that service should be made on or before September 15th, while the moving papers and an order shortening time were not filed until September 17th, should have been made in the trial court in the first instance.

Shaw, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco, George A. Sturtevant, Judge.

Actions by Willett & Burr, a corporation, against D. Alpert, Milton Brownstone, and S. Gordon. From orders discharging writ of attachment as to defendants Alpert and Gordon, plaintiff appeals. Orders affirmed.

R. H. Countryman, of San Francisco, for appellant.

F. W. Nightingill, of San Francisco, for respondent Alpert.

A. S. Newburgh, of San Francisco, for other respondents.

LAWLOR, J. Under stipulations two separate appeals from two orders, one discharging an attachment as to the defendant Alpert, the other discharging the writ in the same action as to defendant Gordon, are considered together.

The plaintiff corporation brought an action to recover damages against the defendants, Alpert, Brownstone, and Gordon, in the total sum of $6,562.50. At the time of filing the complaint the plaintiff also filed an undertaking on attachment. The affidavit is in the usual form, and alleges that the plaintiff is a corporation and that each of the defendants is indebted to the plaintiff in the sum of $6,562.50 upon an express contract for the direct payment of money. A writ of attachment was issued in regular form, and a garnishment was served on the Bank of Italy in San Francisco, covering the funds of Alpert and Gordon. On September 6, 1917, defendant Alpert served and

filed a motion to discharge the writ of attachment, in support of which he filed an affidavit. The motion was made on the grounds: First, that the complaint does not state facts sufficient to constitute a cause of action; second, that the writ of attachment was improperly issued, in that the alleged cause of action does not come within the provisions of sections 537 and 538 of the Code of Civil Procedure; third, that the writ of attachment was irregularly issued, in that the claim sued upon "was not an indebtedness due from defendant to plaintiff upon a contract, express or implied, for the direct payment of money, but that on the contrary, said alleged claim set forth in plaintiff's complaint herein is for an alleged breach of contract upon a claim for unliquidated damages."

On September 11, 1917, the motion of defendant Alpert, after hearing, at which counsel for defendant Gordon appeared as amicus curiæ and argued in favor of the motion, was granted, and the court made an order discharging the writ as to all of the defendants; the name D. Alpert, however, appearing in parentheses following the word "defendants." Counsel for defendant Gordon at this time reserved the right to make a separate motion to discharge the writ as to defendant Gordon. On the following day, September 12, 1917, the plaintiff perfected its appeal from the order so made. Thereafter defendant Gordon appeared specially for the purpose of making a motion to discharge the writ, and on September 18, 1917, moved to have the attachment discharged on the grounds:

"(1) That said writ of attachment was irregularly and improperly issued." (2) That the writ was not issued in accordance with the provisions of sections 537 and 538 of the Code of Civil Procedure. (3) That the writ was not issued in an action based upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state. (4) That the cause of action was not upon a contract, express or implied, against the defendant, or defendants, not residing in this state, but, on the contrary, against the defendant or defendants residing in the state and residents thereof. (5) That the action is for damages for alleged breach of contract, and that the damages are unliquidated, "and cannot be ascertained with reasonable certainty from an inspection of the complaint, or the affidavit upon which said alleged illegal attachment is based. (6) That the affidavit on attachment is insufficient for any and all the grounds heretofore shown and alleged."

Plaintiff made preliminary objections to the hearing of the motion of defendant Gordon on the ground that the notice of motion had not been filed within the time allowed by law, and on the further ground that the trial court had no jurisdiction to hear the motion:

"For the reason that the attachment had been discharged, and an appeal taken and perfected, and the superior court had no further jurisdiction in the matter pending the determination of said appeal, and on the further ground that defendant Gordon had not filed an affidavit of merits, and on the further ground that the notice of motion of defendant Gordon was insufficient as he gave and made only a special appearance and not a general appearance, and on the further ground that the notice of motion of defendant Gordon was stated in the conjunctive form, and that all of the conjunctive grounds must exist or the motion must be denied."

On October 10, 1917, the motion was granted and an order made discharging the attachment as to the defendant Gordon. From this order plaintiff has also taken an appeal.

The essential facts appearing in the complaint are these: The Pacific Coast Redwood Company, on July 12, 1916, for $5,000, sold to one Baker "two locomotives, two hoists, together with all railroad iron, cars, railroad equipment, and all machinery and iron in and about the mill of the party of the first part, now situate on land owned by the party of the first part, along and near the Navarro river, Mendocino county." This contract was, on August 4, 1916, assigned by Baker to Alpert, defendant and respondent herein. Alpert shortly thereafter entered into contracts with Dillingham and Linn and others for the delivery of the rails at Albion, "except rails that were buried," undertaking to pay them a certain price for their services and assuming other obligations. On January 28, 1917, Alpert, with Brownstone and Gordon, his codefendants, sold to Lerch and Dimmick for $8,000 "all that certain personal property located in and upon the lands of the Pacific Coast Redwood Company at Navarro river, * * * consisting of one locomotive, two donkey engines, eleven flue boilers, also all pipe and other miscellaneous equipment and scrap iron, also at least six hundred tons rails and fittings and in addition to the foregoing approximately one hundred ton rails now at Albion"; the buyers agreeing to assume the obligations of the contracts with Dillingham and Linn and others for the delivery of the material at Albion. On April 30, 1917, after $4,000 of the $8,000 purchase price had been paid to Alpert and his associates, the plaintiff corporation purchased from Lerch and Dimmick, for $6,000, the material they bought from the defendants, assumed the payment to Alpert and his associates of $4,000, the balance due on the $8,000 purchase price, and assumed the obligations of Lerch and Dimmick under the contracts for hauling, releasing them from all warranties except as to the payment of the first $4,000, and as to the genuineness of signatures, in consideration of which Lerch and Dimmick assigned to the plaintiff corporation their

interest in the contract, excepting from the operation of the assignment one hundred tons of rails at Albion. Subsequently the plaintiff corporation made the final payment of $4,000 to Alpert, Brownstone and Gordon.

It is alleged in the complaint that the defendant delivered only 425 tons, instead of 600 tons, of rails. It is further alleged that plaintiff, by reason of the failure of the defendants to deliver the balance of 175 tons of rails, has been damaged in the sum of $6,562.50. The affidavit of the plaintiff's president for attachment contains averments that the defendants are indebted to the plaintiff in the sum of $6,562.50 "over and above all legal set-offs or counterclaims upon an express contract for the direct payment of money, to wit, a written contract to sell and deliver certain personal property, to wit, 600 tons of rails, the price of which has been fully paid to defendants, but defendants only delivered 425 tons of said rails, more or less, to the damage of plaintiff in said sum of $6,562.50."

Two questions are presented by the appeals. First, is the case one in which the character of the action is such that attachment will lie under subdivision 1 of section 537 and subdivision 1 of section 538 of the Code of Civil Procedure? and, second, were the defendants entitled to be heard on their respective motions to dissolve the attachment?

[1] 1. As to the character of the action, it is simply one brought by the vendee in a contract for the sale of personalty against the vendors to recover damages for a failure of the vendors to deliver the full quantity of property claimed to be called for by the contract, a delivery of a part of the quantity having been made, and the vendee having paid the full purchase price. There was no entire failure of consideration so as to entitle the vendee to recover the purchase price paid on that ground, nor was there any attempt to rescind for a partial failure so that the vendee could recover the purchase price paid on that ground, and the action in fact is not brought for a recovery of the purchase price, or any part thereof, but is strictly for damages for a breach of contract.

There is much discussion in the briefs as to whether the damages sought are liquidated or unliquidated; the appellant claiming that they are liquidated and that because of that fact an attachment will lie. In support of this are cited Donnelly v. Strueven, 63 Cal. 182; Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718; Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Hamburger v. Halperm, 28 Cal. App. 317, 152 Pac. 61. But whether the damages sought be liquidated or unliquidated is not determinative. The determinative question is whether the action is within the statutory requirement that it be "upon a contract, express or implied, for the direct payment of money," and in all of the cases just mentioned it will be found upon examination that there was either an express contract for the direct payment of money, or else a similar contract implied in fact or as a matter of law in the manner hereinafter mentioned. In not one of them was the action one for the recovery of damages for the breach of a contract other than for the direct payment of money.

The statute is explicit. It permits of an attachment against residents of the state (and the defendants in the present case are such residents) only, as we have said, "in an action upon a contract, express or implied, for the direct payment of money. * * *" Subdivision 1, § 537, Code Civ. Proc. It is obvious that the contract in this case, so far as the defendants are concerned is not an express contract for the direct payment of money. The contract was not one by which, according to its terms, the defendants were to pay money. They were to deliver certain personal property, including a certain quantity of rails, and the action is one for damages for their alleged failure to make a complete delivery.

If an attachment will lie, it must be because there was an implied contract on the part of the defendants to pay money, to wit, the value of the rails contracted for, but not delivered. The position of appellant's counsel is apparently that there is such an implied contract in this case. He states his position thus:

"If plaintiff had sued under a common count that it had bought and paid for 175 tons of rail, that the rail had not been delivered, that the rail was of the value of $6,562.50, the complaint would have stated a cause of action."

Now, it is true that, where a common count will lie, the law implies, as a fiction which cannot be controverted, a promise or contract to pay the amount recoverable in such an action, and that some of our decisions go so far as to sustain the issuing of an attachment in such a case upon the strength of the promise or contract so implied, even though there was in fact no such promise or contract. But, on the other hand, no such promise or contract will be implied unless a common count will lie. The implication is created solely to sustain the common count. It results that, if a common count will not lie, no promise will be implied by law, unless there was one in fact, which is not the case here. The plaintiff's right to an attachment in the present case must therefore depend upon whether or not it could have brought the present action in the form of a common count. Plaintiff's counsel, in the statement just quoted, assumes

that it could; but the truth is that it could not, and this is determinative of the plaintiff's right to an attachment.

The action, as we have said, is one to recover damages for a failure on the part of the defendants to execute completely their contract to deliver, along with other things, a certain quantity of rails, and it is well-nigh elementary that a common count will not lie to recover damages for the breach of an unexecuted contract, where the obligation breached is something other than the payment of money. The rule is thus stated in 5 Corpus Juris, pp. 1386–1388, with the citation of a large number of authorities (the italics are ours):

"3. Existence of Express Contract as Affecting Right to Maintain General Assumpsit on Implied Contract. (a) General Rule. It is a well settled rule that when an express simple contract is open and *unexecuted*, and plaintiff proceeds for a breach of it, he must declare specially. Indebitatus assumpsit will not lie. * * *

"(b) Limitations and Exceptions to Rule—(1) Where Contract Has Been Fully Performed by Plaintiff. (a) Defendant's Obligation to be Settled by Payment of Money. Where an express contract, not under seal, has been fully performed on plaintiff's part, *and nothing remains to be done under it but the payment of money by defendant*, which is nothing more than the law would imply against him, plaintiff may declare specially on the original contract, or generally in indebitatus assumpsit at his election. * * *

"(b) Defendant's Obligation to be Settled Otherwise Than by Payment of Money. *If the agreement is to be carried out by defendant in some way other than by the payment of money, the general rule is that it must be declared on specially.* * * *"

The rule so stated is the rule in this state. It is expressed in almost identical language in Castagnino v. Balletta, 82 Cal. 250, at page 257, 23 Pac. 127. To the same effect are O'Connor v. Dingley, 26 Cal. 11; Barrere v. Somps, 113 Cal. 97, 101, 45 Pac. 177, 572; Roche v. Baldwin, 135 Cal. 522, 525, 65 Pac. 459, 67 Pac. 903.

The rule is enforced so strictly that a common count will not lie, not merely where the defendant's obligation is, as in the present case, to deliver something wholly different from money, but where it differs as slightly from an obligation to pay money as an obligation to deliver a promissory note in a certain amount. The case of O'Connor v. Dingley, just mentioned, was of just that character. The plaintiff and the defendant had entered into a contract whereby the plaintiff was to construct a building for the defendant, and the latter was to pay for it by his note. The plaintiff constructed the building, and the defendant refused to give his note, whereupon the plaintiff brought an action for the amount of the note upon a common count, and brought the action before the time at which the note, if given, would have become due, and therefore at a time when the defendant's obligation was still one to give a note, and not to pay money. The plaintiff recovered judgment in the lower court, and upon appeal this was reversed, on the ground that a common count would not lie in such a case, and that the action had to be upon the special contract. The court said:

"The conclusion of law found by the court would have been upheld under the rules of pleading at common law (though not, in our opinion, by the rules established by our Practice Act), if the part of the contract to be performed by the appellant had consisted merely of the payment of money. But he did not promise to pay in money at the time of the completion of the work. He undertook to execute his note, as specified in the contract, and the ground of the action against him was his failure to execute the note according to the contract, and not his liability for the payment of money upon the completion of the work. It was held in Musser v. Price, 4 East, 147, which was a case in indebitatus assumpsit to recover the price of goods sold and delivered, to be paid for in three months by a bill of two months, that the action would not lie in that form, that the proper ground of the action was the nonperformance of the agreement to pay in a bill of two months, and that the contract was broken by his not giving the bill. See Hoskins v. Duperoy, 9 East, 498; Dutton v. Solomson, 3 Bos. & Pull. 582; Brooks v. White, 1 Bos. & P. N. R. 330; Ward v. Whitney, 8 N. Y. 442; Lutz v. Ely, 3 E. D. Smith [N. Y.] 621; Hanna v. Mills, 21 Wend. [N. Y.] 90 [34 Am. Dec. 216]. In the last case Mr. Chief Justice Bronson says: 'When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired, but he can sue immediately for a breach of the special agreement.' The respondent was entitled to sue at the time he commenced this action, but he should have sued specially for the breach in failing to execute the note according to the contract."

On the question of whether a common count will lie, no distinction is possible between this case of O'Connor v. Dingley and the present.

It may be well to point out the distinction between the present and such cases as Fuel Co. v. Tuck, 53 Cal. 304, cited by appellant, where, upon a failure of consideration, or a breach of contract followed by rescission, the plaintiff sues to recover, not damages, but the money he has paid under the contract. Such an action proceeds upon the theory that the defendant has received money which should be returned by him to the plaintiff and which, therefore, the law implies a promise on his part to return, and the action for its recovery may therefore take the form of indebitatus assumpsit. But where, as in the present case, there is neither an entire failure of consideration nor a rescission of the contract, so as to

entitle the vendee to recover back his money, with the result that he is limited to his remedy of damages, or where there has been an entire failure of consideration and the vendee yet elects not to recover his money, but to recover damages, the action does not proceed upon any theory of the defendant having received money which he should return to plaintiff, and which the law can therefore imply a promise on his part to return, and so indebitatus assumpsit will not lie. If this distinction between actions for the recovery of money paid because of failure of consideration or of rescission resulting from a breach of contract, and actions for damages for a breach of contract be not sound, it would follow that indebitatus assumpsit would lie in every case of a breach of contract. Such is not the law.

To recapitulate, it is plain in the present case that there is no express contract for the direct payment of money; it is also plain that there is no implied contract unless the law creates the fiction of one for the purpose of permitting an action upon a common count; and, finally, it is a well-settled rule that an action upon a common count will not be permitted in such a case as this, where there is an express contract to do something else than pay money and damages are sought because of the failure of the defendant to do that something else. It follows that the present action is not one in which the statute authorizes the issuance of an attachment. To hold otherwise would be simply to wipe out the statute and permit an attachment in every action for damages for a breach of contract, regardless of whether or not the contract be one for the direct payment of money.

[2, 3] 2. Under plaintiff's second contention—that the motions to dissolve the attachment were improperly heard by the trial court—it is urged that the trial court lacked jurisdiction to entertain the motion of respondent Gordon to dissolve the attachment as to him, by reason of the fact that appellant had taken and perfected an appeal from the order dissolving the attachment as to defendant Alpert. There is no merit in this contention. If the order made on the Alpert motion discharged the attachment as to Gordon, the appellant was not injured by the subsequent order. But if the former order simply discharged the attachment as to Alpert, the court still had jurisdiction to entertain the motion of Gordon to dissolve the writ. In one aspect of the case the order would not be reversed because the appellant was not injured; in the other, the contention of the appellant is futile. It is well settled in this state that each defendant can move to discharge an attachment which, as to him, was irregularly or improperly issued. Sparks v. Bell, 137 Cal. 415, 70 Pac. 281; Kennedy v. California Savings Bank, 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163.

[4] Another objection of appellant is that no affidavit of merits accompanied the motion of the defendant Gordon to dissolve the attachment. The record shows that the respondent filed an affidavit in which he set forth that he was a resident of the state of California and that the money attached belonged to him. This, we think, was sufficient. The motion might have been made without any affidavit on his part. Section 557 of the Code of Civil Procedure provides:

"If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made."

[5] Under this same contention the point is made that defendant Gordon's motion should not have been heard for the reason that he appeared specially and not generally. The respondent's motion to dissolve the attachment contains this language:

"The defendant S. Gordon appearing for the purposes of this action and for no other. * * *"

Under the requirements of section 556, Code of Civil Procedure, a general appearance is not necessary before the defendant can make his motion to dissolve the attachment. That section reads:

"The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued."

Section 554, Code of Civil Procedure, relied on by appellant in support of this contention, relates to the release of property under attachment upon the execution of an undertaking, and has therefore no bearing on the point urged.

[6] Appellant contends that the court should not have heard the motion of Alpert because the notice of motion was insufficient. The insufficiency is not pointed out, nor do the cases cited by appellant support the contention. The notice stated that the motion would be made on the ground that the attachment was improperly issued, in that the alleged cause of action set forth in the complaint and in the affidavit in support of the attachment were insufficient to bring the alleged claim sued upon within the provisions of sections 537 and 538 of the Code of Civil Procedure, and, further, that the writ was irregularly issued in that the claim sued upon was not for an indebtedness upon a contract, express or implied, for the direct payment of money. We think the notice of motion was sufficient.

[7] Nor is there any merit in appellant's

contention that the court erred in granting defendant Alpert's motion, which recited that the attachment was irregularly and improperly issued. On this point appellant urges that since the conjunctive form was used it must be made to appear that the issuance of the attachment was both irregular and improper. The appellant does not deny that the attachment was improperly issued. He contends, however, that there was no irregularity in the issuance of the writ, and that, therefore, it was error to have granted the motion. It is too well settled to require citation of authority that if such an order can be upheld upon any ground urged an appellate court will not interfere.

[8] It is urged by appellant that the notice of motion was not filed in proper time. "The motion was noticed for September 18, 1917. An order provided that the service should be made on or before September 15, 1917. The service was made on September 14, 1917, but the moving papers and the order shortening time were not filed until September 17, 1917." It is sufficient to say that this objection should have been made in the trial court in the first instance. It not appearing that this was done, the point will not be considered on appeal.

The orders are affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LENNON, J.; WILBUR, J.

SHAW, J. I dissent. The case comes up upon appeal from an order granting a motion to dissolve the attachment. Upon a decision of such a motion the court does not scrutinize the complaint and judge its sufficiency as rigidly as upon considering an order sustaining a demurrer thereto. "Unless the complaint shows upon its face that the plaintiff has no cause of action with the help of an amendment, the attachment should not be dissolved. If the complaint is defective merely, and can be made good by amendment, the plaintiff should be allowed to amend before the decision of the motion to dissolve; but if the complaint is incurable the attachment must be dissolved." Hathaway v. Davis, 33 Cal. 168.

The complaint in this action shows that the defendant Alpert had sold 600 tons of iron rails and other property to the plaintiffs at the price of $8,000, which the plaintiffs had paid in full, and that the title to the rails passed to the plaintiffs at the time the price was so paid; that the plaintiffs obtained 425 tons of said rails and all of the other property, but that defendant failed to deliver the remaining 175 tons.

When the title passed to the plaintiffs in pursuance of the sale, the defendant became the mere bailee of the plaintiffs with respect to the property sold. His failure to deliver the 175 tons of rails amounted to a conversion thereof. In such a case it seems to be well settled that the bailor may waive the tort shown by the conversion and sue the bailee in assumpsit for the value of the property converted. Hill v. Smith, 32 Vt. 433; Winside State Bank v. Lound, 52 Neb. 469, 72 N. W. 486; Deere v. Lewis, 51 Ill. 254; Davis v. Fish, 1 G. Greene (Iowa) 406, 48 Am. Dec. 387; Lehmann v. Schmidt, 87 Cal. 20, 25 Pac. 161. See, also, 1 Cooley on Torts, 164, note 27. The theory upon which these decisions rest is that the law implies a contract in such a case on the part of the bailee to pay to the owner the value of the goods so converted. The facts stated in the complaint are sufficient to support an action of this character, and consequently they are sufficient to show that the action is, or could be, by a sufficient amendment, based upon an implied contract for the direct payment of money. In such a case an attachment will lie.

If it be contended that the somewhat obscure allegation in the complaint to the effect that, instead of there being 600 tons of rails, there were only 425 tons, should be taken as an allegation that the remaining 175 tons had no existence, then the contract set forth, so far as the 175 tons of rails are concerned, would be a contract for the sale of property which had no existence. It was designated and specified property, and therefore the contract of sale could not be fulfilled by the delivery of other rails procured elsewhere. The rule regarding a contract of sale of property which has not even a potential existence is that it is a void contract. 1 Mechem on Sales, § 199; Strickland v. Turner, 7 Exch. Rep. 217. In that event, inasmuch as the plaintiff paid the price thereof, it necessarily follows that the defendant has received of the plaintiff whatever portion of the price was properly applicable to the 175 tons of rails which had no existence. In other words, the defendant has received from the plaintiff that amount of money for which he has rendered no consideration whatever and a suit in assumpsit for money had and received could be maintained at common law. This would be a suit upon an implied contract for the direct payment of money, in which case an attachment would clearly lie.

It is true that apparently it has been decided in this state that an attachment will no lie where the action is in assumpsit upon the implied contract raised at common law in a case where the defendant had unlawfully received money belonging to the plaintiff. Babcock v. Briggs, 52 Cal. 502. But the decision in that case consists of but two lines, and it is difficult to determine whether it was placed upon the ground that no action on contract would lie in such a case as has just been stated, or whether it was

placed on the ground that the complaint by its averments confined its scope to an action in tort. The statute allows an attachment in all cases of implied contracts for the direct payment of money. The word "direct" is apparently surplusage, for every contract for the payment of money would be a contract for the direct payment of money. The common law has always been in force in this state except as changed by statute. It is to be presumed that the term "implied contract," as used in the attachment law, was intended to include all cases where at common law a contract was implied. If this be not so, great confusion would result. If it is now proposed to limit the application of that section to cases where the contract is one implied from the evidence, or to cases where there is an actual contract for the payment of money, though not expressly stated, and to exclude cases where the contract arises solely by implication of law, the matter should be clearly stated so that it would be generally understood. I do not believe that this was the intent of the statute.

44 Cal. App. 115

HILBORN v. SOALE et al. (Civ. 3039.)

(District Court of Appeal, Second District, Division 2, California. Nov. 4, 1919.)

1. HUSBAND AND WIFE ⊂⊃14(3)—DEED CONSTRUED TO CREATE JOINT TENANCY.

A deed of property to a husband and wife "as joint tenants with the right of survivorship," to have and to hold to the said grantees "and to the survivor or [of] them forever," *held* to create a joint tenancy, and not a joint life estate in the husband and wife and a contingent remainder in fee to the survivor.

2. DEEDS ⊂⊃97—HABENDUM CLAUSE CAN BE RESORTED TO TO LIMIT GRANT.

The habendum clause in a deed, where such intent is made clear, can be resorted to to restrict, limit, or enlarge the estate indicated in the grant.

3. JOINT TENANCY ⊂⊃4—EXECUTION SALE OF INTEREST OF JOINT TENANT RESULTS IN TENANCY IN COMMON.

The execution sale of the interest of one of two joint tenants severs the joint tenancy and leaves the purchaser at the execution sale and the other joint tenant as tenants in common.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Grace A. Hilborn against Carl B. Soale and Wilson H. Soale, her husband. Judgment for plaintiff, and defendants appeal. Affirmed.

S. L. Carpenter, of Los Angeles, for appellants.

Frank L. Muhleman and Jones & Evans, all of Los Angeles, for respondent.

SLOANE, J. The title to the property involved in this action was conveyed to the defendants and appellants, Carl B. Soale and Wilson H. Soale, her husband, by the following deed:

"Grant Deed. Bertha E. Hookway and William R. Hookway, her husband, in consideration of ten dollars to them in hand paid, the receipt of which is hereby acknowledged, do hereby grant to Carl B. Soale and Wilson H. Soale, her husband, as joint tenants *with the right of survivorship*, all that real property situated in the city of Pasadena, county of Los Angeles, state of California, described as follows: Lot twenty-eight (28) of the Bixby tract, as per map recorded in book 14, page 92, miscellaneous records of said county, subject to taxes fiscal year 1908–1909. To have and to hold to the said grantees *and to the survivor or [of] them forever*. Witness their hands this second day of July, 1908. Bertha E. Hookway. William R. Hookway."

Plaintiff claims title to an undivided half of the premises under an execution sale of the interest of Wilson H. Soale, and brought this action for partition between himself and the defendant Carl B. Soale. This appeal is from the interlocutory judgment in plaintiff's favor.

[1, 2] The case turns on the construction of foregoing deed. Respondent claims that the conveyance created a joint tenancy in fee in the two grantees, and appellants contend that the effect of the deed was to create a joint life estate in the husband and wife, and a contingent remainder in fee to the survivor. Appellants' contention is based upon the theory that the words in the deed, italicized herein for the purposes of this case, are effective to prevent the severance of the joint tenancy by execution sale, or voluntary act of either of the parties to the title, and preserve the right of survivorship by creating an independent title in the survivor upon this life estate. Without discussing the question as to whether or not such an estate can be created under the limitations of the California Civil Code, we are satisfied that the language of the instrument, as relied upon by appellants, is not calculated and was not intended to limit or modify the apt language for the creation of a joint tenancy. We see nothing in the words "with the right of survivorship," following the grant to "Carl B. Soale and Wilson H. Soale, her husband, as joint tenants," other than the expressed declaration of the implied incident of right of survivorship which characterizes a joint tenancy; and the italicized words in the habendum clause, "To have and to hold to the said grantees *and to the survivor of them forever*," is in no wise inconsistent with the granting clause. Of course, no question of tenancy by entireties, as between husband and wife, is involved in this case under our statutes; and it is appar-

ent under the granting clause, independent of the language in controversy, that it was the intention of the grantor to create a joint estate. It is not disputed that the habendum clause, where such intent is made clear, can be resorted to to restrict, limit, or enlarge the estate indicated in the grant; but no such purpose is indicated here. In Barnett v. Barnett, 104 Cal. 298, 37 Pac. 1049, and Jacobs v. All Persons, etc., 12 Cal. App. 163, 106 Pac. 896, cited by appellants, the habendum clause under consideration in each instance in expressed terms limited the estate vested in the grantee named to a life interest.

[3] Without reviewing appellants' citations from the courts of other states, we find them all distinguishable from the case at issue here, and for the most part concerned with the construction of deeds in which the habendum clause is in irreconcilable conflict with the granting clause. Such is not the condition here. In Swan v. Walden, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194, in which case the deeds in question more nearly correspond to the deed under consideration here than in any of the foreign cases cited, our Supreme Court held that a conveyance to grantees, husband and wife, "as joint tenants, with fee to the survivor," and another to grantees as husband and wife "during their joint lives," and afterwards to the survivor in fee simple absolute, vested the estate in these grantees in joint tenancy. We reach the same conclusion in this case. The execution sale of the interest of Wilson A. Soale to the plaintiff here severed the joint tenancy and left plaintiff and defendant Carl B. Soale tenants in common, and the land subject to partition between them.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

43 Cal. App. 738

GATES v. KEHLET et al. (Civ. 3080.)

(District Court of Appeal, First District, Division 1, California. Oct. 23, 1919.)

1. APPEAL AND ERROR ⟸907(3)—PRESUMPTION THAT FINDINGS OF FACT ARE SUSTAINED BY THE EVIDENCE.

On appeal based on judgment roll alone involving question whether findings of fact are sufficient to support the judgment, it must be assumed that findings are fully sustained by the evidence.

2. LANDLORD AND TENANT ⟸194(3) — RELEASE OF ORIGINAL LESSEE AFTER SUBLETTING WITH CONSENT OF LESSOR.

Where with consent of lessor lessee assigned lease upon express understanding that he should remain liable for performance by assignee, who afterwards under a like understanding assigned his interest, *held*, that acceptance by lessor of keys from one of assignees in possession upon express understanding that he would attempt to rent premises for benefit of original lessee and the assignees did not relieve original lessee from liability.

3. LANDLORD AND TENANT ⟸208(4)—ORIGINAL LESSEE CANNOT COMPLAIN OF AGREEMENT WITH ASSIGNEE TO RELET PREMISES.

Where under terms of original lease and assignments thereof by original lessee and his assignee both original lessee and his assignee were made liable for whole unpaid portion of rentals under original lease, an agreement by lessor with assignees of original lessee's assignee that lessor would attempt to relet premises for benefit of original lessee and all the assignees was for the benefit of original lessee, and he cannot complain thereof.

4. PLEADING ⟸48—DENOMINATING AMOUNT CLAIMED AS RENT INSTEAD OF DAMAGES DOES NOT AFFECT RIGHT OF RECOVERY.

Where plaintiff states in complaint the facts upon which he relies for recovery and does not in body of complaint or prayer denominate the amount claimed as either rent or damages, suggestion that complaint is defective because the plaintiff is suing for rent, and not for damages, has no merit, and even if plaintiff had so denominated amount claimed, it would not affect his right of recovery.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by C. W. Gates against Oswald Kehlet and others. From a judgment in favor of plaintiff, defendant L. M. Armstrong appeals. Affirmed.

Stuart M. Salisbury, of Los Angeles, for appellant.

Barstow, Rohe & Jeffers, of Los Angeles, for respondent.

RICHARDS, J. This is an appeal by the defendant Armstrong from a judgment in favor of plaintiff in an action brought to recover a sum of money alleged to be due under the terms of a certain lease and of an alleged agreement on the part of said Armstrong guaranteeing the performance of the terms and conditions of said lease.

This appeal is based upon the judgment roll alone, and the only two questions presented by the appellant are: First, as to whether the findings of fact are sufficient to support the judgment; and, second, as to whether the plaintiff's amended complaint contains facts sufficient to constitute a cause of action.

[1] The following is a summarized statement of the findings of the trial court, which we must assume upon the record before us are fully sustained by the evidence in the case: On the 24th day of September, 1912, the plaintiff and respondent herein, as lessor, and the defendant and appellant Armstrong

herein, as lessee, made and entered into a written lease of certain premises in the city of Los Angeles at a rental of $125 monthly during the first year of the term of said lease, and of $150 per month during the remaining four years of said term, which said term of said lease was to expire on the 30th day of September, 1917. Said defendant Armstrong entered into possession of said premises under said lease. Thereafter, and on the 4th day of December, 1913, the said Armstrong, with the consent of his lessor, assigned all of his interest in said lease to the defendant herein, Oswald Kehlet, upon the express condition that said Armstrong should remain liable to the said lessor for the performance by Kehlet of all the terms and conditions of said lease. Thereafter, and on the 1st day of May 1914, the said defendant Kehlet, with the consent of the original lessor, assigned all of his interest in said lease to the defendants herein Mary E. and Ade Orrill, upon the express condition and agreement that the said defendants Armstrong and Kehlet should and did become and remain guarantors for the performance by the said assignees of Kehlet of all of the terms and conditions of said lease. Thereafter the premises became vacant, and so remained from October, 1914, to May, 1915, during all of which time the defendants had the keys to and possession of said premises. In the month of May, 1915, the defendant Ade Orrill gave the keys of said premises to the plaintiff upon the express understanding and agreement that the plaintiff would make what effort he could to rent said premises, but only on behalf of and for the benefit of the defendants herein, and that neither they nor any of them would thereby be relieved from any liability whatever, but that, in case the said premises were relet for any sum less than the stipulated rental thereof under the terms of said lease and of said assignments thereof, the lessor would expect the defendants to pay him the difference, that the plaintiff in the exercise of reasonable diligence did succeed on or about June 1, 1915, in obtaining a tenant for said premises for a stipulated rental of $75 per month up to December 31, 1915, and thereafter again rented said premises for the period between January 1, 1916, and December 31, 1916, at a stipulated rental of $90 per month, but that said premises then became vacant, and so remained between January 1, 1917, and September 30, 1917, the date of the termination of the original lease of said premises. That after crediting the amounts so received from the succeeding rentals of said premises through the efforts of said plaintiff upon the total sums due and payable under the terms of said original lease there still remained due the sum of $2,325 as rent of said premises, for which sum, together with certain expenses, costs, and counsel fees, the court rendered judgment against each and all of said defendants. From the judgment so rendered the defendant Armstrong prosecutes this appeal.

[2, 3] The said appellant's first contention is that the findings do not sustain said judgment; his claim being that the surrender of said premises by the defendants Orrill to said plaintiff and his acceptance of the same and the subsequent reletting of the premises by him terminated the original lease, and thereby relieved the said appellant Armstrong of any further liability for the rent thereof under his agreement and guaranty. We can perceive no merit in this contention in view of the facts as found by the court that the retaking of the possession of said premises on the part of the plaintiff as the original lessor thereof was under an express agreement that he was doing so for the benefit of the defendants, and that his act in so doing and the reletting of the premises by him was not in any manner to relieve the lessees or any of them of liability for the rent of said premises as provided in said lease. The burden of the appellant's contention, however, seems to be that this agreement as to the terms and conditions of the plaintiff's retaking of the possession of said premises and attempt to relet the same was made with the defendants Orrill, who were then in possession of the premises, and was not made with the appellant, and that he therefore is not bound thereby. The difficulty about this contention is that under the terms of the original lease and of the assignments thereof by both Armstrong and Kehlet, the appellant Armstrong was made expressly liable for the whole unpaid portion of the rentals due under said original lease, and that he had guaranteed the payment of the same, and that the agreement which the plaintiff made with the Orrills was made for his benefit, and that he was in no wise affected other than advantageously by said agreement, and hence cannot complain of it. The agreement between the plaintiff and the Orrills did not work a termination of the estate created by the terms of said original lease, or of their assignment thereof, but only worked a termination of their possession for their benefit and for the benefit of their two preceding lessees. The authorities cited by the appellant upon this point do not sustain his contention and have no application to a state of facts such as the findings in this case reveal. On the other hand, it has been held by this court that, where a landlord accepts the possession of rented premises from his tenant upon the understanding and agreement that he does so for the latter's benefit and in order to relet the premises on the latter's behalf, he has a right to recover from the tenant and from whoever else has made himself liable therefor the difference between what he has been able, in good faith, to let the property for and the amount agreed to be paid under the terms of the original lease. Baker v. Eilers Music

Co., 26 Cal. App. 371, 146 Pac. 1056. We therefore see no merit in the appellant's first contention.

[4] As to his remaining point, that the plaintiff's amended complaint fails to state a cause of action, it is mainly supported by the argument of counsel for the appellant in support of his first contention, and hence falls with it. The suggestion that the plaintiff's said complaint is defective because the plaintiff is said to be suing for "rent," and not for "damages," has no merit. The plaintiff states in his amended complaint the facts upon which he relies for a recovery, and does not denominate the amount he claims to be due in the body or prayer of said complaint as either rent or damages; and even if he had done so it would not affect his right of recovery of the sum due as either upon the facts set forth in the complaint.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLEY, Judge pro tem.

44 Cal. App. 64

SINGH v. SUPERIOR COURT IN AND FOR GLENN COUNTY et al.

(Civ. 2058.)

(District Court of Appeal, Third District, California. Nov. 3, 1919.)

1. BRIBERY ⟸1(2) — STATUTE PROHIBITING BRIBERY OF "EXECUTIVE OFFICER OF THIS STATE" INCLUDES DISTRICT ATTORNEY.

In view of Pen. Code, § 771, under which the duties of the district attorney are for the state within the territorial limits of the county, and Pol. Code, § 343, designating the district attorney "as a civil executive officer," the district attorney is an "executive officer of this state" within the provisions of Pen. Code, § 67, relating to bribery of public officers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Executive Officer.]

2. STATUTES ⟸181(2)—CONSEQUENCES OF A PARTICULAR CONSTRUCTION MAY BE CONSIDERED.

Where the language of a statute is upon its face ambiguous, or its meaning likewise uncertain or obscure, the consequences of a particular construction or interpretation may be taken into consideration, and where not necessary a penal statute will not be given a meaning which would lead to absurd consequences.

Application by Channan Singh for writ of prohibition to be directed to the Superior Court of the State of California in and for the County of Glenn, and the judge thereof, Hon. William M. Finch, to enjoin proceedings upon an indictment. Application dismissed.

W. T. Belieu, of Willow, and Arthur C. Huston, of Woodland, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondents.

HART, J. The petition asked for a writ of prohibition, restraining and prohibiting respondents from hearing, proceeding with and deciding any matter in relation to a certain indictment returned by the grand jury of Glenn county against petitioner.

The charging part of said indictment reads as follows:

"The said Channan Singh * * * did then and there willfully, unlawfully and feloniously and corruptly, offer and give a bribe, to wit, $500 in currency, lawful money of the United States, to one H. W. McGowan, who was then and there, and on the 6th day of January, 1919, and ever since said time has been and now is, an executive officer of the state of California, to wit, the duly elected, qualified, and acting district attorney of the county of Glenn, state of California, with the intent then and there to willfully, unlawfully, feloniously, and corruptly to influence the act, vote, decision, and opinion of the said H. W. McGowan, as such officer, in respect to the prosecution of a certain action entitled the People of the State of California v. Santa Singh, Mit Singh, and Ishar Singh, on the charge of the crime of assault with a deadly weapon with the intent to commit murder, * * * then and there * * * pending in the superior court of the county of Glenn, state of California, contrary," etc.

[1] The indictment herein assailed is based on section 67 of the Penal Code, which reads:

"Every person who gives or offers any bribe to any executive officer of this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison not less than one nor more than fourteen years, and is disqualified from holding any office in this state."

The contention of the petitioner is that a district attorney is neither an executive officer nor an officer of the state.

Waiving consideration of the question, which, under some of the decisions in this state, might arise here, whether the petitioner has available to him for the relief he seeks by this proceeding a plain and an adequate remedy in the ordinary course of law, the real ground of his objection to the indictment being that that document does not state a public offense under any known law of this state, we will proceed to consider the merits of the contention advanced by him.

It may first be conceded that a district attorney is a county officer in at least a geographic sense—that is to say, that the exercise of his powers as such is limited territorially to the county for which he has been elected. But, considering the nature and

purposes of county governments, he is also in a sense a state officer, or, perhaps it would be more correct to say a part of a political organization which is itself an agent of the state. The authorities are quite uniform upon the proposition that all the powers and functions of a county government organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy. Dillon on Municipal Corporations (5th Ed.) § 35; People v. Sacramento County, 45 Cal. 692; People v. McFadden, 81 Cal. 489, 498, 22 Pac. 851, 15 Am. St. Rep. 66; County of San Mateo v. Coburn, 130 Cal. 636, 63 Pac. 78, 621; Reclamation Dist. No. 1500 v. Superior Court, 171 Cal. 672, 679, 154 Pac. 845; County of Sacramento v. Chambers, 33 Cal. App. 142, 164 Pac. 613; Dillwood v. Riecks, 184 Pac. 35. The more important duties of a district attorney are the prosecution of criminal cases, which are prosecuted, not in the name of the county or the people of the county, but in the name of the people of the state. The Legislature, in section 771 of the Penal Code, seems to have proceeded upon the theory that the district attorney, in exercising his powers as such, acts for the state. That section provides that when an accusation is presented by the grand jury of a county against the district attorney the judge of the superior court in and for the county in which such accusation is presented must, upon the delivery of the accusation to him, "appoint some one to act as prosecuting officer in the matter, or place the accusation in the hands of the district attorney of an adjoining county, and require him to conduct the proceedings." This language is mandatory, and if the judge should elect to order a district attorney of an adjoining county to prosecute the accusation, that officer would be compelled to perform that duty. Hence it is clear that the theory of that provision of section 771 is that, in the performance of the duties imposed upon that officer by law a district attorney acts for the state within the territorial limits of the county for which he was elected; for it is hardly supposable that, if that was not the theory of said provision, the Legislature would have authorized the imposition upon an official in one county the performance of duties appertaining to his office in another county. But this discussion, in view of the conclusion at which we have arrived upon points the decision of which is decisive of this case, may well be regarded as unnecessary or academic.

As above stated, the petitioner contends that a district attorney is not an executive but a judicial officer; hence that officer does not come within the class of officers mentioned in section 67 of the Penal Code, the bribing of or offering to bribe whom is by said section made a public offense. There are some decisions in other jurisdictions which say that a district attorney is a judicial officer. We cannot assent to that proposition, so far as this state is concerned. In the first place, it is to be stated that the Legislature, in general language contained in section 343 of the Political Code, designates a district attorney as a "civil executive officer." In the second place, we remark that we cannot conceive of any duty among those imposed by law on a district attorney which is of a judicial nature, except perhaps the duty of giving legal opinions to other county officers with respect to their official duties, which, strictly speaking, is not judicial, for, when performing such a duty, he does no more than the lawyer engaged in private practice does when advising his clients. The Attorney General of the state is required to advise the several other state executive and administrative officers with regard to their respective duties, but he is also designated by said section 343 of the Political Code as a "civil executive officer."

But it is further insisted that a district attorney is not within the class of officers referred to in section 67 of the Penal Code, because, as is the contention, he is not an "executive officer of this state." Said section, it will be noted, provides that "every person who gives or offers any bribe to *any executive officer of this state*," etc., and the argument is that the language italicized was intended to be understood as being synonymous with the phrase, "state officer." That position cannot, in our opinion, be sustained. We think what the Legislature intended to say in section 67 was that "every person who gives or offers any bribe to any executive officer *in* this state," etc. This construction is strengthened by the consideration that there is no other section in the Penal Code which makes it a crime to give or offer a bribe to an executive officer, either county or state, for the purpose of corruptly influencing his official action than section 67, and we shall not commit ourselves to the belief, in the absence of more persuasive reasons than those which learned counsel have been able to present here, that the Legislature has either intentionally or inadvertently omitted to pass a law authorizing the punishment of a person for corrupting or attempting to corrupt a county executive officer. And if the Legislature had intended to limit the application of section 67 to state officers, it would have been a very easy matter for it to have given apt and unambiguous expression of such intention. It would have undoubtedly said, if such had been its purpose, "any state executive officer," in the place of "any executive officer of this state."

[2] It is a familiar rule of statutory construction that where the language of a statute is, upon its face, ambiguous, or its meaning likewise uncertain or obscure, the consequences of a particular construction or interpretation of such statute may be taken into consideration. If the construction of section

67 of the Penal Code contended for by petitioner were to be adopted, the result would be that no punishment could be inflicted upon a person for giving or offering a bribe to a county executive officer. The language of said section, as is plainly manifest, does not make it clear that the Legislature intended to restrict the operation of the section to state officers. While it may be conceded that, without consideration of the consequences following from such a construction of the section, it might with some show of reason be held that the Legislature intended the section to be so restricted, it can, likewise viewed, reasonably be held to be the legislative intent at the bottom of the section to include within the purview of its provisions any executive officer in this state, whether state, county, or municipal. Under this view of the section, we are not compelled to give to it a meaning which would lead to absurd consequences.

We have carefully examined the very able brief of counsel for petitioner and the authorities cited therein in support of their several contentions here. We have found nothing in the cases or other authorities cited which have tended to lead us from the conclusion herein arrived at.

The alternative writ is discharged, and this proceeding dismissed.

We concur: ELLISON, Presiding Judge, pro tem.: BURNETT, J.

43 Cal. App. 779

In re MAUVAIS' ESTATE.

TEVIS et al. v. FERGUSON.

(Civ. 2962.)

(District Court of Appeal, First District, Division 1, California. Oct. 27, 1919.)

1. WILLS ⇐278—PETITION FOR REVOCATION OF PROBATE BY "PERSONS INTERESTED."

A petition under Code Civ. Proc. § 1327, for the revocation of the probate of a will, alleging that petitioners are son and daughter of deceased, and, together with another named daughter and son, constitute the sole heirs at law of deceased, shows that the petitioners were "persons interested" within the meaning of the statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interest.]

2. WILLS ⇐278—WANT OF INTEREST OF PETITIONERS FOR REVOCATION OF PROBATE MAY BE SHOWN BY ANSWER.

In a contest under Code Civ. Proc. § 1327, by heirs at law to revoke the probate of a will, the right of the petitioners to wage the contest may be challenged by answer creating an issue as to their necessary interest.

3. WILLS ⇐166(11)—UNDUE INFLUENCE NOT SHOWN BY DECLARATION OF DECEDENT.

Statements of a decedent, both prior to and subsequent to the date of a will, that she intended treating all her children alike in the final disposition of her property, are not of themselves sufficient to establish undue influence on the part of a favored child.

4. WILLS ⇐166(7)—OPPORTUNITY AND INTEREST NOT ENOUGH TO SHOW UNDUE INFLUENCE.

Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive so to do, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act.

5. WILLS ⇐166(12)—SUFFICIENCY OF PROOF OF UNDUE INFLUENCE.

While the exercise of undue influence may be shown by indirect evidence, such evidence must do more than raise a suspicion, and must amount to proof of circumstances inconsistent with the claim that the will was the spontaneous act of the alleged testator.

6. WILLS ⇐166(1)—UNDUE INFLUENCE NOT SHOWN.

In a will contest evidence *held* insufficient to sustain a finding that undue influence was exercised.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Clemence Mauvais, deceased. From an order revoking the probate of the will and the accompanying judgment declaring the will to be null and void, Juliette M. Ferguson, individually and as executrix, appeals. Reversed and remanded.

Delphin M. Delmas, of Los Angeles, and Leib & Leib, of San Jose, for appellant.

Harry W. McNutt, of Los Angeles, amicus curiæ.

Oliver Ellsworth, of San Francisco, and James P. Sex, of San Jose, for respondents.

BARDIN, Judge pro tem. This is an appeal from an order revoking the probate of the alleged will of Clemence Mauvais, deceased, and the accompanying judgment declaring said will to be null and void.

Two claims are urged in behalf of the appeal: (1) That the court was without jurisdiction to hear the petition for the revocation of probate of said will; and (2) that the evidence adduced below is insufficient to justify the findings of the jury. These claims will be disposed of in the order stated.

Clemence Mauvais died on August 8 1916, leaving as her sole heirs at law her four children, all of mature age, named Juliette Mauvais Ferguson, the appellant and proponent of the will, Romeo Mauvais and Edith Mauvais Tevis, the respondents and contestants,

and Ernest Mauvais. Mrs. Mauvais left a written instrument dated June 16, 1907, purporting to be her holographic will, by the terms of which she left all her property to her daughter Juliette. On September 22, 1916, the order was made admitting the purported will to probate and appointing Juliette Mauvais Ferguson the executrix thereof; letters testamentary being thereupon issued to her.

Within one year after said order was made the contestants filed their petition containing allegations against the validity of said will and praying that the probate thereof be revoked. A demurrer was interposed against the petition based upon general and special grounds. The demurrer was ordered sustained on September 21, 1917, leave being granted to file an amended petition within ten days. An amended petition was filed September 29, 1917, seven days after the expiration of one year from the date of the order admitting the will in question to probate. The amended petition concededly contains all the essential allegations required by the statute. The appellant has ever since the filing of the amended petition asserted by appropriate pleadings and procedures the claim that the court was without jurisdiction to entertain the proceeding in contest of said will, and that the contestants were barred from procuring the relief sought, for the reason that the statute of limitations applicable to the subject-matter in hand (section 1327, Code Civ. Proc.) precluded the filing of a petition in contest of the will after the expiration of the time limited by the statute, except it be in mere amplification of a petition filed within the prescribed time, and that, since the original petition failed to show that the contestants were persons "interested" within the meaning of the section of the Code stated above, such defect could not be cured by amendment made after the expiration of the statutory period, and that therefore the bar of the statute must prevail.

The first petition contains the following allegation:

> "That your petitioners are son and daughter of said deceased, and that together with said Juliette Ferguson, a daughter, and Ernest Mauvais, a son, constitute and are the sole heirs at law of said deceased."

To this allegation there was added, in the amended petition, the following:

> "That said decedent in said alleged will leaves nothing whatsoever to any of her children except said daughter, Juliette, to whom she bequeaths and devises all her property and estate."

[1] We are of the opinion that the original petition as a pleading showed that the petitioners were persons "interested," within the meaning of the section of the Code referred to. The contention of the appellant to the effect that the court was without jurisdiction to hear the contest or to grant the relief prayed for, is neither in accord with the views of the Supreme Court of this state already expressed upon this subject (Estate of Zollikofer, 167 Cal. 196, 138 Pac. 995; Estate of Land, 166 Cal. 538, 137 Pac. 246; Estate of Benton, 131 Cal. 472, 63 Pac. 775), nor with that of other jurisdictions where similar statutory requirements have been prescribed (40 Cyc. 1242; case note 130 Am. St. Rep. 189; case note L. R. A. 1918A, 448–452).

[2] If for any reason not apparant upon the face of the petition the petitioners were not in fact "interested" within the meaning of the statute notwithstanding their status as heirs at law of the decedent, it would have been proper to challenge the right of the petitioners to wage the contest of decedent's will by answer creating an issue as to the necessary interest of the petitioners, and as was done in Estate of Wickersham, 153 Cal. 603, 96 Pac. 311, and in Estate of Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231.

We pass now to the consideration of the second point urged in behalf of this appeal. The contestants' case is founded upon the theory that the proponent of the will in contest and the sole beneficiary therein named procured such will to be made against the will and wish of the testatrix by the exercise of undue influence, and that therefore it must follow that the paper purporting to be a will is invalid and void. The allegations of the petition having relation to the charge of the exercise of undue influence are substantially as follows: That for some months prior to the execution of the alleged will the health of the decedent was seriously impaired, thus producing a weakened condition of the physical and mental powers of said decedent, which condition existed at the time of the exercise of the testamentary act in question and rendered her easily susceptible to undue and unreasonable influences; that decedent was a woman of strong and easily excited prejudices; that at the time of the execution of said alleged will the proponent made her home with the decedent, was in constant attendance upon her, and assumed charge of her affairs; that by reason of decedent's said impaired mental and physical condition, and of proponent's close association with her, that decedent's will and mind became controlled and directed by proponent who by false statements and prejudices embittered the mind of the decedent against her other children; and that under such circumstances, and while under the domination and control of proponent, and against her own will and wish, she executed the purported will. All these allegations of the petition were controverted by the answer. The findings of the jury were in favor of the contestants.

The will in contest was the second holographic will made by Mrs. Mauvais following

the death of her husband. The record is silent as to the immediate circumstances attending its execution. The preparation of the first will bears close and significant relationship to the execution of the second one. Both wills were practically the same; the difference consisting only in the omission from the second will of the bequest of a watch to Romeo Mauvais and some articles of jewelry of Edith Tevis.

With reference to the preparation and execution of the first will, E. M. Rea, of the Santa Clara county bar, testified that for a number of years he had been the personal attorney of Romeo Mauvais, Sr., the predeceased spouse of Clemence Mauvais, and that upon the death of Mr. Mauvais he became the attorney of Mrs. Mauvais serving as legal adviser to her in matters personal to her own affairs, and also in her representative capacity as executrix of her deceased husband's last will. Mr. Rea testified that shortly following the death of Mr. Mauvais, which occurred in the earthquake of 1906, Mrs. Mauvais requested him to call at the family home, which he did. Mrs. Mauvais stated to Mr. Rea on that occasion that she desired to make her will. At that time Mr. Mauvais' will was still in the family home. It was suggested by the attorney that, in view of Mrs. Mauvais' desire to be secretive about the execution of her will, she make a holographic will as her husband had done, which was agreeable to Mrs. Mauvais. She gave detailed instructions as to the disposition of her property, and her will was prepared with the assistance of Mr. Rea, who closely followed the phraseology of the holographic will of Mr. Mauvais as to form. The testamentary desires of Mrs. Mauvais were explicitly carried out. In explanation of the reason why she made her daughter Juliette practically the sole beneficiary under her first will (although she was accustomed to speak in loving terms of all her children), she stated to Mr. Rea, according to his testimony that Edith "had everything she wanted and would never want for anything," and that "Ernest would get no good out of the money" for certain expressed reasons, "and that as long as Juliette had the money she was sure that Ernest could always come around and get some money when he needed it," and that Juliette "had married poorly, and that her husband was not in a position to do for her as he wanted to." Practically the whole of one afternoon was consumed in the preparation and execution of the will referred to. No one else was present at any time. Juliette Ferguson was not at the house at the time, and, so Mr. Rea testified, had not been for several days at that time. The will, as executed, was left with Mrs. Mauvais to be placed in a secret receptacle in the Mauvais home.

Referring to the holographic will in contest, dated June 16, 1907, Mr. Rea testified that—

"Mrs. Mauvais brought this present will up to my office; I looked it over in court yesterday. She showed it to me. So far as my memory goes it was that exact paper. She might have copied it again; I can't say; but it was the same as that will. She told me she had rewritten it and left out the provisions of the watch to Romeo and the Jewelry to Mrs. Tevis, and she asked me to look it over and see if it was all right, which I did."

In 1908 the relation of attorney and client between Mr. Rea and Mrs. Mauvais ceased. She then retained Hiram D. Tuttle, formerly a judge of the superior court of Santa Clara county, as her counsel. Judge Tuttle stated in his testimony that he was legal adviser to Mrs. Mauvais for several years, and that his impression was that she had shown him the will in contest and had consulted him as to its form.

The testimony of Mr. Rea and of Judge Tuttle touching the matters above referred to stands unimpeached and uncontradicted in the record.

There is no evidence directly showing that Juliette Ferguson had anything at all to do with the preparation or execution of either of the wills referred to or knew or suspected either was being made. She positively swore that she did not know of their existence until after they were made, and there is no proof to the contrary. She stated that she did not learn of the preparation of the first will until after her mother's death.

The evidence does not disclose that the decedent suffered any serious impairment of health until after the execution of the will in probate; in fact, not until some months following its execution. There is not even slight evidence in the record showing that at the time of the exercise of either of the testamentary acts referred to in the evidence either her mental or physical powers were in a debilitated or weakened condition. In fact, the evidence shows that mentally she was a woman of superior will power and possessed a firm and determined mind, not only at the time of the execution of the will in probate but for years afterwards, and until her last illness.

Mr. Rea testified that at the time she made the first will she was in perfect health. Quoting from his testimony relative to the quality of her mind:

"During the long acquaintance I had with her I had opportunities to judge of her intelligence. * * * She was very superior to either the ordinary man or woman in business. * * * Mrs. Mauvais had a very technical mind and she got to the bottom of things. When Mrs. Mauvais consulted me upon a law point—I have to use a vulgar expression—'she was from Missouri, and I hard to show her.' She would take the statute and diagnose it herself, and go over it, and if my opinion didn't suit her,

she would go to some other lawyer and come back and talk it over with me, and before she got through she would get right to the bottom of things. In matters of business in buying or selling or loaning money she was very thorough. Mrs. Mauvais had a very good idea of the value of real estate and of moral security of the people, and she went into those things very thoroughly, a hundred times better than I could myself on a business proposition. In regard to her will I would say that Mrs. Mauvais always made up her own mind. I dealt with her for years. Mrs. Mauvais was a person who made up her mind from personal investigation. She was exceedingly firm and determined. She was never a woman of vacillating purpose of will on anything that I ever saw in all the many years of acquaintance, both socially and in business."

Judge Tuttle testified:

That he was the legal adviser of Mrs. Mauvais for several years following 1908, and that "from her first appearance in my office I was impressed with her understanding, thorough understanding of her business. She was a capable woman; she was above the average in mentality. She understood her affairs; she understood things when they were explained to her, and insisted upon explanations frequently in matters that other clients would not be apt to insist upon, and matters would have to be explained to her fully frequently before she would adopt the advice which I was disposed to give her. In a general way she was a very competent woman. I do not think anybody could persuade Mrs. Mauvais to do what she did not think was right. She was a high-minded woman with correct notions of right and wrong, duty and the violation of duty."

Stated in brief form, Dr. Filipello testified:

That he had been acquainted with Mrs. Mauvais for 20 years, and had been her regular family physician since about 1902; that he saw her socially quite often. "I always found that she was in perfect, clear, sound intelligence, very bright. She was firm in her decisions, very affectionate to her children, and she attended to her business regularly. * * * She was not a woman readily influenced by the opinion or the advice of others, even her physician."

She often spoke about her business affairs. Dr. Beattie testified:

That he had called upon Mrs. Mauvais professionally at the beginning of her last illness and attended her for some months; that "she was a very strong-minded woman much to my surprise on many occasions; absolutely self-reliant. She was quick and alert. I formed the opinion that she was a high-minded, high-principled woman and a woman of refined education."

Dr. J. U. Hall testified that he had attended Mrs. Mauvais professionally as a consultant from time to time for a period of eight years, beginning in January, 1908, and had opportunities to form and did form the opinion that she had, for a woman of her age, a keen, forceful independent mind.

A number of letters written by the decedent to her children, for the most part subsequent to the execution of the will in probate, were offered in evidence. They show a degree of refinement and intelligence superior perhaps to that possessed by the average person. She continually addressed and spoke of all her children in terms of affectionate endearment and disclosed no degree of partiality nor suggestion of prejudice for or against any of them.

The relations existing between Mrs. Ferguson and her brothers and sister, during the years following the death of their father, Romeo Mauvais, Sr., were strained and fraught with misunderstandings and often with great bitterness of feeling. But it is not at all certain that these family disturbances and quarrels, and any false tales the daughter Juliette may have carried to her mother, had any perceptible or enduring influence upon the mind of the decedent. For instance, in a letter written by Mrs. Mauvais to her son Romeo in 1907 or 1908, having reference to previous difficulties between Juliette and Romeo, she wrote: "You know, Romeo, dear, I can't take any part in any of my children's misunderstandings." Much less may it be said that there is any substantial evidence in the record to which our attention has been directed which directly or indirectly establishes it as a fact that such family difficulties, or any statements made by the daughter Juliette to her mother, growing out of them, unduly influenced or unfairly affected the mind of the mother with reference to the composition and execution of the will in probate.

[3] Testimony was adduced on behalf of the contestant to the effect that the decedent had stated at times, both prior to and subsequent to the date of the will in issue, that she intended treating all her children alike in the final disposition of her property. Such statements, however, are not of themselves sufficient to establish undue influence. In re Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Kilborn, 162 Cal. 4; Estate of Lavinburg, 161 Cal. 536, 119 Pac. 915.

[4] The favored daughter had ample opportunity, so far as time and environment were concerned, to influence her mother's mind, but, as said in the Estate of Kilborn, 162 Cal. 4, 120 Pac. 762:

"Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act."

It may be assumed, as claimed by the contestants, that the beneficiary of the will in question exerted a general influence over the affairs of the testatrix; yet, without proof that such influence was brought to bear upon the testamentary act, a case of undue influence is not made out. Estate of Morcel, 162 Cal. 188, 121 Pac. 733.

[5] The contestants offered no evidence directly showing the exercise of undue influence by the daughter Juliette with respect to the testamentary act itself in question. While it is, of course, true that the exercise of undue influence may be shown by indirect evidence, such evidence must—

"do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." Estate of Kilborn, 162 Cal. 4, 120 Pac. 762; McDevitt's Estate, 95 Cal. 17, 30 Pac. 101; Estate of Calkins, 112 Cal. 296, 44 Pac. 577; Estate of Morcel, 162 Cal. 188, 121 Pac. 733.

"In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." In re Langford, 108 Cal. 608, 41 Pac. 701.

It seems very highly improbable that a woman of Mrs. Mauvais mental capacity, temperament, and business experience, knowing how to write her will (having in fact already written two), accustomed to advise freely with lawyers, self-reliant and of decisive mind, and situated as she was, would have permitted any paper which she had been forced to execute against her desires to stand for years without revocation.

[6] It appears to us that the legal inferences proper to be drawn from the circumstantial evidence relied upon by the contestants amounted in weight and value to no more than to create the suspicion or surmise that the will in probate was procured through the undue influence of the proponent. We believe that the proof relied upon is insufficient as a matter of law to upset the will in contest.

The order and judgment appealed from are reversed, and the cause remanded for a new trial.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 61

NORTHERN REDWOOD LUMBER CO. v. INDUSTRIAL ACC. COMMISSION et al. (Civ. 3205.)

(District Court of Appeal, First District, Division 1, California. Nov. 1, 1919. Hearing Denied by Supreme Court Dec. 29, 1919.)

MASTER AND SERVANT ⊂=419—LIMITATION ON POWER OF INDUSTRIAL COMMISSION TO MODIFY ITS AWARD.

Under Workmen's Compensation Act, § 20(d), Industrial Accident Commission had no power to alter or amend its award after period for rehearing had expired, where application therefor was not based upon new facts occurring since the making of the award, notwithstanding section 30(e).

Proceedings under Workmen's Compensation Act for compensation for death of Albert C. Lay, opposed by the Northern Redwood Lumber Company, employer, and California Casualty Company, insurer. To review order of Industrial Accident Commission denying employer's petition to be relieved from liability upon the award employer applies for certiorari. Application denied.

Redman & Alexander, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

PER CURIAM. The facts of the case are these: Albert C. Lay, an employé of the Northern Redwood Lumber Company, the petitioner herein, was killed while in course of such employment on February 24, 1916. An application for an award was filed by the parents of the deceased on March 10, 1916, against the said employer, no reference being made in the application to the existence of any insurance carrier. The employer filed its answer on March 21, 1916, raising certain issues, but not setting up the fact of its insurance. On March 27, 1916, however, the California Casualty Company, which was at the time of said casualty the insurer of the Northern Redwood Lumber Company, filed its appearance and answer in the case in its capacity as such insurer, and was thereupon joined as a party defendant. The matter went to hearing before the commission, and its award was entered June 13, 1916, in favor of the applicants and against both the employer and its insurer. No petition for rehearing was filed, and nothing further was done in the proceeding, except that the insurer made for some period of time the payments which were provided for in said award. On June 30, 1919, three years after the making of said award, the employer made an informal request of the commission for relief from liability upon the award under the provisions of section 30(e) of the Workmen's Compensation Act (St. 1917, p. 859). This informal petition having been denied, a formal petition for such relief was filed, which was also denied, whereupon the Northern Redwood Lumber Company filed its petition herein for a writ of review as to said last-named order.

The claim of the petitioner herein is that under the provisions of said section 30(e) of the Workmen's Compensation Act it was entitled at any time after the entry of said award to present its petition to the commission for release from liability under the terms of said section of the act, and that the com-

mission, upon the showing required to be made under said section, was bound to enter its order for such relief, and had no jurisdiction to make or enter any other order having the effect of denying the right of the petitioner to such relief.

On the other hand, the respondents herein contend that under section 20(d) of the Workmen's Compensation Act the commission has no jurisdiction or power to alter or amend in any way a decision or award which has been made by it after the period provided for a petition for rehearing has expired, except that, under the terms of said section 20(d) of said act, it is given continuing jurisdiction to alter or amend its award during a period of 245 weeks from the date of the injury upon the proof or showing of facts occurring after the making of said award, and within said last-named period, and that the application of the employer herein for an order altering or amending the award of the commission so as to exclude it from its terms as a judgment debtor thereunder, not having been based upon any new facts occurring since the making of said award, did not bring the case within the limited jurisdiction of the commission as provided in said last-named section.

We are of the opinion that this contention on the part of the respondents herein must be sustained upon the authority of Georgia Casualty Co. v. Ind. Accident Comm., 177 Cal. 289, 170 Pac. 625, in which case it was held by the Supreme Court that the jurisdiction of the commission over its awards expired when it denied an application for rehearing thereon, or when the time to make such application had passed, except for the continuing jurisdiction of the commission to alter or amend its awards under section 20(d) of the act, which was confined to cases where the application was predicated upon new facts occurring since the making of the award. In the instant case there are no new facts arising since the making of the award in question upon which the petitioner's application could be predicated. It was entitled to be relieved of liability under the provisions of section 30(e) of the act at the time it presented its answer before the commission and at the time a hearing was had thereon. It made no such claim at that time, nor for a period of more than three years thereafter and after the time for a rehearing had long since expired. The application which the petitioner herein finally made was in effect for an order altering and amending the commission's judgment and award; and under the authority of the case above cited we are constrained to hold that the commission had no jurisdiction to make the required order.

It follows that the application herein must be denied. It is so ordered.

44 Cal. App. 118

PEOPLE v. ALLISON. (Cr. 676.)

(District Court of Appeal, Second District, Division 1, California. Nov. 4, 1919.)

1. RAPE ⊂⊃52(1)—MARRIAGE OF ACCUSED TO PROSECUTRIX NOT SHOWN BY EVIDENCE.

In a prosecution for rape on a female under the age of 18 years, prosecutrix's testimony that she never saw accused before the alleged attack and defendant's reference to another woman as his wife *held* to sustain a verdict that prosecutrix and accused were not married to each other.

2. RAPE ⊂⊃41—PROSECUTRIX MAY TESTIFY AS TO HER AGE.

In a prosecution for rape, the prosecutrix's testimony is competent to show that she was under 18 years of age.

3. RAPE ⊂⊃52(4)—PROSECUTRIX'S TESTIMONY AS TO HER AGE HELD SUFFICIENT.

In a prosecution for rape, prosecutrix's uncontradicted testimony that she was 16 years of age *held* sufficient to show that she was under 18 at the time of the alleged attack.

4. CRIMINAL LAW ⊂⊃564(1)—EVIDENCE HELD SUFFICIENT TO SHOW VENUE.

In prosecution for rape, prosecutrix's identification and description of the place where the crime was committed, which was shown to be in a certain county by other uncontradicted testimony, *held* sufficient to establish the venue.

5. CRIMINAL LAW ⊂⊃1036(1)—OBJECTION TO EVIDENCE NECESSARY.

In a criminal case, an accused's failure to object to evidence when offered precludes him from complaining on appeal of its admission.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Everett Allison was convicted of rape, and appeals from the judgment and an order denying a new trial. Affirmed.

John F. Pryor, of Hanford, and Lamberson & Lamberson, of Visalia, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

SHAW, J. Upon an information charging him therewith, defendant was convicted of rape alleged to have been committed in Tulare county upon a female under the age of 18 years, who was not his wife. Judgment followed, from which, and an order denying his motion for a new trial, defendant appeals.

[1] The first point urged in support of a reversal of the judgment and order is insufficiency of the evidence to show that the prosecuting witness was not the wife of defendant. As in the case of People v. Bonzani, 24 Cal. App. 549, 141 Pac. 1062, involving a like question, there was no direct testimony upon the point; nevertheless the character of the evidence was such as to exclude the

existence of such relationship. Not only in his testimony did defendant refer to a person as his wife who was other than the victim of his alleged lust, but the prosecuting witness, whose name was shown to be different from that of defendant, testified that prior to the commission of the offense she never met defendant and did not know him. The conclusion based upon a fair inference to be drawn from such testimony is that reached by the jury, that they were not husband and wife when the crime alleged was committed.

[2, 3] That the testimony of the prosecuting witness was competent to show that she was under 18 years of age admits of no question. People v. Ratz, 115 Cal. 132, 46 Pac. 915. At the trial, on her direct examination, she stated that she was 16 years of age, and, in the absence of any evidence tending to contradict such statement, it must be deemed a sufficient showing that she was under 18 when the alleged attack was made upon her.

[4] The claim that the venue was not established is likewise without merit. The prosecuting witness, in her testimony, identified and described the place where the crime was committed, which place was, by other uncontradicted testimony, shown to be in Tulare county.

[5] It is finally claimed that the court erred in receiving in evidence a garment worn by the prosecuting witness at the time in question, upon which there were certain stains, the nature of which, however, was not shown. Considering the entire testimony, and conceding this evidence to have been incompetent, as claimed, the jury could not have been influenced thereby in reaching its verdict. However this may be, and conceding it was prejudicial, no objection whatsoever was made to the evidence when offered. Having failed by seasonable objection to direct the attention of the trial court to the alleged error, appellant's position in this court is not such as entitles him to complain of the evidence so admitted. People v. Wilson, 36 Cal. App. 589, 172 Pac. 1116.

We find no merit whatsoever in the appeal. The judgment and order denying defendant's motion for a new trial are affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 98

HOFFMAN v. GURNSEY. (Civ. 2195.)

(District Court of Appeal, Second District, Division 2, California. Nov. 4, 1919.)

APPEAL AND ERROR ⊂=1011(1)—FINDINGS ON CONFLICTING EVIDENCE CONCLUSIVE.

The trial court's finding on conflicting evidence as to the terms of a contract between the parties *held* conclusive upon appeal.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by J. C. Hoffman against E. R. Gurnsey. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellant.

E. C. Campbell, of Long Beach, for respondent.

THOMAS, J. This is an action for an accounting, and for judgment in the sum of $1,669.34. Judgment went in favor of plaintiff for the sum of $1,589.37. There was a motion for new trial, which was denied. The appeal is from the order denying said motion and from the judgment so entered.

Appellant urges two points in support of his appeal: (1) Insufficiency of the evidence to support finding 1, "that the contract between the parties was that set out in paragraph 1 of the complaint"; and (2) that the judgment is in excess of that justified by the evidence. Neither of these points, we think, is well taken.

First of all, there was conflict in the evidence as to what the contract between the parties was. The court accepted plaintiff's version. That question, therefore, is settled, so far as this court is concerned. Bradley v. Davis, 156 Cal. 267, 104 Pac. 302; Knox v. Moses, 104 Cal. 502, 38 Pac. 318; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. According to the agreement under which the parties hereto worked together, plaintiff was to find a customer and defendant was to furnish the listings, the office, and the machine, and give plaintiff half of the profits made on the customers he brought in. That the plaintiff brought in four customers, as alleged in the complaint, is true. That defendant did not carry out his part of the agreement, but concealed the facts as to what the profits actually were—notably so in the cases of the Barbour and Eberle transactions—is equally true. There is, we think, ample evidence to support the finding attacked.

This brings us to a consideration of the second point urged. This, in effect, is an attack on the third finding made by the court, wherein the court finds that in the Barbour-Hill deal the gross profit was $6,000, that the gross expenses on same were $1,567.34, that the net profits were $4,232.66, and that plaintiff had received no more than $716.33 on that account. We think no good purpose can be served by a verbose statement of the facts or by setting out here lengthy quotations from the evidence to support our conclusion, and refrain from so doing. The judgment is amply supported by the findings, which, in

turn, are supported by the evidence, and is therefore not excessive.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

44 Cal. App. 23

TAYLOR et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 3153.)

(District Court of Appeal, First District, Division 1, California. Oct. 30, 1919.)

1. APPEAL AND ERROR ⟸458(2)—SUPERSEDEAS UNAUTHORIZED TO STAY EXECUTION PENDING APPEAL FROM ORDER SETTING ASIDE SATISFACTION.

The appellate court, pending appeal from an order setting aside satisfaction of judgment, cannot by supersedeas stay execution on the judgment; an appeal by provision of Code Civ. Proc. § 949, staying only proceedings in the lower court on the judgment or order appealed from.

2. APPEAL AND ERROR ⟸477—REMEDY FOR STAY PENDING APPEAL FROM ORDER SETTING ASIDE SATISFACTION IS IN TRIAL COURT.

The remedy, pending appeal from order setting aside satisfaction of judgment, to prevent execution on the judgment, is for the judgment defendant to apply to the trial court in which the action is pending for a stay of proceedings on the judgment, on the ground that the appeal stays the operation of the order, or to begin action to enjoin the execution on the ground that it has been stayed by operation of Code Civ. Proc. § 949.

Application by Ambrose Taylor and others for writ of supersedeas to the Superior Court of the City and County of San Francisco and the Judge thereof. Writ dismissed.

Fred C. Peterson, of Grass Valley, for petitioner.

Lincoln E. Savage, of San Francisco, for respondents.

PER CURIAM. Application for a writ of supersedeas. A judgment having been entered by the superior court against the petitioners, satisfaction thereof was entered, which, upon motion, was set aside. An appeal has been taken from the order of the court setting aside said satisfaction of judgment, and in the meantime the petitioners seek by an application to this court for a writ of supersedeas to stay proceedings upon the judgment.

[1, 2] Upon an examination of the section of the Code (section 949, Code of Civil Procedure) under which it is claimed this application may properly be made, the court is disposed to the view that the remedy of supersedeas sought to be invoked cannot be availed of here. The section mentioned provides that the perfecting of an appeal in the manner provided by the provisions of the sections of the Code stays proceedings in the court below upon the judgment or order appealed from. Now, of course, if there are any proceedings upon the specific order appealed from, those proceedings would be stayed by the operation of the section; but, if there are no proceedings upon the order appealed from, then, of course, there can be no stay of proceedings accomplished by the writ of supersedeas. Now, in the case at bar, there are no proceedings upon the specific order appealed from. That order merely sets aside the satisfaction of judgment; and that order, when made, requires no further proceedings for its execution. It is complete and final in itself. The proceedings which counsel is seeking to have stayed are the execution of the judgment itself, but those proceedings have nothing to do with the order which is appealed from in this case.

The question under consideration has, we think, been finally passed upon by the Supreme Court of this state in Bateman v. Superior Court, 139 Cal. 140, 144, 72 Pac. 922. We are unable to escape from the conclusions reached in that case nor from the reasoning upon which they are placed. We cannot conceive what possible form a writ of supersedeas, if issued in this case, would take so as to give it the effect which the petitioners desire. The broadest form which such a writ could take would be the form indicated by the language of section 949, Code of Civil Procedure. The utmost that could be obtained by the issuance of the writ would be a stay of proceedings upon the order appealed from. Now, there are no proceedings upon that order which could be stayed. The order has been entered. No further proceedings are necessary to make it effective, and the only proceedings which are sought to be stayed are those which would follow the issuance and levy of a writ of execution upon the judgment, which has not been appealed from. We have no power to stay the levy of an execution upon the judgment in this case because there is no appeal from that judgment before us. It seems to us, therefore, that the petitioners have mistaken their remedy, and that their proper procedure is either to make an application to the court in which the action is pending for a stay of proceedings upon the judgment on the ground that the effect of the appeal is of itself to stay the operation of the order; or, if the court refuses to grant that relief, then to begin some appropriate action to enjoin the execution of the judgment upon the ground that as a matter of law the execution of the judgment has been stayed

by virtue of section 949 of the Code of Civil Procedure.

For these reasons the demurrer to the petition is sustained, and the writ dismissed.

44 Cal. App. 39

GLOYD v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 2985.)

(District Court of Appeal, Second District, Division 1, California. Oct. 30, 1919. On Petition for Rehearing, Nov 28, 1919. Hearing Denied by Supreme Court Nov. 29, 1919.)

1. DIVORCE ⟸156—ENTRY OF FINAL DIVORCE DECREE JUDICIAL ACT.

The entry of a final divorce decree on expiration of the year following entry of interlocutory judgment, under Civ. Code, § 132, is a judicial act and not merely a clerical act consequent upon a previous judicial act; the prevailing party's right to such final decree being subject to be defeated by events occurring after entry of interlocutory judgment.

2. DIVORCE ⟸156—RECONCILIATION OF PARTIES DURING YEAR AFTER ENTRY OF INTERLOCUTORY JUDGMENT AUTHORIZING DENIAL.

Reconciliation of the parties and actual resumption of marriage relation during year following entry of interlocutory decree under Civ. Code, § 132, adjudging prevailing party entitled to divorce to be granted upon expiration of following year, may justify court in refusing, or make it the duty of the court to refuse, to grant the divorce.

3. DESCENT AND DISTRIBUTION ⟸63 — DIVORCE ⟸83—ENTRY OF FINAL DECREE AFTER DEATH OF HUSBAND UNAUTHORIZED.

Where husband who had been adjudged entitled to divorce by interlocutory decree under Civ. Code, § 132, died before expiration of year following entry of interlocutory decree, the court was without power, upon expiration thereof, to enter final divorce decree, the marriage relation having been dissolved by death; and the wife was left vested with the property rights to which she was entitled as surviving wife.

On Petition for Rehearing.

4. PROHIBITION ⟸3(5)—ADEQUACY OF REMEDY BY APPEAL MUST BE PLAIN AND SPEEDY.

The mere right of appeal does not constitute a bar to an application for a writ of prohibition, since it must further appear that in the particular case the exercise of such right of appeal would afford the petitioner a plain, speedy, and adequate remedy.

5. DIVORCE ⟸180 — DISMISSAL OF APPEAL UPON DEATH OF PARTY.

The death of one of the parties to a divorce action pending appeal from the decree would be sufficient ground for dismissal of the appeal.

Application for writ of prohibition by Maiette S. Gloyd against the Superior Court of the State of California in and for the county of Los Angeles, J. P. Wood Judge thereof. Writ granted.

Oscar Lawlor and Overton, Lyman & Plumb, all of Los Angeles, for petitioner.

John C. Stick, of Los Angeles, for respondents.

CONREY, P. J. Prohibition. This matter is presented for decision upon the petition filed and the answer thereto of the respondent. The facts as we shall state them are admitted.

On the 27th day of February, 1918, in the superior court of Los Angeles county, in an action wherein Albert M. Gloyd was plaintiff and the petitioner Maiette S. Gloyd was defendant, an interlocutory decree was entered adjudging that the plaintiff was entitled to a divorce from the defendant, "and that when one year shall have expired, after the entry of this interlocutory judgment, a final judgment and decree shall be entered, granting a divorce herein, wherein and whereby the bonds of matrimony heretofore existing between the said plaintiff and the said defendant shall be dissolved." It was alleged in the complaint and admitted by the answer and declared in the findings of fact in that action that there was no community property belonging to the plaintiff and defendant. The conclusions of law and the interlocutory decree were silent with regard to community property and all other property rights of the parties, and did not in terms purport to deal with any other matter than the right to a divorce. On the 4th day of April, 1918, Albert M. Gloyd died, leaving a separate estate consisting of property of large value, the principal part of which is located in the state of Missouri. Litigation is pending in the District Court of the United States for the Western District of Missouri, between the said Maiette S. Gloyd, claiming to be the widow of Albert M. Gloyd, deceased, and other persons concerning their respective claims of interest in the estate of said Albert M. Gloyd. On the 10th day of March, 1919, pursuant to notice, the attorneys who appeared for Albert M. Gloyd in the divorce action presented to the superior court a motion requesting that court to enter the final decree of divorce. This motion was resisted by the defendant in that action, petitioner herein, who contended there, and contends here, that the superior court had no jurisdiction to hear said motion or enter a final decree purporting to dissolve the marriage of Albert M. Gloyd and petitioner. Nevertheless the court did entertain the motion and threatens to, and unless restrained and prohibited from so doing will, make and enter the demanded final decree.

The interlocutory judgment, with its provision for a final judgment, was in conformity with section 132, Civil Code. That section was added to the Code in the year 1903 (Stats. 1903, p. 76). Since the enactment of that section, its meaning and effect have been considered in a considerable number of decisions. In Estate of Walker, 176 Cal. 402, 168 Pac. 689, the death of the husband, plaintiff in a divorce action, occurred about four months after the entry of the interlocutory decree, and a controversy arose over the question of legitimacy of twin children born within ten months after the plaintiff's death. It was held that—

"The marriage relation existing between the husband and wife was not dissolved by the interlocutory decree of divorce, but by the death of the husband on November 20, 1913."

In Olson v. Superior Court, 175 Cal. 250, 165 Pac. 706, 1 A. L. R. 1589, the Supreme Court said:

"It is never to be forgotten that the interlocutory decree does not sever the marital bonds. It is merely a declaration that one of the spouses has at that time established a right to a final decree which will be entered at and after the expiration of one year."

It was then suggested that one of the important purposes of the law was to give the spouses opportunity to effect a reconciliation, and it was held that, where such reconciliation had taken place and the marital relations had been resumed within the year following the entry of the interlocutory decree, the court properly refused to enter a final decree. In Estate of Dargie, 162 Cal. 51, 121 Pac. 320, referring to Civil Code, § 132, the court said:

"By the terms of the statute, it is the final judgment alone that grants the divorce, dissolves the marriage, restores the parties to the status of single persons, and permits each to marry again. The statute does not itself declare the marriage dissolved at the expiration of the year from the interlocutory judgment. It merely suspends for one year the power of the court to dissolve it, and, in effect, provides that it becomes dissolved only when, after the expiration of that period, the court has, by its final judgment, so declared. In the meantime the parties remain in the legal relation of husband and wife. * * * It follows from what we have said that, at the time of the death of the decedent, Erminia P. Dargie was his wife and that she is now entitled to such rights as the law confers upon her, under the circumstances, as his widow, including the right to a family allowance."

[1, 2] From the law as thus settled and determined is becomes clear that the entry of a final decree of divorce is a judicial act and not merely a clerical act consequent upon a previous judicial act. Although by the interlocutory decree it has been declared that the prevailing party is entitled to a divorce and the time for appeal therefrom may have expired, that right is subject to defeat by events occurring after the interlocutory decree has been entered. As we have seen, reconciliation of the parties and actual resumption of the marriage relation may justify the court in refusing, or make it the duty of the court to refuse, to grant the divorce.

Petitioner contends that the death of either the husband or wife prior to the entry of a final decree of divorce deprives the court of the power to enter such final decree; that this is so because the subject of the litigation is the personal status of the husband and wife, arising from the marriage; and that this is a thing which terminates upon the death of either one of those parties. In Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064, it was pointed out that the object of an action for divorce is to change the personal status of the plaintiff in relation to the defendant, and that upon the death of the plaintiff there was no personal status which a judgment could change. Such an action, the court said, could not be further prosecuted or defended upon the death of the plaintiff, whether her death was before or after the judgment. It was further suggested in that case that the primary and substantive subject of litigation in a suit for divorce is the personal relation of the parties, and their right to community property is but incidental thereto. In Begbie v. Begbie, 128 Cal. 154, 60 Pac. 667, 49 L. R. A. 141, the defendant died during the pendency of an appeal taken by her from an order denying her motion for a new trial in an action wherein a divorce had been granted to the plaintiff. Upon the suggestion of the death of appellant, the court dismissed the appeal and held that, the action being solely for the purpose of determining the defendant's personal status, it abated upon her death, and the court was without authority to review the proceedings of the superior court.

[3] Observing the principles above stated, we are satisfied that the superior court is without jurisdiction to change or alter the status of petitioner by entering a decree of divorce in the action of Gloyd v. Gloyd. The principal if not the only subject-matter of that action remaining for further judicial determination after the entry of the interlocutory decree down to the time of the death of the plaintiff was the status of the plaintiff and defendant as husband and wife. That relation and status having been dissolved by death, the petitioner, Maiette S. Gloyd, forthwith became the surviving wife of Albert M. Gloyd, with the vested right to be recognized as his widow and with such further vested rights of property as may result from the fact that she was his wife at the time of his death.

Respondent relies upon that part of the Civil Code, § 132, which says:

"The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided."

In Estate of Seiler, 164 Cal. 181, 128 Pac. 334, Ann. Cas. 1914B, 1093, the Supreme Court referring to this provision of the Code, said:

"Possibly it was designed to enable the court to establish, by final decree rendered after the death of a party, property rights which had been passed upon, provisionally or otherwise (Pereira v. Pereira, 156 Cal. 1, 103 Pac. 488, 23 L. R. A. [N. S.] 880, 134 Am. St. Rep. 107) in the interlocutory decree. But certainly such final decree could not have been intended to effect the dissolution of the marriage. This result is already accomplished by the death of one of the parties. Nor can we believe that the Legislature intended to authorize the court, possibly of its own motion and against the will of the only remaining party in interest (Civ. Code § 132), to enter a decree which should operate retroactively to take away rights of inheritance which had, by the death, become vested in the surviving spouse."

Respondent claims that, on the record in Estate of Seiler, the foregoing statement of the court was mere dictum. At least, it was on a point presented by counsel, and states a view with which we agree. And if the view so stated be correct, it follows that even if, for any imaginable purpose, the respondent might be authorized to enter a final decree declaring that there was no community property, such authority does not carry with it jurisdiction to enter a decree purporting to put an end to a matrimonial relation which has ceased to exist. Assuming that, as claimed by respondent, the decision of this court in John v. Superior Court, 5 Cal. App. 262, 90 Pac. 53, is in conflict with this conclusion, that decision, so far as such conflict exists, must be deemed to be overruled.

It is ordered that a peremptory writ issue in accordance with the prayer of the petition herein.

We concur: SHAW, J.; JAMES, J.

On Petition for Rehearing.

PER CURIAM. Counsel for respondent, in their petition for a rehearing after judgment rendered herein, suggest that with the answer there was filed a demurrer; the ground of demurrer being that the petition did not state facts sufficient to constitute a cause of action in which a writ of prohibition should issue.

When this case was called before the court for hearing, the attorney for respondent stated to the court that "a return has been made," and that the parties had agreed that the matter might be submitted upon briefs. The court made its order of submission accordingly. The briefs ignored the existence of any demurrer. We think that in the opinion filed we did not neglect any material part of the argument submitted by counsel in their briefs.

It may be said further, however, that we did carefully consider the question whether or not a proper case was presented for the issuance of a writ of prohibition.

[4, 5] The mere right of appeal does not constitute a bar to an application for a writ of prohibition. It must further appear that in the particular case the exercise of such right of appeal would afford to the petitioner a plain, speedy, and adequate remedy. As has been pointed out by counsel for petitioner, the death of one of the parties to a divorce action pending appeal from the decree would be sufficient ground for dismissal of the appeal. Two cases establishing that rule are cited in the opinion filed in this case. Moreover, facts were alleged in the petition which, as it seems to us, tended to render inadequate the right of appeal from any final decree of divorce that might be entered in the action of Gloyd v. Gloyd.

The petition for a rehearing is denied.

43 Cal. App. 716

ROSSITER v. SHULZ. (Civ. 3081.)

(District Court of Appeal, First District, Division 1, California. Oct. 22, 1919.)

1. DEEDS ⟸59(1)—DELIVERY FOR RECORD IS DELIVERY TO GRANTEE.

Where mother, who had contracted for purchase of lot, and who had assigned her interest in contract to her son, upon final payment receipted for deed wherein son was named as grantee, and deed, after recordation, was sent by the recorder by mail to the son at his mother's address, delivery was sufficient.

2. TRUSTS ⟸89(2) — EVIDENCE OVERCOMES PRESUMPTION OF RESULTING TRUST.

Positive testimony of defendant son that he had given his mother the money with which the lots in question were purchased *held* to warrant finding that defendant held the property free of any trust in favor of his mother, and was the absolute owner thereof.

3. TRUSTS ⟸81(4)—NO PRESUMPTION AS TO RESULTING TRUST.

The doctrine that a resulting trust arises when a transfer of realty is made to one person and the consideration therefor is paid by another does not arise where the parties concerned are parent and child.

4. TRUSTS ⊂=81(1)—PRESUMPTION THAT CONVEYANCE TO CHILD IS AN ADVANCEMENT.

In case of transfer of realty to one person and payment of consideration by the other, the presumption is, where the parties concerned are husband and wife, or parent and child, that the purchase and conveyance were intended to be an advancement for the nominal purchaser and not to create trust.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by J. G. Rossiter, as administrator of the estate of Carrie Smith, deceased, against Robert A. Shulz. From judgment quieting defendant's title, as prayed for in his cross-complaint, plaintiff appeals. Affirmed.

John Dennison, of Los Angeles, for appellant.

Landreth & Patten, of Los Angeles, for respondent.

KERRIGAN, J. Plaintiff, as administrator of the estate of Carrie Smith, deceased, brought this action against the defendant, her son, to establish a resulting trust in two lots in Los Angeles standing in defendant's name. From the judgment quieting the latter's title as prayed for in a cross-complaint filed in the action, the plaintiff appeals.

[1] The documentary evidence showed that the decedent in her lifetime contracted to purchase the two lots in question. One of them she bought from one Furth under a contract, her interest in which she assigned to the defendant. Upon making the final payment upon this lot, she receipted for a deed wherein the defendant was named as grantee and which, after its recordation, was sent by mail to the defendant at his mother's address.

There is no merit in the contention that such delivery of the deed was insufficient, for it is clear that whatever control the grantor had over the deed was lost when it was mailed by the recorder to the defendant, and title could then vest only in the grantee named in the instrument.

[2] As to the other of said lots, its purchase was contracted for by deceased with one Humbert, the contract providing that upon completion of the payments therein specified a deed was to be given to defendant. The payments on this contract had not been completed when plaintiff's intestate died, but defendant thereafter paid the balance due and took a deed from Humbert in his own name in accordance with the terms of the contract.

[3, 4] It thus appears that at no time did the title to either lot stand in the name of plaintiff's intestate, and the evidence offered by plaintiff, viewed in its strongest light, showed merely that the decedent was in possession of the lots at the time of her death, and that the payments had been actually made by her. To offset any presumption that might be drawn from these facts that the title was taken in the son's name for convenience only and that he held title in trust for his mother, there was the positive testimony of the defendant that he had given his mother the money with which the lots were bought, which testimony fully warranted the trial court in finding that the defendant held the property free of any trust in favor of his mother and was the absolute owner thereof. Indeed, that court would have been justified in reaching such conclusion without that particular testimony, for the doctrine that a resulting trust arises when a transfer of real property is made to one person and the consideration therefor is paid by another does not arise where the parties concerned are husband and wife or parent and child. In such case the presumption is that the purchase and conveyance were intended to be an advancement for the nominal purchaser. Hamilton v. Hubbard, 134 Cal. 603, 605, 65 Pac. 321, 66 Pac. 860. It may be noted that the only heir of the deceased other than this son was her husband, from whom she was living apart. The only evidence offered in behalf of plaintiff was that of two persons who held claims against the estate of the deceased of rather dubious origin and merit, and we are fully satisfied with the action of the trial court in refusing to impress the defendant's title with a trust upon the testimony in this record.

Judgment affirmed.

We concur: RICHARDS, J.; BEASLY, Judge pro tem.

44 Cal. App. 31

WALSH v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SACRAMENTO COUNTY et al. (Civ. 2056.)

(District Court of Appeal. Third District, California. Oct. 30, 1919.)

DIVORCE ⊂=66—ATTORNEY'S FEES CANNOT BE GRANTED TO WIFE IN DIVORCE, WHILE MOTION FOR CHANGE OF VENUE PENDING.

An application for attorney's fees for prosecution of a wife's divorce suit cannot be heard while a motion for change of venue is pending.

Application by Leyla M. Walsh for a writ of mandate to the Superior Court of California in and for Sacramento County and Hon. Charles O. Busick, Judge thereof, to require said court to act on a motion for counsel fees. Alternative writ discharged, and proceeding dismissed.

Irving D. Gibson, of Sacramento, for petitioner.

Guy P. Johnson and John A. McGilvray, both of Sacramento, for respondents.

BURNETT, J. On August 16, 1919, petitioner, Leyla M. Walsh, filed in the superior court of Sacramento county a complaint for a divorce against her husband, Earnest E. Walsh. On September 16th the defendant appeared in the action and filed a general demurrer to the complaint and a demand for a change of the place of trial, with an affidavit of merits and of his residence in the county of Butte. At the same time the defendant filed in the court a written instrument purporting to be a motion for said change of the place of trial, referring therein to the fact that said demand and affidavit were filed therewith, and averring that he had "served upon the opposing counsel notice of this motion, which said notice sets forth that this motion will be called for hearing on the 29th day of September." A copy of this instrument was served on the same day on the attorney for plaintiff. On the following day, September 17th, plaintiff in said action served upon the attorney for the defendant a notice in writing that on Monday, the 22d day of September, she would present a motion to said superior court "for an order awarding and allowing her, as such plaintiff, the sum of $100 as a reasonable and just sum with which to pay and defray the fees of her attorney for prosecuting said action, and the further sum of $20" for other costs. This application came on for hearing on said date, whereupon defendant, through his attorneys, objected to its consideration by the court for the reason that there was pending and undetermined said motion for a change of venue. Thereupon the court, after reciting said objection made by the defendant and the fact that the other motion was pending before said court, "ordered that said objection of defendant to the hearing of said motion be and it is hereby sustained, and that said motion of plaintiff made before this court on said 22d day of September, 1919, for the payment of counsel fees and costs be and it is hereby abated until after the motion for change of place of trial has been heard and determined, upon the ground that the power of this court to hear or consider said motion for counsel fees and costs is suspended because of the filing herein by said defendant of said affidavit, demand and notice of motion for the change of place of the trial of said action from Sacramento to Butte county, filed herein on September 16, 1919; that defendant is entitled to have all judicial action in the case determined by the superior court of the proper county."

We are satisfied that the decision of the lower court was entirely proper. If the defendant was entitled to have a change of the place of trial, as he claimed, it was his right to have the court of his place of residence determine every judicial question involved in the action. It is true that the court had not passed upon the merits of his motion, and the time had not arrived for its determination; but he had made his demand, and given notice of the hearing thereof even, before petitioner herein had taken any steps to secure an order for said allowance. While it may not be entirely accurate to say that the court thereby lost jurisdiction to consider any other motion, it is at least true that the court pursued the course that is required by the law and the decisions in this state. Even in those cases in other states wherein it is held that the mere filing of an application for a change of venue does not affect the jurisdiction of the court where the action is pending, and that the adverse party, if there be no stay, may proceed, it is declared "he does so at the risk of having the proceedings set aside in case the application is granted." But in other cases, as pointed out in 40 Cyc. 154, "it has been held that the application operates as a supersedeas or stay of proceedings, and that it must be disposed of before any other step can be taken, and that if the case is one where the applicant is entitled to a change of venue as a matter of right the court has no jurisdiction except for the purpose of granting the change." But we are not concerned with the exact technical phraseology of the situation, although it must be said that the appellate courts of this state have gone so far as to hold that under such circumstances jurisdiction to make any previous order does not exist. At any rate, there can be no doubt that the order of the lower court is entirely justified by the decisions of our Supreme Court, to a few of which specific attention may be directed.

In Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649, the holding is summed up in the syllabus as follows:

"A right to a change of the place of trial is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action; and the plaintiff in an action for alimony has no right to have a motion for temporary alimony, pending at the time of a demand for a change of the place of trial, first heard before the demand is passed upon, and the court has no right to make a compliance with an order awarding such alimony a condition precedent to the hearing of the application to change the place of trial."

It is to be observed that in the Hennessy Case the notice for the hearing of the motion for temporary alimony was given days before the defendant made his demand or gave notice of his motion for a change of the place of trial, and yet the Supreme Court held that the trial judge had no right to consider the

former motion until disposition had been made of the latter.

In Brady v. Times-Mirror Co., 106 Cal. 56, 39 Pac. 209, it is said:

"The statute requires the motion to be made 'at the time' the defendant appears and answers or demurs. If he does not then make the motion, he is not entitled to make it at any subsequent stage of the proceedings, even though the condition of the case may be such that if it could be then made it would be granted. Remington S. M. Co. v. Cole, 62 Cal. 318. This necessarily implies that the motion must be made and determined by the court before it can hear or determine any other motion in the case. If the defendants are entitled to have their motion granted, they are entitled to have every motion or proceeding in the case heard before the superior court of the county of their residence."

In G. & S. Co. v. M. & H. F. C. Co., 107 Cal. 378, 40 Pac. 495, it was held that a ruling upon the demurrer could not be made until after a decision upon the motion to change the place of trial.

In Nolan v. McDuffie, 125 Cal. 334, 58 Pac. 4, it was held that the order of the court sustaining a demurrer to the complaint was a nullity, pending the hearing of a motion for a change of venue, notwithstanding the lower court at the time said order was made was not cognizant of the fact that the defendant had made a demand for a change of the place of trial.

The foregoing decisions are controlling in this case. An alternative writ of mandate was issued herein, that the question might be considered; but we are satisfied that the lower court took the proper view of the situation, and the said writ is therefore discharged and the proceeding dismissed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

44 Cal. App. 147

MARR v. ROWELL et al. (Civ. 3069.)

(District Court of Appeal, First District, Division 1, California. Nov. 5, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

1. LANDLORD AND TENANT ⟸169(2)—ACTION MAINTAINABLE AGAINST LESSOR AND LESSEE FOR INJURIES SUSTAINED BY THIRD PARTIES.

A person injured may maintain an action against both a lessee of property for the negligent use and against the lessor for the negligent construction of a fire escape forming a part of the building.

2. PLEADING ⟸205(2) — IMPERFECT STATEMENT OF CAUSE OF ACTION NOT GROUND FOR GENERAL DEMURRER.

Though a complaint was subject to special demurrer for imperfectly stating a cause of action against one of codefendants, a general demurrer was erroneously sustained, where sufficient facts were alleged to constitute a cause of action against him.

Appeal from Superior Court, Fresno County; George E. Church, judge.

Action by Josephine Marr against Milo L. Rowell and another, for personal injuries. From a judgment on an order sustaining a general demurrer without leave to amend as to the defendant named, and overruling it as to the remaining defendant, plaintiff appeals. Reversed.

Everts & Ewing and M. G. Gallaher, all of Fresno, for appellant.

Geo. Cosgrave, of Fresno, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered after an order sustaining a general demurrer to the complaint without leave to amend.

The action is for personal injuries, and was instituted by the plaintiff against the defendants, Milo L. Rowell and H. S. Whistler, the lessor and lessee, respectively, of certain premises in which the injury occurred. The court overruled the demurrer as to Whistler, the lessee, and sustained it as to Rowell, the owner, apparently on the erroneous theory that the premises, being in possession of the lessee, the owner thereof could not be liable.

[1, 2] From the complaint it appears that the plaintiff attempted to allege a cause of action against both the lessor and lessee of the building on the theory that each of them was responsible for the injury—the lessee for the negligent use, and the lessor for the negligent construction of a fire escape forming part of said building. On this theory a cause of action may be maintained against both defendants. Rider v. Clark, 132 Cal. 382, 64 Pac. 564; Kalis v. Shattuck, 69 Cal. 593, 597, 11 Pac. 346, 58 Am. Rep. 568. And the most that can be said against this complaint is that it imperfectly alleges a cause of action against the lessor, for which reason, no doubt, he might have specially demurred; but, containing, as it does in the last analysis, we think, sufficient facts to constitute a cause of action against said defendant, the court was in error in sustaining his general demurrer. Schaake v. Eagle, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759; Payne v. Bæhr, 153 Cal. 447, 95 Pac. 895; Robertson v. Burrell, 110 Cal. 579, 42 Pac. 1086; Norton v. Bassett, 158 Cal. 427, 111 Pac. 253.

The judgment is reversed.

We concur: BEASLY, Presiding Judge pro tem.; RICHARDS, J.

43 Cal. App. 756

VARROIS v. GOMMET et al. (Civ. 2894.)

(District Court of Appeal, First District, Division 2, California. Oct. 24, 1919. Hearing Denied by Supreme Court Dec. 22, 1919.)

1. LIMITATION OF ACTIONS ⟸103(2) — RUNNING OF STATUTE FROM REPUDIATION OF VOLUNTARY EXPRESS TRUST.

In case of a voluntary express trust, where the estate is to be managed for the benefit of the trustor, to be returned on demand, the statute of limitations does not begin to run until after repudiation of the trust.

2. LIMITATION OF ACTIONS ⟸103(2)—STATUTE RUNS FROM REPUDIATION OF VOLUNTARY RESULTING TRUST.

The statute of limitations does not begin to run against actions to enforce voluntary resulting trusts until after a repudiation thereof.

3. LIMITATION OF ACTIONS ⟸103(2) — STATUTE RUNS WITHOUT REPUDIATION OF INVOLUNTARY IMPLIED TRUST.

In the case of an involuntary implied trust raised by operation of law, no repudiation is necessary to start the statute of limitations running against an action to enforce the trust.

4. TRUSTS ⟸371(2)—CHARACTER AS EXPRESS AND VOLUNTARY.

In suit to enforce a trust against several banks, one trustee, and the executrix of the other, complaint *held* to allege an express voluntary trust arising out of the confidential relations existing between the parties.

5. TRUSTS ⟸4—STATUTES NOT APPLYING TO DEPOSIT WITH ADULT FOR USE OF OWNER.

Civ. Code, § 724, is a limitation on the power to create future interests by will or transfer in writing, and has no application to the deposit of money with an adult to be invested for the use and benefit of the owner, while section 857 relates only to the creation of a trust for the benefit of a third person.

6. TRUSTS ⟸35(4)—"TRUST TO CONVEY."

A trust to receive and hold real property to be transferred to the creator of trust on demand is not a "trust to convey" within the meaning of that expression as used in a prior opinion holding that a trust to convey real property to beneficiaries named in the instrument creating the trust is illegal.

7. TRUSTS ⟸30½(1)—RESULTING TRUST BECOMING VOLUNTARY.

If real property was purchased by trustees with money of creator of trust, in the absence of other specific agreement a trust resulted under Civ. Code, § 853, which is as valid as one created or declared by operation of law, and under section 2222 becomes a voluntary trust as to the trustees by any words or acts of theirs indicating with reasonable certainty their acceptance or acknowledgment.

8. LIMITATION OF ACTIONS ⟸103(2) — STATUTE DOES NOT RUN AGAINST TRUST UNTIL REPUDIATED.

In the case of an express trust created by the original agreement, with the possibility of a resulting trust, so far as concerns realty, growing out of the trustees' own acts in purchasing realty with the funds of the trustor, in either event a voluntary continuing trust is created against which the statute of limitations does not begin to run until repudiation of the trust by the trustees is brought to the knowledge of the trustor.

9. PLEADING ⟸192(6)—RAISING DEFENSE OF LACHES BY DEMURRER.

It is only when laches affirmatively appears on the face of a complaint that the defense can be raised by demurrer.

10. TRUSTS ⟸365(2)—NO LACHES IN SUIT TO ENFORCE.

Where demand upon a trustee's executrix was rejected August 22d, and demand made on the executrix individually as trustee was rejected October 15th, and suit to enforce the trust was instituted October 18th, there was no delay warranting the court in holding that plaintiff was guilty of laches.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Pauline Varrois against Marie Gommet, as executrix of the last will and testament of Fleury Gommet, deceased, also as an individual, the French American Bank of Los Angeles, the Italian American Bank, and the First National Bank of San Anselmo. From judgment for defendants on demurrer, plaintiff appeals. Reversed, with directions to overrule demurrer and grant leave to answer.

James P. Sweeney, of San Francisco (Frank J. Fontes, of San Francisco, of counsel), for appellant.

H. U. Brandenstein, of San Francisco, for respondent Gommet.

NOURSE, J. Plaintiff sued Marie Gommet individually and as executrix of the estate of Fleury Gommet for a judgment decreeing that certain real and personal property was the property of plaintiff and held by said defendant in trust for plaintiff, for the transfer of such property to the plaintiff, and for an accounting. Three banks were joined as defendants upon allegations that they held moneys of the plaintiff which were deposited with them by the Gommets for the use and benefit of the plaintiff. No appearance was made for them. A demurrer, both general and special in form, was interposed to the amended complaint on behalf of the defendant Gommet individually and as such executrix. This demurrer having been sustained without leave to amend judgment was rendered in favor of defendant and this appeal followed.

Appellant argues upon all the grounds raised by the demurrer, but respondent relies solely upon the grounds that plaintiff's

action is barred by the statute of limitations and by her laches. As to the other grounds of demurrer it is sufficient to say that they are without merit, and no discussion need be had as to them because abandoned by respondent upon this appeal.

The issue upon this appeal is: Does the amended complaint, being confessed by the demurrer, present a cause of action which upon its face is not barred by the statute of limitations or by the laches of plaintiff?

The allegations of the amended complaint are that plaintiff came to San Francisco from a foreign country when but 17 years of age and took up her abode with her elder sister, the defendant Marie Gommet; that about the 20th day of December, 1900, plaintiff entered into an agreement with Marie Gommet and Fleury Gommet, her husband, whereby they agreed to accept and receive all moneys deposited with them in trust by plaintiff, to be invested, managed, and controlled by them for the use and benefit of plaintiff until the same might be demanded by her. It is also alleged that by this agreement said defendants were to invest such part of said moneys in real estate as they might deem proper, and to transfer the same to plaintiff on demand, together with the rents, issues, and profits. A description is given of the real and personal property alleged to have been purchased with money so given them by plaintiff from time to time from 1900 to 1906, which are alleged to have totaled the sum of $54,000. Fleury Gommet died March 31, 1917. Marie Gommet duly qualified as executrix of his estate, and within time thereafter plaintiff presented her claim to such executrix and demanded the transfer of all the property so alleged to be held in trust for her, and soon thereafter made similar demand upon Marie Gommet individually. Both demands were rejected, and thereupon for the first time plaintiff had knowledge of the repudiation of the alleged trust. The action was instituted immediately after the rejection of the last demand.

Respondent argues that her plea of the bar of the statute was good, because: (1) Where a demand is necessary to set the statute of limitations running, the demand must be made within the time prescribed for the commencement of the action upon the original obligation; and (2) that the alleged trust was an express trust of the type forbidden by the law of this state, and being invalid gave rise to an implied trust against which the statute began to run immediately without demand and without repudiation.

[1, 2] Generally speaking, respondent's position as to the time when demand must be made is correct; but, in the case of a voluntary express trust where the estate is to be managed for the benefit of the trustor to be returned on demand, the statute of limitations does not begin to run until after a repudiation of the trust. Schroeder v. Jahns, 27 Cal. 274, 280; MacMullan v. Kelly, 19 Cal. App. 700, 706, 127 Pac. 819; Norton v. Bassett, 154 Cal. 411, 419, 97 Pac. 894, 129 Am. St. Rep. 162; Arnold v. Loomis, 170 Cal. 95, 98, 148 Pac. 518; Hughes v. Silva, 184 Pac. 415. The same rule is applicable to actions to enforce a voluntary resulting trust. Roach v. Caraffa, 85 Cal. 436, 446, 25 Pac. 22; Faylor v. Faylor, 136 Cal. 92, 96, 68 Pac. 482; Arnold v. Loomis, supra.

[3] It is true, as urged by respondent, that in the case of an involuntary implied trust raised by operation of law no repudiation of the trust is necessary to start the running of the statute of limitations. Benoist v. Benoist, 172 Pac. 1109; Earhart v. Churchill Co., 169 Cal. 728, 731, 147 Pac. 942.

It becomes important then to determine the character of the trust here involved. If it was an involuntary implied trust, then under the authorities last cited respondent's plea of the bar of the statute was good and the judgment of the trial court must be affirmed. On the other hand, if it was a voluntary express or resulting trust, the statute did not commence to run until after repudiation. It is alleged that the moneys were given to the trustees—

"To invest, loan out, care for, manage and control said moneys so deposited by plaintiff with them, or either of them, for the use and benefit of said plaintiff, until the same might be demanded by said plaintiff; to invest such part of said moneys in real estate for plaintiff as in the judgment of said Fleury Gommet, now deceased, and said Marie Gommet, seemed for the best interests of said plaintiff, and to transfer said real estate so acquired by said Fleury Gommet, now deceased, and said Marie Gommet, or either of them, to said plaintiff on demand of said plaintiff, together with all rents, issues and profits thereof; to lend such part of said moneys as in the judgment of said Fleury Gommet, now deceased, and said Marie Gommet, seemed for the best interests of this plaintiff at interest and to take good security therefor; to transfer all evidences of such loans and securities to said plaintiff on said plaintiff's demand; and to hold such balance of said moneys as had not been previously invested or loaned to the order of this plaintiff, for the use and benefit of said plaintiff, until demanded by plaintiff."

Also:

"That it was the agreement and intention of plaintiff and said Fleury Gommet, during his lifetime, and Marie Gommet, that said defendant Marie Gommet and said Fleury Gommet should hold and continue to hold said property during all of said times for the use and benefit of plaintiff, in order that the same might be increased by accumulations of interest, rents, issues and profits; that plaintiff always believed that said property would be delivered and transferred to her upon her request or demand and was so told and assured by said Fleury Gommet on many occasions during his lifetime and up to the time of his death, and also by her said sister the defendant Marie Gommet."

[4-7] From these allegations it is apparent that the pleader alleged an express voluntary trust arising out of the confidential relations existing between the parties. But respondent argues that, as the trust provided for accumulations after minority and permitted the conveyance of real property, it was void as an express trust under sections 724 and 857 of the Civil Code prohibiting trusts for accumulations beyond minority and trusts to convey realty. From this it is argued that it must be treated as an implied trust only. But section 724 is a limitation upon the power to create future interests by will or transfer in writing. It has no application to the deposit of money with an adult to be invested for the use and benefit of the owner, while section 857 relates only to the creation of a trust for the benefit of a third person. Furthermore, a trust to receive and hold real property to be transferred to the trustor on demand is not a trust to convey within the meaning of the Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. If, as alleged in the amended complaint, real property was purchased by the trustees with the money of appellant, then, in the absence of any other specific agreement, a trust resulted under the terms of section 853, Civil Code. Such a trust is valid as one created or declared by operation of law. Civ. Code, § 853. A trust so created or declared becomes a voluntary trust as to the trustee "by any words or acts of his indicating, with reasonable certainty: (1) His acceptance of the trust, or his acknowledgment, made upon sufficient consideration of its existence." Civ. Code, § 2222.

[8] The complaint alleges both acceptance and acknowledgment on the part of both trustees, the continuance of the confidential relations between the parties, and the promises to turn over the property to appellant, made up to the time of the death of the trustee Fleury Gommet. There is thus pleaded an express trust created by the original agreement, with the possibility of a resulting trust so far as the realty is concerned growing out of the trustees own acts in purchasing the realty with the funds of the trustor. In either event, a voluntary continuing trust was created, against which the statute would not commence to run until a repudiation of the trust on the part of the trustees was brought to the knowledge of the trustor. Arnold v. Loomis, 170 Cal. 95, 98, 148 Pac. 518, Taylor v. Morris, 163 Cal. 717, 725, 127 Pac. 66, Roache v. Caraffa, 85 Cal. 436, 446, 25 Pac. 22. In the latter case the Supreme Court say:

. "If, now, it affects any real estate, as it presently appears to do, it has been made to do so because of the act of the trustee, and by operation of law under sections 852 and 853, Civil Code; but this does not change its character of express trust. A resulting trust, under section 853, may still be an express trust. It was not alone an express trust, but a continuing trust, and the statute of limitations would not run against the cestui que trust, until repudiation by trustee brought home to the knowledge of the beneficiary."

This is clearly the rule of law in this state, and further citation of authority is unnecessary.

[9, 10] Respondent next urges that the action is barred by the laches of appellant. The facts alleged are that at all the times during the continuance of the trust both trustees reaffirmed their obligations and promised to return the property on demand; that their relations were friendly and cordial, and appellant had no reason to anticipate that there would be a repudiation on the part of either trustee until she filed her claim against the estate of Fleury Gommet. The action was commenced within a few months after the rejection of this demand. It is only when laches affirmatively appears on the face of a complaint that this defense can be raised by demurrer. The demand upon the executrix was rejected on August 22, 1917. The demand made upon the respondent individually was rejected October 15, 1917. This suit was instituted October 18, 1917. This does not constitute such delay as would warrant the court in holding that the plaintiff was guilty of laches in the institution of the proceedings. Lamb v. Lamb, 171 Cal. 577, 153 Pac. 913; Cooney v. Glynn, 157 Cal. 583, 589, 108 Pac. 506; Hughes v. Silva, 184 Pac. 415.

For the reasons given, the judgment is reversed, with directions to the trial court to overrule the demurrer and to grant leave to the respondent to answer the amended complaint.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 45

PEOPLE v. MARTIN. (Cr. 847.)

(District Court of Appeal, First District, Division 1, California. Oct. 31, 1919.)

1. CRIMINAL LAW ⊜806(1) — ONE INSTRUCTION DEFINING CRIME SUFFICIENT.

That on a trial for robbery definition of the crime was given in one of the instructions was enough.

2. CRIMINAL LAW ⊜824(1)—REQUEST FOR INSTRUCTION NECESSARY.

Failure to instruct or to instruct more specifically on a proposition is not error in the absense of request for instruction.

3. CRIMINAL LAW ⊜655(1) — REMARK OF JUDGE AFTER VERDICT HARMLESS.

Remarks of the trial judge could not have harmed defendant, having been made after return of verdict.

4. CRIMINAL LAW ⊂645—PROSECUTING ATTORNEY MAY WAIVE OPENING ARGUMENT TO JURY AFTER CLOSE OF EVIDENCE.

Pen. Code, § 1093, subd. 5, providing that, when the evidence is concluded, unless the case is submitted on either side or on both sides without argument, the prosecuting attorney and counsel for defendant may argue the case, the prosecuting attorney opening the argument and having the right to close, does not prevent the prosecuting attorney waiving an opening argument with right still to closing argument, especially as section 1094 authorizes the court to depart from the order of trial prescribed by section 1093.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Frank Martin was convicted of robbery, denied a new trial, and appeals. Affirmed.

J. K. Ross, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., and R. L. Chamberlain, of Sacramento, for the People.

WASTE, P. J. The defendant was convicted and sentenced to the state prison for the crime of robbery. This appeal is from the judgment and order denying a new trial.

[1, 2] Appellant's first contention is that the court misdirected the jury. He complains that there is no explanation in the charge of the gist of the offense. The definition of the crime of robbery was given to the jury in one of the instructions of the court. That was sufficient. Furthermore, the failure of the trial court to instruct the jury upon any proposition deemed essential by the defendant is not to be regarded as error, unless he made a request for such instruction. People v. Fice, 97 Cal. 460, 32 Pac. 531; People v. White, 5 Cal. App. 329–335, 90 Pac. 471.

As to the other alleged omissions to instruct: The charge is remarkably short, but the law of the case was correctly, and we think sufficiently, stated by the trial court in its instructions to the jury. If counsel for the defendant deemed it essential that the jury should be specifically instructed upon any particular phase of the case, it was his privilege and duty, to request such instruction. In the absence of such request, the charge to the jury is not open to attack on the ground that it failed to specifically cover a particular point in the case, which counsel for the defendant deemed pertinent and material to the question of the defendant's guilt or innocence. People v. Stirgios, 23 Cal. App. 49, 136 Pac. 957. See, also, People v. Rogers, 163 Cal. 476, 126 Pac. 143; People v. Wong Chow, 2 Cal. Unrep. 382, 4 Pac. 763.

There is nothing in the appellant's next contention that there is not sufficient evidence to warrant the conviction. The testimony of the complaining witness and of the arresting officer amply supports the verdict.

[3] There is no merit in the contention of appellant that certain remarks of the trial court worked an injury to the defendant. The alleged improper language of the court was made after the jury had returned its verdict, and had been discharged.

[4] The third and last point made by appellant is that the court erred in refusing to compel the district attorney to make an opening argument in order that appellant might "reply," and also erred in denying appellant the privilege of "closing the case." An examination of the record shows that at the conclusion of taking of the testimony the district attorney announced his willingness to waive argument. Thereupon defendant's counsel demanded the right "to close the case," with the apparent intention of making the only argument in the matter. Upon this application being denied, defendant submitted the case. As we read the entire record relative to this episode in the trial, we see nothing more than an expressed willingness on the part of the district attorney to submit the case to the jury without argument, and an attempt on the part of the defendant to force the district attorney into making an opening argument, on penalty of having the trial court refuse him the right to reply after defendant's counsel had argued. We do not understand that the court denied defendant the right to make his usual argument with the customary privilege of the district attorney to reply in case he so desired. We find nothing in section 1093, subd. 5, of the Penal Code to prevent a district attorney from waiving an opening argument in a criminal case. The section, however, does give him the right to close. Furthermore, the trial court may, in the exercise of its discretion, depart from the order of trial prescribed in that section. Penal Code, § 1094. The early cases cited by the appellant in support of his contention in this regard have no bearing upon the section of the Code as it now stands.

The judgment and order are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

⊂For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

44 Cal. App. 95

DOUGLAS v. ORTH et al. (Civ. 3030.)

(District Court of Appeal. Second District, Division 2, California. Nov. 3, 1919.)

1. LIMITATION OF ACTIONS ⊂=58(4)—ACCRUAL OF CAUSES OF ACTION AGAINST CORPORATION AND STOCKHOLDERS.

Where plaintiff was injured in collision between a delivery wagon of a company and an automobile in which he was riding, his causes of action against the company and against its stockholders on their liability as such arose at the same time—that is, the time of the collision.

2. LIMITATION OF ACTIONS ⊂=65(2)—STOCKHOLDERS' LIABILITY NOT BASED ON PRELIMINARY JUDGMENT AGAINST CORPORATION.

Cause of action against stockholders of corporation on their stockholders' liability for injuries from collision with its delivery wagon, since it accrues at the same time as against the corporation, is not based upon judgment against the corporation.

3. LIMITATION OF ACTIONS ⊂=105(2)—NO EXCLUSION OF TIME FOR APPEAL BY CORPORATION, IN SUIT AGAINST IT FOR INJURIES, FROM PERIOD OF LIMITATIONS GOVERNING ACTION TO ENFORCE STOCKHOLDERS' LIABILITY FOR SAME INJURIES.

Where plaintiff was injured in a collision between a delivery wagon of a company and the automobile in which he was riding, and sued the company to recover, the time from filing of the company's appeal to affirmance of the judgment by the Supreme Court should not be excluded from the time between the collision and the date of affirmance in determining whether plaintiff's cause of action to enforce the liability of stockholders in the company is barred by Code Civ. Proc. §§ 338, 359.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. K. Douglas against Margaret Orth and others. From judgment for defendants, plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant.

Ingall W. Bull, of Los Angeles, for respondents Margaret Orth and John G. Orth.

Frankel & Frankel, Goldberg & Meily, and Leo Silverstein, all of Los Angeles, for respondent Kornblum.

THOMAS, J. This is an action against three stockholders of a corporation to recover the proportionate amount of a judgment obtained against the corporation in which these defendants were stockholders, on their alleged liability as such.

Summarized, the facts upon which the present action is based are as follows: On November 13, 1912, the plaintiff was injured in a collision between a delivery wagon of the Berlin Dye Works & Laundry Company, a corporation, and an automobile in which he was riding. Plaintiff commenced an action on the 13th of December, 1912, against said corporation for damages arising out of the collision, and, after trial, recovered judgment for the sum of $10,000, from which judgment the corporation appealed. The judgment was affirmed on December 17, 1914. On August 14, 1916, 3 years and 8½ months after the collision, plaintiff commenced this action against the three stockholders as aforesaid. Demurrers were interposed to the complaint by defendants on the grounds: (1) That it did not allege a cause of action against them; and (2) that the alleged cause of action was barred by the provisions of sections 338 and 359 of the Code of Civil Procedure. The demurrers were sustained with leave to amend. Plaintiff refused to amend, and judgment was thereupon entered for defendants.

All parties to this action agree that the cause of action accrued, if any did accrue against the defendants, on the date of the collision, although more space is devoted to the argument and the citation of cases in support of this point than on any other proposition. But it is contended by appellant that the cause of action against these defendants is not barred, for the reason that the time which elapsed from the filing of the appeal to the affirmance of the judgment by the Supreme Court in the action aforesaid against the said corporation—from September 5, 1913, to January 16, 1915, both dates inclusive, a period of 1 year, 4 months, and 11 days—should be deducted from the 3-year limitation period. Appellant further contends that by excluding the said period only "2 years and 5 months' time for limitation between the time of the happening of the accident and the filing of the complaint herein" had elapsed, and hence the action would have been brought in time.

[1, 2] Appellant also urges that "the cause of action" in this case is the judgment referred to against the corporation, and in support thereof says:

"Surely it must be said that, if the corporation could maintain an appeal, which it could and did, in this behalf, any steps taken by it should be imputed to and become an act of the stockholders. The cause of action primarily was against the corporation sole, and after judgment was rendered then suit could be maintained on the judgment against the stockholders for their pro rata payment thereof."

With this contention we are unable to agree. We think the "cause of action" arose at the same time against the corporation and against the stockholders on their liability as such, if any there was. Davidson v. Rankin, 34 Cal. 503; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Miller v. Lane, 160 Cal. 90, 116 Pac. 58. This being

the law, and it being conceded that the cause of action against the corporation arose on the date of the collision, the cause of action therefore, if any exists against the defendants here, arose out of the act or omission, if any, by which the liability was incurred, and plaintiff's cause of action against defendants, if any he has, is not based upon the judgment against the corporation.

[3] There is only one question in this case, and that is:

"Should the time from the filing of the appeal to the affirmance of the judgment by the Supreme Court as aforesaid be excluded from the time transpiring between the date of the collision and the said date of affirmance in arriving at our conclusion as to whether the cause of action is barred by the statutes?"

We think not. Stilphen v. Ware, 45 Cal. 110; Union Trust Co. v. Journeay, 29 Cal. App. 502, 156 Pac. 999; Hyman v. Coleman, supra. In the case last cited the court said:

"A judgment against the corporation does not create a new liability, nor extend the time prescribed by the statute of limitations for bringing suit against the stockholders."

This being true on "contractual obligations," a fortiori it would be so when the obligation is one imposed by law.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

44 Cal. App. 26

THRASHER v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA et al. (Civ. 2876.)

(District Court of Appeal, First District, Division 1, California. Oct. 30, 1919. Hearing Denied by Supreme Court Dec. 29, 1919.)

1. PHYSICIANS AND SURGEONS ⟸11(3) — HEARSAY EVIDENCE INADMISSIBLE BEFORE BOARD OF MEDICAL EXAMINERS.

In a proceeding before the board of medical examiners to revoke a license to practice medicine, hearsay evidence is inadmissible, in view of Medical Practice Act, § 14, as amended in 1915 (St. 1915, p. 196, § 12).

2. EVIDENCE ⟸275½, New, vol. 18 Key-No. Series — DYING DECLARATIONS ADMISSIBLE ONLY IN PROSECUTIONS FOR HOMICIDE.

Dying declarations are not admissible in a proceeding before the board of medical examiners to revoke a license to practice medicine, or in any other proceeding, except in criminal cases of homicide, under Code Civ. Proc. § 1870, subd. 4.

3. CRIMINAL LAW ⟸407(1)—DECLARATIONS IN PRESENCE OF ACCUSED INADMISSIBLE WHEN DENIED AT TIME BY ACCUSED.

Statements made in the presence of an accused are not admissible in evidence under Code Civ. Proc. § 1870, subd. 3, relating to admissions by conduct, where accused expressly denies the truth thereof; it not being the accusation, but the conduct of the accused, that is evidence in such cases.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding before the Board of Medical Examiners of the State of California to have the license of Marion Thrasher to practice medicine revoked. An order, purporting to find and adjudge the respondent guilty of unprofessional conduct and to revoke his license to practice medicine, was, on writ of review, set aside and annulled, and the Board of Medical Examiners and others appeal. Affirmed.

Harry A. Encell, of Oakland, for appellants.

Samuel M. Shortridge, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment of the superior court made and entered upon the hearing of a writ of review, setting aside and annulling an order of the board of medical examiners of the state of California purporting to find and adjudge the respondent guilty of unprofessional conduct, and to revoke his license to practice medicine in this state.

The respondent was charged before said board of medical examiners with unprofessional conduct under the first subdivision of section 14 of the Medical Practice Act, which provides that such unprofessional conduct shall consist in "the procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion." The respondent appeared before said board upon said charge and a hearing was had, during the course of which certain essential evidence in support of said charge was admitted over the objection of respondent as to its competency. At the conclusion of the hearing the said board adjudged the respondent guilty of the said charge, and ordered his license to practice medicine revoked. Thereupon the respondent applied for a writ of review to the superior court which, upon the hearing on said writ, annulled the said judgment and order of the board of medical examiners, whereupon the latter have prosecuted this appeal.

The chief contention of the respondent at the hearing upon said writ and also upon this appeal is that the board of medical examiners received in evidence over his objection certain hearsay evidence which was not admissible under the rules with regard to the admission of evidence by which said board of medical examiners must be govern-

ed in proceedings before it. Section 14 of the Medical Practice Act, as amended in 1915 (Stats. 1915, pp. 196, 197), provides in respect to such cases that "if the charges on their face be deemed sufficient by the board, and issue be joined thereon by answer, the board shall proceed to determine the matter, and to that end shall hear such proper evidence as may be adduced before it." In the case of Englebretson v. Industrial Accident Commission, 170 Cal. 793, 151 Pac. 421, the Supreme Court of this state, in construing the terms of the statute then in force in relation to the rules of evidence governing hearings before said commission (which was much more broad and liberal than the terms of the Medical Practice Act above quoted), held that hearsay evidence was inadmissible upon hearings before tribunals of that character, and annulled the award of said commission because of its error in the admission of such evidence. In the later case of Connolly v. Industrial Accident Commission, 173 Cal. 405, 160 Pac. 239, this ruling was affirmed.

[1] We have no doubt that the principle enunciated in these cases is to be given full application to hearings before the board of medical examiners, in view of the language of the statute above quoted, which limits the power of said board to the hearing only of "such proper evidence as may be adduced before it." In the case of Englebretson v. Industrial Accident Com., supra, it was further held that where the ruling of the inferior tribunal upon an essential element in the case was based solely upon the hearsay evidence which had been thus improperly admitted, the judgment of such tribunal would be annulled upon a writ of review. In the instant case it is admitted that an essential element in the case necessary to be established by competent evidence was the fact of the pregnancy of the woman upon whom the respondent performed the operation. It is the contention of the respondent herein that the only substantial evidence upon this essential element in the case was wholly hearsay, and particularly that the chief evidence upon this point consisted in a written statement in the nature of a dying declaration made and signed by the patient a short while before her death. We have examined carefully the record before us, and find that this contention of the respondent as to the state of the evidence must be sustained, and that aside from said written statement of the woman there is not only a dearth of evidence of her pregnancy in the record, but that upon that feature of the case the testimony of the autopsy surgeon strongly supports the respondent's claim that the woman was not in fact pregnant when the operation, which was in the nature of a curettement, was performed.

[2, 3] The question then remains as to whether the written but unsworn statement of the deceased woman was admissible upon the hearing before the board of medical examiners, either as a dying declaration or upon any other theory which would take it out of the objection to it as hearsay. That it was not admissible in this particular proceeding as a dying declaration the authorities seem uniform and clear, holding that such declarations are inadmissible except in criminal cases of homicide, and never in civil actions or proceedings. Code Civ. Proc. § 1870, subd. 4; Jones on Evidence, § 330, 2; 21 Cyc. 981, and cases cited; People v. Hall, 94 Cal. 595, 30 Pac. 7. It is in fact conceded by the appellants herein that the statement in question was not admissible as a dying declaration, but it is insisted by the appellants that it was admissible upon another ground and under subdivision 3 of section 1870, Code of Civil Procedure, as "the act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." The record of the proceedings had before the board of medical examiners does in fact disclose that the written statement of the respondent's patient was read in the respondent's presence and hearing while she was in the hospital and near to death, but it also discloses that while said statement was being read the respondent interrupted it several times with questions and assertions amounting to denials of its truth, and also produced a statement of his own regarding the case which the woman had already signed as correct, in which it was asserted by him that the patient had already had a miscarriage before coming to him for treatment. To such a state of the record the language of the Supreme Court in the case of People v. Teshara, 134 Cal. 542, 66 Pac. 798, has exact and special application. The court there says:

"The court also erred in refusing to strike out the evidence of Patton and Mullen as to the accusation made by Loucks, when Amaya and defendant were brought to his bedside. The statement made by Loucks at that time was hearsay, and Teshara made no admission of its truth, either expressly or tacitly. He expressly denied it. The court and the district attorney seem to have lost sight of the fact that it is not the accusation, but the conduct of the accused, that is evidence in such cases, and that the only reason for admitting the accusation is to explain the conduct. The district attorney should not have offered this evidence, knowing, as he did, that Teshara had not remained silent under the accusation, but had repelled it at the time it was made."

See, also, People v. Ah Yute, 54 Cal. 89; People v. Hartwell, 175 Pac. 21.

It will thus be seen that the unsworn statement of the woman as to her state of pregnancy at the time of the respondent's treatment of her case was not competent evidence of the fact of such pregnancy, and that the respondent's acts and conduct in respect thereto cannot be held to amount to an

admission of the truth of her statement in that regard. It follows that there was no sufficient evidence before the board of medical examiners upon that essential feature of the case to justify it in finding the respondent guilty upon the charge before it and in making its order revoking his license to practice medicine. The trial court was therefore correct in its ruling that such finding and order were unsupported by evidence, and hence beyond the jurisdiction of said board.

Judgment affirmed.

We concur: KERRIGAN, J.; BEASLY, Presiding Judge pro tem.

44 Cal. App. 69

CALIFORNIA CANNERIES CO. v. GREAT WESTERN LUMBER CO. (Civ. 2933.)

(District Court of Appeal, First District, Division 1, California. Nov. 3, 1919. Rehearing Denied Dec. 2, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

1. PLEADING ⟸34(6)—DEFECTIVE PLEADING CORRECTED BY PROOF.

Allegation that defendant "failed, neglected, and refused to deliver the box-shook" in question, is an allegation from which demand for delivery may be reasonably implied, and, since defendant did not avail itself of the infirmity by special demurrer, it cannot after judgment question sufficiency of complaint to support the judgment because of said infirmity.

2. PLEADING ⟸59—CONDITIONS PRECEDENT.

It is a general rule that performance of conditions precedent in a contract must be averred in the complaint, either specifically or by authorized general averment, or waiver thereof alleged.

3. PLEADING ⟸59, 374—DEMAND FOR PERFORMANCE MUST BE ALLEGED.

Whenever it is essential to the cause of action that the plaintiff should have actually requested defendant to perform its contract, such request must be stated in the complaint and proved.

4. APPEAL AND ERROR ⟸907(3)—EVIDENCE PRESUMED COMPETENT IN ABSENCE OF BILL OF EXCEPTIONS.

In the absence of any bill of exceptions, it must be assumed that the evidence presented in support of a finding was competent to establish the allegation of the complaint and was received without any objection and was sufficient to sustain the facts found.

5. PLEADING ⟸34(6)—NO PRESUMPTION THAT THE FACTS NOT PLEADED WERE PROVED.

The court will intend, after judgment, in order to support it, that facts imperfectly alleged have been established, but it will not presume for such purpose that material facts not at all stated have been proved.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the California Canneries Company against the Great Western Lumber Company, in which defendant filed a cross-complaint. From the judgment rendered, defendant appeals. Affirmed.

Marcel E. Cerf and C. H. Sooy, both of San Francisco, for appellant.

John R. Jones, of San Francisco, for respondent.

WASTE, P. J. Plaintiff brought this action to recover damages for alleged breach of a contract to furnish material for making boxes. Defendant, after demurrer (general as to the point here involved) overruled, denied generally and specifically the allegations of the complaint, and by way of cross-complaint set up a common count for goods, to wit, box-shook, sold and delivered. The trial court found in favor of plaintiff as prayed, but offset the damages by the amount claimed in the cross-complaint and entered judgment accordingly. Defendant appeals on the judgment-roll alone.

The complaint alleges the execution of the contract between the plaintiff and the defendant, setting forth a copy, and that the delivery of the box material was to be made in carload lots, at the cannery of plaintiff in San Francisco. Then occurs the following allegation:

"That defendant has failed, neglected, and refused to deliver (certain described material), to plaintiff's damage in the sum of $4,167.94."

This is followed by the prayer for judgment.

Under the terms of the contract, the defendant agreed to sell to plaintiff, and the plaintiff undertook to purchase, receive, and pay for, upon the specified terms and prices, "their entire requirements in box-shook for their own use." Defendant agreed to fill all orders promptly as it might receive the same from the plaintiff, all shook to be shipped between April 1, 1917, and January 1, 1918, as ordered by plaintiff, delivery to be made within 10 days from the time the order was received.

The court found "that defendant has broken said agreement, in that it has failed, neglected, and refused, to deliver" the material as in the complaint described; that plaintiff thereupon purchased said box-shook in the open market and paid therefor the market value, to wit, $14,864.55; that the price for the same, according to the contract, was $10,696.61; that the difference between the market value and the contract price was $4,167.94; that plaintiff was indebted to defendant, for box-shook sold, $2,311.91, which

amount, plus a small demurrage charge, was deducted from the difference between the contract price and the amount plaintiff was compelled to pay in the open market. The judgment before mentioned followed these findings.

[1] But one question is presented for consideration on this appeal: Does the complaint state facts sufficient to support the judgment? Appellant contends that the judgment must be reversed because it does not appear from the complaint that the plaintiff ever required of defendant any box-shook that was not delivered, or gave any orders to defendant that were not promptly filled, or delivery made within the time specified in the contract. In other words, it insists that it was a condition precedent, devolving on plaintiff, to make a demand for the delivery of such box-shook as it required, before defendant was obligated to deliver, and that the failure to allege such demand in its complaint is fatal to plaintiff's cause of action.

[2, 3] It is a general rule that performance of conditions precedent in a contract must be averred in the complaint, either specifically or by authorized general averment, or a waiver thereof alleged. 21 R. C. L. 462. Whenever it is essential to the cause of action that the plaintiff should have actually requested the defendant to perform its contract, such request must be stated in the complaint and proved. 4 Ency. of Pleading and Practice, 647. "If the contract which has been broken provided for the delivery of the goods to the buyer on request, it is a condition precedent to the buyer's right of action that he should make this request." Benjamin on Sales (7th Ed.) § 878. Such request must be both alleged and proved. Radford v. Smith, 3 M. & W. 257, 258, cited in Benjamin on Sales, supra.

[4] Compliance with the requirements of these rules of procedure is to be found, if at all, in the allegation of the complaint "that defendant has failed, neglected and refused, to deliver" an amount of box-shook, and in the finding of the lower court "that defendant has broken said agreement, in that it failed, neglected and refused to deliver" the same. In the absence of any bill of exceptions, it must be assumed that the evidence presented in support of this finding was competent to establish the allegation of the complaint, and was received without any objection, and was sufficient to sustain the facts found. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 695, 75 Pac. 564; Damon v. Quinn, 143 Cal. 75, 77, 76 Pac. 818. The allegation of the complaint, therefore, stands proved, and it only remains to determine whether, or not, it sufficiently states the performance of the required condition precedent resting on plaintiff, i. e., the making of a proper request, or demand, for the delivery of the box-shook it required.

[5] The court will intend, after judgment, in order to support it, that facts imperfectly alleged have been established, but it will not presume for such purpose that material facts not at all stated have been proved. Barron v. Frink, 30 Cal. 486, 489; Richards v. Travelers' Ins. Co., 80 Cal. 505, 507, 22 Pac. 939; San Francisco v. Pennie, 93 Cal. 465, 468, 29 Pac. 66; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 397, 43 Pac. 1111; San Joaquin Lumber Co. v. Welton, 115 Cal. 1, 46 Pac. 735, 1057. If, therefore, there is no statement in the complaint of the performance of the condition precedent, the contention of appellant must be upheld. On the other hand, if there was not here an absence of a material averment, but only a case of a material averment defectively pleaded, the point might have been well taken upon special demurrer, but the objection may not now be heard. Merrill v. Pacific Transfer Co., 131 Cal. 582, 585, 63 Pac. 915.

Respondent takes the position that the term "refused to deliver," in the complaint, viewed in the light of the entire pleading, is an averment, sufficient after judgment, because the facts essential to the cause of action appear therein by reasonable implication, in that a refusal implies a demand. This contention appears to be well supported by a number of authorities.

In Mutual Life Ins. Co. v. Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. (N. S.) 127, the answer to the amended complaint alleged as a separate defense that certain premiums upon a policy of life insurance became due and that both the insured and beneficiary "failed, neglected, and refused to pay" the same to the defendant, by reason whereof the said policy of life insurance became void and of no effect. A demurrer was interposed to this defense on the ground that it failed to state facts sufficient to constitute a defense, and the demurrer was sustained. On certiorari in the United States Supreme Court (Mutual, etc., Co. v. Hill, 178 U. S. 347, at 350, 20 Sup. Ct. 914, 915 [44 L. Ed. 1097]) it was held that the allegation in the answer "does not disclose a mere omission, for it is 'neglected and refused,' and, of course, there can be no refusal unless with knowledge of the opportunity or duty. A party cannot be said to refuse to do a thing of which he knows nothing. Refusal implies demand, knowledge, or notice." The judgment of the Circuit Court of Appeals was reversed, and the case remanded, with instructions to overrule the demurrer to the answer.

In Bowen v. Young, 37 Misc. Rep. 547, 75 N. Y. Supp. 1027, 1029, while the facts were somewhat similar, the position of the parties was reversed. It appeared from the

complaint that the defendants purchased under the contract certain Niagara clips, to be made and delivered as required in such quantities as should from time to time be ordered. It was alleged that defendant, after ordering a certain amount of the commodity, refused and neglected, and still refuses and neglects, to accept any further quantity, or to place his order for the same, or carry out the contract in any respect. On demurrer it was urged that it did not appear in the complaint that the plaintiff's assignor had tendered a performance of the contract by offering to deliver the balance of the clips. The court said:

"In determining whether a complaint should be sustained as sufficient, we have to consider, not only the facts alleged, but also all that can, by reasonable and fair intendment, be implied from them; and averments which sufficiently point out the nature of the pleader's claims are sufficient, if under them he would be entitled to give the necessary evidence to establish his cause of action. Coatsworth v. Lehigh Valley Ry. Co., 156 N. Y. 451, 51 N. E. 301. Under the contract, it appears that the clips were to be manufactured from time to time in such quantities as ordered. And it appears that the defendant, since February 16, 1897, up to the time of the assignment, refused to order any of the clips. The word 'refuse,' as defined by the Century Dictionary, means 'to deny, as a request, demand, or invitation; to decline to accept; reject; as to refuse an offer.'"

Therefore, under the complaint, the court held it was proper to show that plaintiff's assignor, down to the time of their assignment to the plaintiff, offered to manufacture and deliver clips to the defendant, and that such offers were declined by him.

In Shaler v. Van Wormer, 33 Mo. 386, 388, the action was by the indorsee against the maker and indorser of a negotiable promissory note. The court said:

"Neither demand nor notice is expressly averred, but both by clear implication. The petition, after the usual averments in regard to the making and indorsement of the note, proceeds thus: 'At the maturity of said note, the same was duly presented for payment at the banking house of said Tesson & Danjen and payment thereof was refused.' * * * The averment 'that payment was refused' presupposes a previous demand of payment. The word 'refuse' signifies 'to deny a request, demand, invitation, or command,' and the proof of the refusal to pay necessarily involves the proof of a previous demand.'"

In Divan v. Loomis, 68 Wis. 150, 151, 31 N. W. 760, 761, the allegation was that the defendants "wholly and positively refused to perform their said agreement." The demurrer to the complaint was overruled. On the appeal the order of the lower court was affirmed, the court saying:

"It is said that the complaint is insufficient because it fails to aver any request of Loomis to comply with the terms of the alleged agreement. An allegation of refusal implies a previous demand, and is equivalent to an allegation of a demand and a refusal. Hammond v. Mason & H. O. Co., 92 U. S. 724 [23 L. Ed. 767]; Bogie v. Bogie, 41 Wis. 220. This being so, the breach is sufficiently alleged."

In Burns v. Fox, 113 Ind. 205, 14 N. E. 541, the court, while adhering to the rule that in actions in specific performance it is necessary for the plaintiff to show that he has made a demand for a conveyance, held the use of the word "refused" in the complaint implied such a demand.

In Davis v. Lumpkin, 106 Ga. 582, 586, 32 S. E. 626, 628, it was held that the ordinary meaning of the word "refuse" carries the idea of an application to the person refusing.

Again, in Beckhard v. Rudolph, 68 N. J. Eq. 740, 747, 63 Atl. 705, 707, it was held that the term "refuse" naturally, if not necessarily, imports a previous demand, or request for payment.

In People v. Perkins, 85 Cal. 509, 511, 26 Pac. 245, 246, the court said:

"To refuse is to decline the acceptance of something offered, or to fail to comply with some requirement. Neglect imports the omission or disregard of some duty. * * * The power to refuse a thing or neglect a duty must necessarily be based upon a knowledge of the existence of the thing or the duty."

In the light of these authorities, we are satisfied that under the more liberal rule of construction, to be applied to pleadings after judgment entered, we are justified in holding that the allegation of the complaint that the defendant "failed, neglected, and refused to deliver the box-shooks" in question, is an allegation from which the giving of the necessary orders to the defendant to furnish the same may be reasonably implied. There is not, therefore, such an entire absence of a material averment as to render the complaint fatally defective. As appellant did not avail itself of the opportunity to assail the infirmity of the averment by special demurrer, it cannot now successfully advance such contention.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

44 Cal. App. 790

GREAT WESTERN LUMBER CO. v. CALIFORNIA CANNERIES CO.
(Civ. 2932.)

(District Court of Appeal, First District, Division 1, California. Nov. 3, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Great Western Lumber Company against the California Canneries Company. From the judgment rendered, the defendant appeals. Affirmed.

Marcel E. Cerf and C. H. Sooy, both of San Francisco, for appellant.
John R. Jones, of San Francisco, for respondent.

WASTE, P. J. The issues involved in this appeal are identical with those in California Canneries Co. v. Great Western Lumber Co. (No. 2933) 185 Pac. 1008, this day decided. By stipulation of the parties the result of that action was embodied in findings and judgment in this cause without a separate trial. The records were presented here in one transcript on appeal.

On the authority of the decision in that case, the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

44 Cal. App. 16

UMSTEAD et al. v. AUTOMOBILE FUNDING CO. OF AMERICA.

(District Court of Appeal, First District, Division 1, California. Oct. 29, 1919.)

1. APPEAL AND ERROR ⊂=994(3)—WEIGHT OF TESTIMONY AND CREDIBILITY OF WITNESSES FOR TRIAL COURT.

The matter of credibility of witnesses and weight to be given to the testimony of each is a matter resting in the discretion of the trial judge, whose determination may not be reviewed on appeal.

2. PRINCIPAL AND AGENT ⊂=23(5) — RELATIONSHIP NOT SHOWN.

In an action to rescind a conditional sale of an automobile, evidence *held* insufficient to sustain a finding that persons who made certain representations to plaintiffs were acting as agents of the defendant.

3. PRINCIPAL AND AGENT ⊂=115(2) — EVIDENCE NOT SHOWING IMPLIED AUTHORITY TO MAKE REPRESENTATIONS AS TO PROPERTY SOLD.

Where automobile sales company negotiated with plaintiffs for the sale of an automobile, but would not sell on credit and had plaintiffs draw up an application to defendant, a company engaged in the purchasing of cars from dealers who have already found a buyer and in turn reselling them on credit to the buyers, and defendant accepted the application and fully prepared all the necessary papers for the transaction between itself and plaintiff and intrusted them to the motor sales company with instructions to have them properly signed and returned, the motor sales company was defendant's agent for that particular purpose, and for nothing else, and any representations made by the motor sales company as to the car obtained by plaintiffs was not binding on defendant.

4. EVIDENCE ⊂=121(2) — PRINCIPAL BOUND ONLY BY ADMISSIONS AND REPRESENTATIONS OF AN AGENT AT TIME OF TRANSACTION.

Only those representations, declarations, and admissions of an agent, respecting the subject-matter of a transaction, will bind the principal, which are made at the same time and constitute part of the res gestæ.

Appeal from Superior Court, Los Angeles County; C. A. Raker, Judge.

Action by Kate A. Umstead and others against the Automobile Funding Company of America. Judgment for plaintiffs, and defendant appeals. Reversed.

Leon R. Yankwich, of Modesto, for appellant.
G. P. Adams, of Los Angeles, for respondents.

WASTE, P. J. Plaintiffs instituted this action to rescind a lease and conditional sale of an automobile, and to recover payments made, on the ground that the automobile was not new, as represented prior to the making of the contract. The real parties plaintiff are Kate A. Umstead and Edith G. Lawrence, sisters; their husbands also being made parties. Cousins and Lawrence (the latter not related to plaintiffs), partners, operating under the name of Chevrolet Motor Car Company of Los Angeles, were dealers in automobiles. Defendant is a corporation engaged in the purchasing of cars and trucks from dealers who have already found a buyer, and in turn leasing them to the purchasers on terms; in other words, as we view it, reselling them on credit. The lower court rendered judgment in favor of plaintiffs. Defendant made a motion for a new trial, which was denied, and defendant appeals.

Plaintiffs Kate A. Umstead and Edith G. Lawrence were desirous of purchasing a new automobile, and made several trips to the place of business of Cousins and Lawrence to inspect automobiles and have the same demonstrated. They finally decided to buy, and claim that they selected one of two cars on the floor of the sales rooms. At the trial, it was admitted as a fact that this automobile was represented to them by the Chevrolet people to be a new car. Plaintiffs did not have sufficient ready money to pay the entire purchase price of the car and proposed a sale on the installment plan. Cousins and Lawrence, not being able to sell a car on

credit, volunteered to get a company handling such transactions to buy the car, and in turn resell it to plaintiffs on satisfactory terms. They prepared, and the plaintiffs Mrs. Umstead and Mrs. Lawrence signed, an application in writing, addressed to the defendant, in which, after stating "We desire to purchase from Chevrolet Motor Car Company of California, one new five-passenger touring motor car, season of 1914, model Baby Grand, with catalogue equipment," etc., the price is quoted, and the application continues:

"We hereby propose that if you will purchase the same (securing and keeping for yourself such discount for cash as you may be able to obtain) we will and do hereby bind myself to execute and deliver unto you an agreement in words and figures set forth in the draft thereof hereto attached and made a part hereof."

This application was presented to, and accepted in writing by, the defendant. Whether the lease was actually attached to the application does not fully appear.

On information and data secured from Cousins and Lawrence, Buckingham, the vice president of defendant, prepared an agreement denominated a "lease and conditional sale of automobile" and the promissory notes secured by it, and gave them to Cousins and Lawrence, with instructions to have them properly signed by plaintiffs and returned. The principal document was a lease by and between the defendant and the plaintiffs, on terms therein specified, for the period of seven months, with the right to purchase after expiration of that time, and receive a bill of sale, of "One (1) 1914; Baby Grand Chevrolet touring car; standard equipment; car number 5392," together with its equipment.

At the time the application was accepted by defendant, Cousins and Lawrence entered into an agreement with it, in which, in consideration of defendant accepting the same, they recommended the applicants (plaintiffs) as persons worthy of credit, and agreed to assume the entire fulfillment of the manufacturer's guarantee covering the car, and also agreed that in case of nonpayment on the part of the applicants they would cooperate with defendant to secure payment, or in case a recovery of the car proved necessary, they further agreed to co-operate with defendant in such recovery, and to store and sell such recovered car under defendant's direction, and at a compensation mutually agreed upon.

Before executing the lease on the part of defendant, Buckingham, its vice president, personally examined the car bearing the number, and answering the description as inserted by him in the lease, and certified to his company that it was a new car. When cross-examined in court, during the trial of this action, he testified that he could not tell from the investigation he had made whether it was a new car or not; that he had the statement of Cousins and Lawrence as to what car it was and checked up that certain car.

When the papers were all signed, defendant paid the Chevrolet Motor Car Company for the automobile, received from it a bill of sale thereof, and the automobile was placed in possession of the plaintiffs.

According to the testimony of, and in behalf of, plaintiffs, they had trouble in operating the car from the start, alleged weakness of parts and serious mechanical defects soon manifesting themselves. Disagreements arose between plaintiffs and the motor company over the amount and payment of repair bills. After keeping and using the car for three months, and driving it until the speedometer registered about 5,000 miles, plaintiffs, according to their pleadings and testimony, for the first time learned that the automobile which had been delivered to them was not new, but was secondhand, and had been used by the Chevrolet Motor Car Company, before its sale to them, as a demonstrating car. They thereupon refused to pay any further installments upon their contract, and gave notice to the defendant, in writing, that they had elected to rescind their contract with it. They made demand for cancellation of the lease and repayment of the amounts paid thereunder, together with items for repairs and insurance. Defendants thereupon took possession of the car, which, according to the testimony, was in very bad shape. The rear "axle was broken, the motor was loose all over—it needed a general tightening up and overhauling."

The court found that, as an inducement to plaintiffs Umstead and Lawrence to enter into the contract, the defendant represented and stated falsely, fraudulently, and deceitfully to the plaintiffs, and thereby induced them to believe, and the plaintiffs did believe, that the automobile was new, and had not been used, when, as a matter of fact, it had been used, and was not new. The first part of this finding is based on the admission that Cousins and Lawrence represented the automobile to be new. No one else made the statements. To further support that portion of the finding it was necessary for the trial court to conclude that Cousins and Lawrence were the agents of the defendant. Appellant contends, first, that there is not competent evidence to sustain the finding that the automobile delivered was not a new car. On this point, plaintiff Kate Umstead testified that in a conversation just prior to the rescission of the contract, and, about three months after the lease was signed, Cousins and Lawrence "acknowledged that it was not a new car; that they stated that the car was a demonstrator." Plaintiff Nathan Lawrence testified that in one of the conversa-

tions prior to this litigation the following occurred between Mrs. Lawrence and Cousins:

"Mrs. Lawrence made this statement at the time: 'Now, Mr. Cousins, you have had your say, etc., and what you would do, and would not do.' That is not the exact words, but that is the substance. Now she says, 'I have something to say to you. This is your demonstrator car, and you know it.' And he (Cousins) said: 'Yes, Mrs. Lawrence, that is our demonstrator.'"

He further testified that—

"Mr. Lawrence (of the Chevrolet Company) said they had used their judgment, as we were going to make that long trip, and if we had a new car we would not have got through the Newhall tunnel; that they would have had to come and tow us back. That was the Visalia trip."

The same witness testified:

"We rode in that car practically 30 days, up Canteere Hill, when the demonstration was made, before we bought the car."

Mrs. Blake, a witness for the plaintiff, testified that Mrs. Lawrence, one of the plaintiffs, said to Cousins, "I know this is not a new car, and you sold us a demonstrator," and Mr. Cousins said: "Well, Mrs. Lawrence, that is so." Witness Blake, an automobile mechanic, who appears to have done considerable work on the car while plaintiffs had it in their possession, testified that Cousins and Lawrence said to plaintiffs, because of the fact that (the plaintiffs) were going on a long trip, they, "in using their best judgment, had decided that it was advisable to give them a slightly used car." There was also evidence to the effect that the speedometer of the car registered 1,700 miles after its return from a trip after plaintiffs obtained it. Just which trip and what the mileage of these trips was does not appear.

Cousins and Lawrence both emphatically denied that they admitted that the automobile was a demonstration car. In explanation of the statements credited to them by the other witnesses, they both testified that the car, sold and delivered to plaintiffs, was a new car, one of two new ones which they had received in their consignment for the month, and which they had in their salesroom; that they had no demonstrating car, but took the plaintiffs out in one of the new cars, which was made ready for that use, and so used only on that occasion, and had not been demonstrated to anyone else; that it was the car subsequently sold to plaintiffs; that it had been driven around only a few times in the process of "tuning it up, and getting it ready." Lawrence testified that, when charged by plaintiffs with having sold plaintiffs a "demonstrator," he merely explained the actual facts to them. Both witnesses testified that the car was in good condition after "tuning up," and was in "A1 shape."

[1] The conflict in the testimony in support of the finding that the car was not new was a matter for the consideration of the lower court. The matter of credibility of the witnesses, the weight to be given to the testimony of each, was a matter resting in the discretion of the trial judge, whose determination may not be reviewed by us.

Appellants next contend that the testimony relative to the condition of the car, whether sufficient to support the finding, or not, was erroneously admitted, for two reasons: First, that Cousins and Lawrence were not shown to be the agents of defendant, hence any statements made by them in the premises were not binding on defendant; and, second, even though an agency was shown, the statements, or alleged admissions, as to the car not being new, were made after the transaction was closed. These contentions, we think, are correct.

[2] The witness Buckingham, vice president of the defendant company, Cousins, and Lawrence each testified that the latter two had no connection whatever with the defendant corporation, and were not its agents. The plaintiffs introduced testimony to the effect that, when the lease was being signed, Lawrence and Cousins were accompanied by a young man named Darling, and said by Cousins and Lawrence to be from the Funding Company, who made inquiries about the payment of the installments under the contract, and who went away saying as he left, "I now turn you over to these gentlemen, who will act as our agents," referring to Lawrence and Cousins. Defendant's vice president testified that Darling was not an agent of, and had no connection whatever with, defendant. Lawrence and Cousins testified that he was the representative of another concern, engaged in business similar to that of the defendant, and that he was interested in securing the contract if defendant did not consummate the deal. On cross-examination plaintiffs' counsel asked the vice president of the defendant, referring to Darling:

"So you did not act through him, but you acted merely through the Chevrolet Motor Car Company, in having the contract signed?"

The witness answered, "Yes, sir."

This is all the evidence relied on by respondents to establish the fact that the relation of principal and agent existed between defendant and Cousins and Lawrence. In our judgment it does not have that effect.

[3] When defendant, having fully prepared all the necessary papers for the transaction between itself and plaintiffs, intrusted them to Cousins and Lawrence, with instructions to have them properly signed and returned,

it made them its agents for that particular purpose, and for nothing else. The deal between plaintiffs, and the Chevrolet people for the purchase by plaintiffs of the car had already been arranged for. Consequently, we find nothing in the transaction itself sustaining the finding that the relation of principal and agent existed to the extent that representations made by Cousins and Lawrence before defendant was in any way a party thereto were binding on the latter.

[4] Appellant's second ground of objection to the admission was equally good. The alleged declarations of Cousins and Lawrence, if established, were not made until long after the automobile deal was closed.

It is a well-established general rule that only those representations, declarations, and admissions of an agent, respecting the subject-matter of a transaction, will bind the principal, which are made at the same time, and constitute a part of the res gestæ. Moore v. Bettis, 30 Tenn. (11 Humph.) 67, 53 Am. Dec. 771, 772, and note. The more recent cases, likewise, support the general rule that the unauthorized declarations or admissions of an agent, not made contemporaneously with the occurrence, or transaction to which they relate, are not competent evidence against the principal, unless they are so immediately connected with the transaction as to constitute a part thereof. Peterson Bros. v. Mineral King Fruit Co., 140 Cal. 624, 629–630, 74 Pac. 162. See, also, cases cited in notes to Conklin v. Con. Ry. Co., 196 Mass. 302, 82 N. E. 23, in 13 Ann. Cas. 859.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

44 Cal. App. 34

THEODORE et al. v. WILLIAMS, Judge of Superior Court. (Civ. 3074.)

(District Court of Appeal, Second District, Division 1, California. Oct. 30, 1919.)

1. INJUNCTION ⟸231 — EVIDENCE INSUFFICIENT TO SHOW VIOLATION OF INJUNCTION.

Whether or not defendant violated an injunction was a question for the court on all the evidence in the contempt proceeding, and where the evidence is such that it cannot be said that the trial court abused its discretion in deciding that defendant was not guilty, such decision will not be disturbed.

2. INJUNCTION ⟸223(1) — EVIDENCE SHOWING ACTS NOT A VIOLATION.

Where a former laundry driver for plaintiff, while acting in the same capacity for another, was enjoined from soliciting business from customers on his former route for plaintiff, his driving along the street with his wagon, labeled with his own name and that of his employer, and his carrying an advertisement in a newspaper, wherein he stated he was the agent of his present employer, giving a phone number, construed not acts in violation of the injunction.

3. INJUNCTION ⟸223(1)—ACCEPTING FRUITS OF MISCONDUCT OCCURRING PRIOR TO INJUNCTION NOT A VIOLATION.

Where a laundry driver was enjoined from soliciting patronage from persons on route he formerly worked for plaintiff, contempt proceedings related to acts committed subsequent to the injunction, and defendant's acceptance of work from customers whom he had induced to give him their laundry by wrongful acts prior to the injunction is not a violation thereof, and does not render him guilty of contempt of court.

4. INJUNCTION ⟸230(3)—EVIDENCE INSUFFICIENT TO SHOW VIOLATION OF INJUNCTION.

In a contempt proceeding against a laundry driver, enjoined from soliciting patrons on a route he formerly handled for plaintiff, evidence *held* insufficient to show that defendant had violated the injunction.

Application by G. M. Theodore and others, doing business as the Anaheim Laundry Company, for mandamus against R. Y. Williams, Judge of the Superior Court of Orange County, to compel an adjudication of contempt against J. L. Adkins. Writ dismissed.

Ward Chapman and L. M. Chapman, both of Los Angeles, for petitioners.

Clyde Bishop, of Santa Ana, for respondent.

SHAW, J. This is an original proceeding in mandate to compel the superior court of Orange county to adjudge J. L. Adkins guilty of contempt for the violation of a decree granting an injunction against him in an action therefor, wherein petitioners were plaintiffs and he was defendant.

Petitioners were the proprietors of a laundry in the city of Anaheim, operated under the name of the Anaheim Laundry. As an employé of petitioners, Adkins had charge of laundry route No. 1 in said city; his duty being to gather from and return to customers in such territory the articles consigned to petitioners for laundry. About March, 1919, Adkins severed his connection with the Anaheim Laundry, and in the same capacity entered the employ of the Model Laundry, also operating in said city of Anaheim, and, using the information obtained while in petitioners' employ, proceeded to solicit the business and patronage of customers of the Anaheim Laundry residing in said laundry route No. 1. Thereupon, in an action therefor, the court, on April 22, 1919, rendered a decree perpetually enjoining Adkins from soliciting, either directly or indirectly, any laundry work from any customers of petitioners who were such on the 26th day of March, 1919, in

what was known as route No. 1 in the city of Anaheim, and further enjoin and restrain him from receiving any laundry work from such customers as the result of any solicitation on his part, either directly or indirectly, or taking any laundry work of said customers, obtained through such solicitation, to any competing laundry, or disclosing to any competing laundry the names or addresses of such customers or endeavoring to persuade them to cease their patronage of petitioners, or take their laundry work to another laundry.

Thereafter, upon application of petitioners, supported by affidavits that Adkins was violating the injunction so granted, he was by the court cited to appear therein on May 3, 1919, and show cause why he should not be adjudged guilty of contempt and punished therefor. Pursuant to this order, Adkins appeared in court, at which time a hearing was had, and the court made an order as follows:

"It appearing to the court that the defendant has not violated any of the terms of the injunction, therefore the defendant is not adjudged in contempt of this court."

The purpose of the injunction granted in the action was to protect the rights of plaintiffs therein, who are petitioners here. This purpose could only be accomplished by enforcing the terms of the injunction, and the only means provided by law for such enforcement was the proceeding in contempt, wherein, upon the disobedience of the injunction being shown, it was the duty of the court to impose punishment therefor. The application for writ of mandate is based upon the alleged neglect of this duty on the part of the court. While counsel for petitioners concede the general rule that, where a lower court is vested with power to determine a question upon which a right depends, mandamus will not issue to control the discretion of such court in the determination thereof (Hammel v. Neylan, 31 Cal. App. 23, 159 Pac. 618; Strong v. Grant, 99 Cal. 100, 33 Pac. 733), they nevertheless insist that, in the absence of any other remedy, the writ will lie to force a particular action by the inferior court when, upon the facts clearly established without conflict of evidence, the court, as a matter of law, may not act otherwise than in such particular manner. Ex parte Ford, 160 Cal. 334, 116 Pac. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; Inglin v. Hoppin, 156 Cal. 483, 105 Pac. 582.

[1] As to whether or not there was a violation of the injunction was a question for the determination of the court upon all the evidence adduced at the hearing of the contempt proceeding, and we cannot say there was an abuse of discretion by the court in deciding that Adkins was not guilty of acts constituting a violation of the injunction.

[2, 3] In addition to the affidavits upon which the citation to show cause was issued, one of the petitioners was called as a witness. His testimony was to the effect that subsequent to the granting of the injunction he had seen Adkins call at the residences of former customers of petitioners and obtain their laundry. As to one of said customers, he said:

"I tried to talk to her; she would not let me have the bundles; she told me they were for Mr. Adkins."

As to another, he stated she refused to give him her laundry, and she said she would have no more laundry for the Anaheim Laundry. As to others, his testimony shows they refused to continue as patrons of the Anaheim Laundry, and transferred their work to the Model Laundry, represented by Adkins. There is no showing, either in the affidavits or testimony, that Adkins had done anything, subsequent to the issuance of the writ of injunction, which could be construed as soliciting laundry from such persons, unless, as claimed by petitioners, the driving along the street of his wagon, plainly labeled "Model Laundry, J. L. Adkins," and the carrying of an advertisement in one of the papers wherein he stated, "I am agent for the Model Laundry, J. L. Adkins, Phone Anaheim 14 W," be construed as acts in violation of the writ. To so hold would deprive him of the right to pursue a lawful calling as a means for obtaining a livelihood. This, in the absence of positive covenant, may not be done. See New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 Pac. 990, Ann. Cas. 1918C, 1022, and cases therein cited. As against this testimony, Mr. Adkins testified that since the injunction was granted—

"I have not in a single instance told anybody to give me their laundry, or requested anybody to give me their laundry. I have not called for laundry in a single instance at any house in Anaheim, except where I have been previously requested personally by note or by telephone to call and get the work."

That former patrons of the Anaheim Laundry possessed the right to transfer their patronage from the Anaheim Laundry to the Model Laundry, represented by Adkins, there can be no doubt. Nor can there be any doubt as to his right to receive it, where such transfer is made without any act on his part which could induce the change. It may be conceded that prior to the issuance of the injunction Adkins had been guilty of unlawful acts, as a result of which he obtained for the Model Laundry the patronage of those who had theretofore given their work to the Anaheim Laundry. But in this proceeding we are not concerned with what he did prior to the issuance of the injunction; the inquiry in the contempt proceeding related to acts committed by him subsequent to the time when he was "enjoined from soliciting, either directly

or indirectly, any laundry work from any customers of" petitioners, and restrained from receiving laundry work from such customers as the result of solicitation on his part, or taking any laundry work of said customers obtained through such solicitation. Conceding that, by means of wrongful acts committed by Adkins prior to the issuance of the writ of injunction, he had obtained the work of petitioners' customers, who thereafter, without further act on his part, other than to call for and receive their laundry on request by phone or otherwise to do so, such acts, being within his right, did not constitute a violation of the injunction. The conclusion of the court was that since the issuance of the writ he had not been guilty of soliciting work from former customers of petitioners; that he had not received any laundry work from such customers as the result of solicitation on his part, nor had he taken any laundry work from customers which had been obtained through such solicitation.

[4] In the absence of any direct showing on the part of petitioners that Adkins had solicited the laundries received by him from their former customers, and that the only act on his part, other than calling at their residences to get the work, was the driving along the streets of a wagon marked "Model Laundry," and the advertisement carried in a newspaper above referred to, it cannot be said the court abused its discretion in accepting as true the statement of Adkins that he had not in a single instance called at any house in Anaheim, except where he had been previously requested personally by note or by telephone to call and get their work.

The writ is dismissed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 76

WERNER v. SOUTHERN PAC. CO.
(Civ. 3010.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

1. MASTER AND SERVANT ⊂=278(18)—NEGLIGENCE OF MASTER FOR JURY.

In an action for the death of a member of a switching crew, killed in a collision between freight cars and an engine making a running switch, or "high-ball," evidence *held* sufficient to sustain a finding that the collision resulted from the negligence of defendant's employés.

2. MASTER AND SERVANT ⊂=289(30) — CONTRIBUTORY NEGLIGENCE OF INJURED SERVANT FOR JURY.

In an action for damages for death of a member of a switching crew, killed in a collision between freight cars and an engine making a running switch, or "high-ball," whether or not deceased was guilty of contributory negligence *held* for the jury.

3. MASTER AND SERVANT ⊂=204(1)—RISKS ASSUMED BY SERVANT ENGAGED IN INTERSTATE COMMERCE.

A servant of an interstate carrier, engaged in interstate commerce, only assumes the ordinary risks and dangers that might be expected by an ordinarily prudent man, without being increased or any additional hazard added thereto by reason of the negligence of the master or any of its employés.

4. TRIAL ⊂=419—NO ERROR IN DENYING MOTION FOR NONSUIT WHERE EVIDENCE WAS SUPPLIED BY MOVANT.

It was not error to deny a motion for nonsuit well taken at the close of plaintiff's case, where there was additional evidence from defendant's witnesses at subsequent stages of the trial strengthening plaintiff's case in the particulars covered by the motion to such an extent that the issue might be resolved in plaintiff's favor.

5. WITNESSES ⊂=388(8)—LAYING FOUNDATION FOR IMPEACHING OWN WITNESS BY FORMER TESTIMONY.

In an action for damages for death, it was not error to permit plaintiff to ask one of his own witnesses on direct examination as to whether or not he had not testified differently at the inquest, and whether certain answers were given at the inquest, under the authority of Code Civ. Proc. § 2049, counsel for plaintiff having stated that he was taken by surprise, and that the former testimony at the coroner's inquest was all that he had to rely on, although such record was not afterwards offered in evidence.

6. WITNESSES ⊂=380(5)—PERMITTING LEADING QUESTIONS AS TO INCONSISTENT STATEMENTS BY OWN WITNESS.

Permitting leading questions is a matter largely within the discretion of the court, and a state of facts which would justify a party in discrediting his own witness by showing that he had made contradictory statements would usually justify the exercise of such discretion in permitting leading questions.

7. NEGLIGENCE ⊂=101—CONTRIBUTORY NEGLIGENCE DIMINISHES, BUT DOES NOT BAR, RECOVERY UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

Contributory negligence is not a bar to recovery, in an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to the employé.

8. APPEAL AND ERROR ⊂=1068(2)—INSTRUCTION MADE HARMLESS BY FINDING.

Conceding that an instruction as to contributory negligence in an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) was erroneous, it was without prejudice where the jury found under a special issue that there was no contributory negligence.

9. COURTS ⟸97(5) — DECISIONS OF FEDERAL COURTS GOVERN AS TO CONSTRUCTION OF FEDERAL EMPLOYERS' LIABILITY ACT.

A decision of the United States Supreme Court construing the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) as giving right of recovery for injuries to an employé resulting in whole or in part from the negligence of fellow servants is binding on the state courts in an action under such act.

10. APPEAL AND ERROR ⟸930(4)—VERDICT ASSUMED NOT BASED ON THEORY OF INSTRUCTION UNSUPPORTED IN EVIDENCE.

An instruction in an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665), which erroneously advised the jury that plaintiff could recover if it was negligence for the railroad to make a running switch, the running switch having been directed by plaintiff's deceased, was not prejudicial, where it appeared without dispute that such method of switching cars was in common use and recognized generally by trainmen as a safe and proper method, as it cannot be assumed the jury based its verdict for plaintiff on negligence in so making the switch.

11. MASTER AND SERVANT ⟸213(4)—ASSUMPTION OF RISK.

Legal representative of a member of a switching crew killed in an attempt to make a running switch cannot recover under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665) on the ground that it was negligence to attempt a running switch at the time, where decedent himself directed the running switch to be made.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Anna M. Werner, adminstratrix of the estate of Charles A. Werner, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry T. Gage and W. I. Gilbert, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

SLOANE, J. The defendant appeals from a verdict and judgment against it in the sum of $8,500 damages for the death of plaintiff's intestate in a railroad accident. Both defendant and the deceased were at the time of the accident admittedly employed in interstate commerce, and the action is brought under the federal Employers' Liability Act of April 22, 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657–8665]).

The decedent was run over and killed while engaged as a member of a switching crew in the yards of the defendant company in Stockton Cal., on the night of November 2, 1915. The undisputed narrative of the facts discloses that on the night in question the crew was switching two freight cars by the method known as a running switch or "high-ball." To effect such a running switch as was here attempted, the engine approaches the switch, with the two cars attached, at sufficient speed to give the cars momentum enough to carry them past the switch upon the main line. When near the switch the engine is slackened sufficiently to enable the man in charge of that part of the work to uncouple the engine from the cars. The engine then speeds ahead and is switched to the side track and the switch replaced so as to permit the cars, by their own momentum, to run past the switch along the main line to a position beyond the side-tracked engine. The switching crew on this occasion consisted of the engineer and fireman, running the engine, the man at the switch, a brakeman on top of the foremost freight car to regulate its speed and distance, and the decedent, on the tail end of the engine, whose business it was to uncouple the cars from the engine when they were ready to make the run for the switch. The program was carried out to the extent that Werner, the decedent, had successfully uncoupled the engine from the cars, the engine had speeded up and was turned onto the side track, and the switch was replaced to permit the cars, approaching under their own momentum, to run forward on the main line. Before the engine had proceeded from the main line a sufficient distance onto the side track to clear the approaching cars, however, it was overtaken and run into by the forward car. The decedent, who had remained on the footboard of the engine, and had jumped off just before the collision, was run over by the freight cars and killed.

[1] As to the cause of the accident, there is evidence tending to show that the engine was slowed down by the engineer as it turned onto the side track, and came nearly to a stop. The engineer stated that he did this on account of the danger in making too sudden an approach over the switch points and the curve in the side track. The evidence also shows that the brakeman on the front freight car made no effort to use the brake to retard the speed of the cars. Various witnesses testified that there was ample room between, the engine and the cars at the time the engine was turned onto the side track to have cleared the way for the freight cars, under ordinary control. We think the jury was clearly justified in finding the collision to have resulted from the negligence of either the brakeman or the engineer, or both.

[2] It is true that the decedent gave the directions that the running switch be used on this occasion, and gave the signals for uncoupling the cars and the starting ahead of the engine; but here his duties in the matter ended. The failure of the undertaking to end safely and successfully is fairly attributable to the subsequent negligence of the engineer

or the brakeman, or both, in not sufficiently accelerating the speed of the engine or retarding the speed of the freight cars; and there is no evidence that there was negligence in making use of the flying switch, or in the manner, time, or conditions of the signals given by the decedent, or in his remaining on the footboard of the engine.

[3, 4] At the close of plaintiff's case in chief the defendant moved for a nonsuit, which was denied. This is one of the grounds of error presented. The grounds of the motion were that the decedent was familiar with the railroad yards and was an experienced railroad man; that he directed the movement of the engine in connecting the cars, directed the movement of the engine in starting the cars, drew the pin which uncoupled the cars from the engine, and had complete knowledge of the move that was to be made by the engine and cars, and therefore assumed the ordinary risks and dangers which were attendant on the movement in question. He did not, however, know, and it does not appear that he had reason to anticipate, that his fellow workmen would not co-operate in co-ordinating their subsequent movements in the usual manner and with the usual skill and prudence. As the jury was subsequently, and we think correctly, instructed, in assuming the ordinary risks of his employment, the decedent "only assumed the ordinary risks and dangers that might be expected by an ordinarily prudent man, without being increased or any additional hazard added thereto by reason of the negligence of the defendant or any of its employés working with him on the switch crew." It is further objected on this motion that there is a failure of proof upon the part of plaintiff to show that the deceased met his death in substantially the manner described in the complaint. On this question the evidence is meager as to just how and why the decedent jumped from the footboard of the switch engine in front of the moving cars; but the testimony discloses that the freight cars struck the engine just about where he had been standing, and as there appears to be no motive for his jumping off onto the track directly in front of the approaching cars, other than in an effort to escape the impending collision, we think the matter was properly left to the jury. There was additional evidence from defendant's witnesses at subsequent stages of the trial tending to strengthen plaintiff's case in the particulars covered by the motion for nonsuit; and if, on the whole showing, the issue may be resolved in plaintiff's favor, there is no error in the denial of the motion, even though originally well taken. Peters v. Southern Pacific Co., 160 Cal. 48, 116 Pac. 400.

[5-7] Appellant takes exception to certain rulings of the court in admitting evidence over its objection. The witness Goedart, a member of the switching crew at the time of the accident, called by the plaintiff, was asked by plaintiff's counsel on direct examination if he had not at the coroner's inquest over this matter answered certain questions as to the distance between the cars and the engine at the precise time the engine was turned onto the side track, and as to the speed at which the cars were approaching, in a certain manner, different and more favorable to the plaintiff than answers given to similar questions on the trial. The witness was shown what purported to be a copy of the transcript of the evidence taken at such inquest, and asked if questions indicated were so asked and answered as shown. A single question and answer will suffice for illustration:

"Q. Didn't you state under oath on November 3, 1915, at Stockton, Cal., while under oath at the time of the coroner's inquest, weren't the following questions asked you and the following answers given: 'At what speed were they going? A. I should judge about 13 and 15 miles an hour.'"

The question was objected to by defendant as leading and suggestive, and as being an attempt to impeach plaintiff's own witness, and improper direct examination. The objection to this and other similar questions was by the court overruled. The questions were mostly answered in the negative, or by the statement of the witness that he did not remember. The jury, moreover, was properly instructed by the court that the evidence offered was only admissible to lay the foundation to show contrary statements of the witness for the purpose of discrediting his testimony on the trial, and could not be considered as evidence of the facts testified to. There was no subsequent offer of the record of the inquest to show what was actually testified to on that occasion.

We think the rulings of the court were without error, under the authority of section 2049 of the Code of Civil Procedure, and that the foundation for such impeaching or discrediting evidence was sufficiently shown to comply with the rule laid down in Zipperlen v. Southern Pacific Co., 7 Cal. App. 206, 93 Pac. 1049. Counsel for plaintiff stated that he was taken by surprise by the testimony given by this witness on the trial, and that the former testimony as given in the purported copy of the transcript at the coroner's inquest was all that he had to rely on. This showing was before the court and was accepted as a foundation for the impeaching testimony, and justified its admission in evidence for that purpose. The fact that this record was not afterwards offered in evidence is immaterial. There was no obligation resting on the plaintiff to follow the matter up. As to the objection that the questions were leading this was largely a matter within the discretion of the court, and a state of facts which would justify the party in discrediting

his own witness by showing that he had made contradictory statements would usually justify the exercise of such discretion in permitting leading questions.

[8] Exception is also taken to the court's instruction to the jury on the question of proportionate reduction of damages in case of contributory negligence. The instruction substantially followed the language of the federal Employers' Liability Act in directing the jury that, if the decedent was guilty of contributory negligence, then "such contributory negligence shall not bar a recovery herein, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé." But even conceding error in the instruction, it would be without prejudice to the appellant in view of the special issue submitted to the jury on which it was found that there was no contributory negligence. If this finding is justified by the evidence, as we have already indicated that in our opinion it was, it becomes entirely immaterial what admeasurement of damages was prescribed for a condition where contributory negligence might exist.

[9] The instructions covering the fellow-servant negligence question were in harmony with the doctrine of the federal Employers' Liability Act, which establishes the right of recovery for injuries to an employé "resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier." This language is construed in the Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, as a modification of the common law relating to negligence of fellow servants as adopted by the Code provisions in California and many other states. In this connection Mr. Justice Van Devanter, speaking for the court in the cases above cited, says:

"Briefly stated, the departures from the common law made by the portions of the act against which the first objection is leveled are these: (a) The rule that the negligence of one employé resulting in injury to another was not to be attributed to their common employer is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employé. * * *"

And in actions in the state courts under the federal Employers' Liability Act the state courts are bound by this rule.

[10, 11] There might be sufficient ground for appellant's exception to the verdict under the instructions covered by exception No. 31 if there was any evidence before the jury tending to show that there was negligence in attempting the running switch on this occasion. In the instruction covering this point the court enumerates, among other grounds of negligence set forth in the complaint, the alleged negligence in "attempting to at all make the said high-ball or running switch," and charges the jury that, if they find from the evidence "that all of said acts of negligence, or any one of them, have been proven, and that all or either was the sole proximate cause of the accident, then you will find for the plaintiff." Had there been any evidence tending to support a finding that the attempt to make this running switch was in itself a negligent act which contributed to the injury, the instruction would be erroneous, for the reason that it appears without dispute that the decedent himself directed this running switch to be made. But we think the evidence shows without controversy that this method of switching cars was in common use, and recognized generally by trainmen as a safe and proper method. Under this state of the evidence it cannot be assumed that the jury predicated its verdict upon negligence in resorting to this mode of switching cars.

We think rulings complained of on other instructions were without prejudicial error.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

44 Cal. App. 130

PEOPLE v. PYLE. (Cr. 683.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1919. Rehearing Denied Dec. 2, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

1. EMBEZZLEMENT ⟸48(1)—INSTRUCTION AS TO CORROBORATION NOT ERRONEOUS.

In an embezzlement prosecution, an instruction "that it is not essential to a conviction that the prosecuting witness, S., should be corroborated by the testimony of other witnesses as to the particular acts constituting offense; it is sufficient if you believe from his evidence and all other testimony and circumstances in proof in the case beyond a reasonable doubt that the crime charged has been committed by the defendant," *held* not erroneous in that the jury was left free to convict whether all the other testimony and circumstances in proof in the case corroborated the complaining witness or not.

2. EMBEZZLEMENT ⟸48(4)—INSTRUCTION ON RECEIVING AND CONVERTING PROPERTY WHILE ASSUMING TO ACT AS AGENT PROPER.

In a prosecution for embezzlement, where there was evidence that defendant, assuming to act as the agent of the complaining witness, was intrusted with a draft for the purpose of giving the same to another to induce him to make a loan, and fraudulently appropriated the draft to his own use, the court properly instructed "that if any person assumes to act as the agent of another, and in such assumed capacity he is intrusted with and receives into his care

and custody property, for the use of another person, and fraudulently appropriates such property to his own use or to any use or purpose not in the due and lawful execution of his trust, he is guilty of embezzlement."

3. CRIMINAL LAW ⟸930—REMARKS OF THIRD PERSON IN PRESENCE OF JUROR NOT GROUNDS FOR NEW TRIAL.

Where a third person made a statement outside of the courtroom and in the presence of some of the jurors that he would "fix" the defendant, and that defendant beat him out of some money, the court did not abuse its discretion in denying a new trial, in the absence of a showing that the statement influenced the verdict of the jury.

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

I. L. Pyle was convicted of embezzlement. From a judgment of conviction and an order denying his motion for a new trial, he appeals. Judgment and order affirmed.

U. W. Breeden and R. J. Adcock, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Jerry H. Powell, and Arthur Keetch, Deputy Attys. Gen., for the People.

THOMAS, J. The information in this action is in two counts—one alleging embezzlement, and the other grand larceny. The defendant was convicted of the former and acquitted as to the latter charge. There was a motion for new trial, which was denied; and thereupon the defendant was sentenced to imprisonment in the state's prison. This appeal is from the judgment and said order denying defendant's motion for a new trial.

Appellant urges four reasons for reversal of the judgment and order, viz.: (1) Error of the court in giving instruction "on the question of corroboration"; (2) error of the court "on the question of receiving and converting property while assuming to act for another"; (3) that there is in the record "no evidence of embezzlement, but that there is some evidence tending to prove that defendant obtained the signature of the prosecuting witness to the draft with intent to cheat and defraud him, of which defendant is not charged"; and (4) abuse of discretion by the court in refusing to grant defendant's motion for a new trial, "for the reason that at least a part of the jury received extrajudicial evidence, from a source and of a nature and under circumstances which naturally would bias them, and prevent the defendant from having a fair trial." Briefly stated, then, defendant's complaint here is: (1) That the court erred in giving certain instructions; (2) insufficiency of the evidence to support the judgment; and (3) abuse of discretion by the trial judge.

Only two of the instructions given are objected to and criticized by defendant here. They are as follows:

(1) "The court further instructs the jury that, if any person assumes to act as the agent or servant of another, and in such assumed capacity he is intrusted with and receives into his care and custody property, for the use of another person, and fraudulently appropriates such property to his own use or to any use or purpose not in the due and lawful execution of his trust, is guilty of embezzlement."

(2) "You are further instructed that it is not essential to a conviction in this case that the prosecuting witness, L. C. Stuckey, should be corroborated by the testimony of other witnesses as to the particular acts constituting an offense; it is sufficient if you believe from his evidence and all other testimony and circumstances in proof in the case beyond a reasonable doubt that the crime charged has been committed by the defendant."

[1] It is contended by defendant, in referring to the instruction last quoted, that "the jury were left by this instruction free to convict, whether all the other testimony and circumstances in proof in the case corroborated Stuckey or not, and for that reason is clearly erroneous," and our attention is called to the case of People v. Neetens, 184 Pac. 27, as supporting this contention. With such contention, however, we cannot agree; nor does the case last cited support such a conclusion. In that case—a prosecution and conviction for obtaining money by false pretenses—the so-called false representations being entirely oral, there was no corroboration of the testimony as required by section 1110 of the Penal Code. In the case at bar the very "customer's draft" which defendant himself admits he drew and secured the "acceptance" of by said Stuckey is in evidence, to say nothing about other corroborating circumstances which answer conclusively defendant's contention here.

[2] As to the first instruction quoted, there was evidence that defendant, assuming to act as the agent of Stuckey, was intrusted with the draft mentioned for the purpose of giving the same to one Doyle to induce him to make the loan in question, and that defendant fraudulently appropriated the draft to his own use. This being so, the instruction, we think, was proper.

We have studied carefully, not only the instructions objected to, but all the instructions given, and they are, in our opinion, ample, and as favorable to defendant as they properly could be on the questions presented; and this is especially true when considered in the light of all the instructions given.

As to the second point—that of the insufficiency of the evidence—no discussion is necessary. Suffice it to say that the record groans under the weight of damning evidence amply sufficient to support the verdict and judgment.

[3] This brings us to the consideration of the last point, viz. the alleged abuse of dis-

cretion by the learned trial judge. In support of his motion for a new trial defendant filed two affidavits wherein it was stated that one Doyle had stated to defendant's attorney, outside the courtroom, and in the presence of some of the jurors, that he (Doyle) would "fix" defendant, that defendant beat him out of some money, and that for what defendant's attorney had done he (Doyle) would have defendant arrested. This, if true, was reprehensible; but, in the absence of a showing that such alleged statements influenced the verdict of the jury, we think it was not an abuse of discretion to deny defendant's motion. Unless we go out and into the thin air of metaphysics for inspiration and wholly disregard the ample evidence, independently of the alleged statements, to sustain the verdict of the jury, and arbitrarily hold that such alleged statements probably influenced the verdict, defendant's contention can find no support. It is not surprising that in these days of unrest that thoughtful men and women, while conceding the improbability of the conviction of an innocent person, under our system of courts and jurisprudence, are extremely apprehensive as to whether we can convict the guilty. To find the learned trial court guilty of an abuse of discretion under the evidence as disclosed by this record would, we think, be to furnish evidence in support of the pessimistic assumption to which we have just referred. "A new trial will not be granted because of remarks about the case made during the trial to jurors, or in the hearing of jurors, by strangers to the litigation, where neither the successful party nor the jurors were at fault, unless such remarks probably influenced the verdict." 29 Cyc. 798.

After reading the entire record we are satisfied, particularly as we are fortified by section 4½ of our Constitution, that, so far as this case is concerned, there has been no miscarriage of justice.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

43 Cal. App 789

EDDY v. STOWE et al. (Civ. 2928.)

(District Court of Appeal, First District, Division 1, California. Oct. 28, 1919.)

1. APPEAL AND ERROR ⟸757(3) — BRIEF TO CONTAIN EVIDENCE.

It is not a compliance with the procedure governing appeals under the so-called alternative method for an appellant to print in his opening brief, or in a supplement thereto, only the testimony in the case favorable to his contentions, as all the evidence material to the point made on the appeal should be presented in order that the court may consider its weight and sufficiency and any conflict presented therein; the court not being required to make an examination of the typewritten transcript.

2. APPEAL AND ERROR ⟸757(1), 763—BRIEF TO INCLUDE PORTIONS OF RECORD TO BE REVIEWED.

The recent amendment to the Code of Civil Procedure does not relieve parties from the necessity of printing in their briefs or in a supplement appended thereto such parts of the record as are desired to be called to the attention of the court when the appeal is taken under the provisions of sections 953, 953a, 953b, 953c, and, when a party fails to comply with that requirement, the court hearing the appeal shall direct such party to print and serve on the adverse party and file with it a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief, in view of section 953c, as amended by St. 1919, p. 261.

3. HIGHWAYS ⟸184(3)—NEGLIGENCE IN COLLIDING WITH HORSE AS QUESTION FOR JURY.

In an action by a horseman injured when defendant's automobile collided with his horse, which was rearing and bucking, whether defendant was negligent *held* for the jury.

4. HIGHWAYS ⟸184(3)—CONTRIBUTORY NEGLIGENCE AS QUESTION FOR JURY.

In such case, whether plaintiff was guilty of contributory negligence *held* for the jury.

5. HIGHWAYS ⟸170 — STATUTORY REQUIREMENTS NOT RELIEVING OF DUTY TO AVOID INJURY.

Where plaintiff's horse was rearing and bucking on a highway and a collision occurred between the horse and defendant's automobile, the case is not governed entirely by St. 1915, p. 397, an act regulating the use and operation of vehicles upon public highways, because both the plaintiff and the defendant had an equal right to the use of the highway, and it was the duty of the defendant, if in a better position to avoid the collision, to take all necessary steps.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. HIGHWAYS ⊂⊃170—DUTY OF AUTOMOBILIST AS TO FRIGHTENED HORSE.

Defendant automobilist having knowledge that plaintiff's horse was frightened, it was his duty to keep a lookout ahead, and as he approached the horse and rider to note the movements of the horse, and when he saw, or by the exercise of reasonable caution could have seen, that the horse was under excitement, bucking and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve plaintiff of his perilous position.

7. HIGHWAYS ⊂⊃170—DUTY OF HORSEMAN TO SIGNAL AUTOMOBILIST TO STOP.

Defendant in such case was not relieved from liability because of the fact that plaintiff, busily engaged as he was, did not signal him to stop as required by St. 1915, p. 397.

8. HIGHWAYS ⊂⊃170—DRIVER OF AUTOMOBILE MUST EXERCISE ORDINARY CARE AS TO FRIGHTENED HORSE.

Whatever the condition or situation, the driver of an automobile must at all times and in all places observe ordinary care to avoid injury to persons or travelers on the highway, and St. 1915, p. 397, relating to the use and operations of vehicles upon public highways, does not leave it to such a driver, in the exercise of reasonable discretion, to decide whether or not he should stop when the rider of a frightened horse fails to signal him to stop.

9. HIGHWAYS ⊂⊃175(1) — BEING ON WRONG SIDE OF ROAD NOT NEGLIGENCE PER SE.

A horseman and an automobilist going in opposite directions have an equal right to the use of the road, and a horseman is not guilty of negligence per se by reason of St. 1915, p. 397, regulating vehicles on highways, because he was on the left side of the road when struck by the automobile; his position in the highway being governed by the actions of a frightened horse which he was unable to control.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Frank G. Eddy against Harry Stowe and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Winfield Dorn, of San Francisco, J. E. Rodgers, of Martinez, and R. E. Fitzgerald and Morrison, Dunne & Brobeck, all of San Francisco, for appellants.

Ostrander & Carey, of Oakland, for respondent.

WASTE, P. J. This is an appeal from a judgment entered after a verdict of a jury in favor of the plaintiff in the sum of $12,000 damages, for personal injuries, alleged to have been sustained by respondent, as the result of a collision between a horse, then being ridden by respondent, and an automobile, being operated by appellant Stowe, an employé of the appellant Mt. Diablo Scenic Boulevard Company.

Appellants' main contention is that the evidence submitted in the court below was insufficient to sustain the verdict against them, but, in fact, affirmatively shows to the contrary. Counsel for appellants have printed in their brief, and in the supplement appended thereto, those portions of the evidence upon which they rely as supporting their position. Respondent insists that the opening brief of appellants should not be considered, claiming that only such extracts from the evidence are quoted as tend to support the views of the appellants, disregarding the testimony which conflicts therewith. An inspection of the brief convinces us that in a number of instances this is apparently true. Therefore, as was pointed out by the court in McKinnell v. Hansen, 34 Cal. App. 76–79, 167 Pac. 887, we are not in a position, without examination of the entire transcript, to assume that the quotations in the brief and printed in the supplement are complete as to the points argued, or to conclude without such examination that the record does not contain the evidence necessary to sustain the verdict of the jury.

[1] It is not a compliance with the procedure governing appeals under the so-called alternative method, for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence, material to the point made on the appeal, should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein. Unless the record is thus prepared, the court cannot intelligently pass upon the appeal on its merits without imposing on counsel a further presentation of the record, or assuming the vexatious burden of an examination of the typewritten transcript. This the court is not required to do. Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 34, 166 Pac. 1025; Marcucci v. Vowinckel, 164 Cal. 693, 130 Pac. 430.

[2] The recent amendment to the Code of Civil Procedure does not relieve the parties from the necessity of printing in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court, when the appeal is taken under the provisions of sections 953, 953a, 953b and 953c, of that Code. When a party fails to comply with that requirement, the court hearing the appeal shall direct such party to print and serve on the adverse party, and file with it, a supplement to his brief in which shall be set forth in full that portion of the record relied on by such party and not printed in any former brief. Section 953c of the Code of Civil Procedure, as amended 1919 (St. 1919, p. 261). In the instant case, in order not to delay the determination of the appeal, otherwise ready for consideration, we forbear from exacting compliance with the statute.

[3, 4] We have therefore very carefully read the evidence, relied upon by appellant, and the other testimony appearing in the reporter's transcript bearing upon the same matters. From such examination we are convinced that the verdict is supported by evidence, which warranted the jury in arriving at the conclusion that the accident was caused by the negligence of appellant Stowe, and that no actions of the respondent in the premises constituted negligence contributing proximately thereto.

Plaintiff, who is a skillful rider and an experienced stockman, and known as such to appellant Stowe, was riding a young horse he was engaged in breaking, on the highway between Danville and Mt. Diablo Park. The horse became frightened at a passing motorcycle, began rearing and bucking, and attempted to jump over the fence on the side of the highway. One of plaintiff's chaparajos caught on the barbed wire, which threw his foot out of the stirrup. While the plaintiff was engaged in subduing the horse, an automobile approached, the occupants of which called to him. As it passed he saw the automobile, driven by appellant Stowe, coming from the other direction, "driving pretty fast," as far as plaintiff's knowledge of automobiles allowed him to judge. The horse, as described by plaintiff, was then "frightened and mad. * * * The horse shied again the fence, and I dug him back again. * * * Then he lunged, tried to get out of my hold, you see, as a horse will do, and when he was about in the center of the road * * * the horse was still rearing and lunging, and I saw the other machine (driven by Stowe), and I thought the horse would go past him, or past my own side of the road. At that time the horse just reared, and the next thing I heard was glass flying, and my lights was out, like that." Plaintiff, upon cross-examination, testified that, as the automobile, driven by appellant Stowe, was approaching, his horse continued beyond his control to such an extent that, while he could prevent it from running away, he could not otherwise direct its movements other than to allow it to rear and plunge. That such was the fact is fully corroborated by the testimony of other witnesses.

Appellant Stowe, by his own testimony, admittedly saw respondent before he (Stowe) met and passed the automobile which was going in the opposite direction. That distance was variously estimated from 100 to 200 feet. There was nothing to prevent his having a clear and unobstructed view of the horse and the rider from that time until the collision occurred. After the other automobile passed the horse, Stowe observed, so he testified, that it was "frightened, jumping around, and crowding over toward the fence." From that moment, he contends, he did not see the horse, although he admitted that he knew the horse was there. According to his testimony, when he met the other automobile, he was going 20 miles an hour, and then "unconsciously slackened down to about 18," as the two machines passed. He made no effort to stop his car until after the collision. From the evidence, somewhat uncertain by reason of the references to the diagram of the scene of the accident, used at the trial, and which is not a part of the record, it appears that Stowe turned neither to the right nor to the left, in order to avoid the plaintiff's bucking horse. The collision took place on the edge of the strip of macadam which was in the center of the roadway, which, in turn, was 42 feet wide between fences. The plaintiff was thrown from his horse and suffered very serious injuries, the gravity of which are not disputed by appellant, and for which the jury awarded the large amount of damages already alluded to.

It is appellant's contention that the case at issue is governed entirely by statutory law, as found in the act regulating the use and operation of vehicles upon public highways. Stats. 1915, p. 397. Pertinent portions thereof are, according to appellant, section 20, par. "a," which requires that the driver or operator of any vehicle, in or upon any public highway, shall drive and operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and of all other vehicles or traffic upon such highway, "and wherever practicable, shall travel on the right hand side of such highway"; and section 20, par. "h," which requires that "every person having control or charge of any motor vehicle or other vehicle upon any public highway, and approaching any vehicle drawn by a horse or horses, or any horse upon which any person is riding, shall operate, manage and control such motor vehicle or other vehicle in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse or horses, and to insure the safety and protection of any person riding or driving the same; and if such horse or horses appear frightened, the person in control of such motor vehicle or other vehicle shall reduce its speed, and, if requested by signal or otherwise by the driver or rider of such horse or horses, shall not proceed further toward such animal or animals, unless such movement be necessary to avoid accident or injury, until such animal or animals be under the control of the driver or rider thereof."

[5, 6] We do not think the case is governed entirely by the statute in question. Both Eddy and Stowe had an equal right to the use of the road, but if defendant was in the better position to avoid the collision it was his duty to take all necessary steps to do so; one of them being his duty to slow down and even to stop his car, if necessary, to avoid running against plaintiff's horse. Furtado v. Bird, 26 Cal. App. 152–158, 146 Pac. 58. With the knowledge that plaintiff's horse was frighten-

ed, it was appellant Stowe's duty to keep a lookout ahead, and as he approached the horse and rider, to note the movements of the horse, and when he saw, or by the exercise of reasonable caution, could have seen, that the horse was under excitement, bucking and manifesting unmistakable fright, ordinary care required him to slow up, stop his machine, or do whatever was reasonably required to relieve respondent of his perilous position. McIntyre v. Orner, 166 Ind. 57, 63, 76 N. E. 750, 4 L. R. A. (N. S.) 1136, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087; Ward v. Meredith, 220 Ill. 66, 77 N. E. 118; Huddy on Automobiles [4th Ed.] sec. 128a, 129).

[7] There is no merit in the contention that appellant Stowe was relieved from negligence in the matter because of the fact that plaintiff, busily engaged, as he was, in subduing a frightened, bucking horse, did not signal him to stop as he approached. By his own testimony Stowe was not looking for a signal because he "didn't feel that he (plaintiff) had his hands full with the horse," and "he (plaintiff) was the last man in the world to signal anybody to stop if his horse was unmanageable."

[8] The Motor Vehicle Act (section 20 [h], supra), as before noted, requires the person driving a motor vehicle on the highway, approaching a horse on which a person is riding, and the horse appear frightened, to reduce the speed of the car, and, if requested by signal or otherwise, by the rider of such horse, to proceed no further toward such animal, "unless such movement be necessary to avoid accident or injury," until such animal is under the control of its rider.

Appellants contend therefore that under this provision the question whether, or not, under the given set of circumstances, it was the duty of Stowe to stop his machine, in order to avoid the accident, was one to be answered by him, in the exercise of reasonable discretion, and failure to stop can be determined to be negligence only in the event of a clear showing of an abuse of such discretion. They quote, in support of this contention, Babbitt on The Law Applied to Motor Vehicles (2d Ed.), § 1122, viz.:

"Under the language of the act, in some of the states the vehicle is required to remain stationary 'unless forward movement be necessary to avoid accident or injury.' In such cases it has been held that it is for the chauffeur to determine whether such movement is necessary. His conclusion is controlling, unless he acts unreasonably or in bad faith, and will not be open to question afterward."

An examination of the two authorities cited by the learned author of the work in question does not warrant an unqualified application of his language to the case at bar. In McCummins v. State, 132 Wis. 236, 112 N. W. 25, the court was construing the section of the Motor Vehicle Act of Wisconsin (Laws 1905, c. 305, § 4), which provided that the driver of the motor vehicle, upon signal or sign of distress from the driver, or rider, of a frightened horse, should stop and "remain stationary, unless a movement forward shall be *deemed* necessary to avoid accident, etc." (The italics are ours.) The court, in brief, held "that the word 'deemed,' as used in this connection, conveys the idea that the standard upon which the operator is to act rests in his judgment." The word "deemed" does not occur in the California statute, and, furthermore, the court in that case said: "This, of course, implies that he must act reasonably under the conditions presented to him." McIntyre v. Orner, supra, also cited by Babbitt, has no reference to the language of the statute imputed to it. On the facts, however, the court (at page 63 of 166 Ind., at page 752 of 76 N. E. [4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359, 8 Ann. Cas. 1087]) used the language we have already quoted in substance.

What appears to us to be a correct statement of the law in such cases is to be found in Webb v. Moore, 136 Ky. 708, 125 S. W. 152 (also quoted in Babbitt), wherein the court said:

"It is manifest that in cases like this no fixed standard of care can be laid down as a matter of law, nor can it be said what conduct will amount to negligence; and so the only rule that we can safely apply, when the facts authorize the submission of the case to a jury, is to leave it to them to determine from all the facts and circumstances whether or not the driver of the automobile exercised or failed to exercise ordinary care to avoid the accident, and whether or not the injured party observed due care. The legal measure of duty is the same upon both of the parties. Each must act with reasonable care to avoid an accident or collision. In some cases, this degree of care as to the operator might require the machine to be stopped upon the first evidence of danger; in others, it might be necessary to slow down the speed; and yet again, it might be more prudent to proceed at a high rate of speed, or not lessen the speed at which the machine is running. Each case presents different conditions and situations. What would be ordinary care in one case might be negligence in another. But, whatever the condition or situation, the driver of the automobile must at all times and in all places observe ordinary care to avoid injury to persons or travelers on the highway."

There is much in the record to indicate that the appellant Stowe was at fault in this matter. While he may have been proceeding along the highway in full compliance with the provisions of the Motor Vehicle Act, he was not thereby relieved of all obligations in the premises. He was approaching a person whom he admits he saw to be riding a frightened horse. He saw the horse and rider at a distance sufficiently great to enable him to have stopped, if need be, in order to avoid an accident. We cannot but feel that the jury was correct in finding that he was guilty of negligence in proceeding as he did, and

that such negligence was the proximate cause of plaintiff's injuries. Appellant, who was well acquainted with the plaintiff, and his ability as a rider, and his familiarity with horses, believed, according to his testimony, already referred to, that plaintiff would sufficiently subdue the horse to allow the automobile to pass safely on some portion of the wide highway. Consequently, he proceeded with no thought of taking precautions to avoid the injury which resulted. This is borne out by the testimony to the effect that shortly after the accident Stowe stated to witness Gould, in effect, that he (Stowe) "was not going so fast, but was hitting it right along; that he saw the horse; that he looked like he was going to jump the fence, getting away from the other machine; and that he took a chance, and thought that he could slip by."

[9] It appears that respondent, in order to avoid the motorcycle which frightened his horse, abandoned the macadamized portion of the road, and turned off to his left, which placed him upon what is sometimes denominated the "wrong side of the road." He was endeavoring to get the horse to cross the road to the right side as Stowe approached. Appellant contends that because of this fact respondent was on the left side of the road and was guilty of negligence per se, to wit, the violation of the statute governing the use of public highways (Stats. 1915, p. 397, supra), which contributed to his injury. There is no merit in this contention, for, as before stated, both parties had an equal right to the use of the road. Furtado v. Bird, supra. Respondent's position in the highway was governed by the actions of his frightened horse, which he was unable to control, as Stowe approached, of which Stowe had ample notice. This did not constitute a violation of the statute governing the use of the highway amounting to negligence per se, as claimed by appellants.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

43 Cal. App. 775

BARBOZA v. CONSELHO SUPREMO DA IRMANDADE DO DIVINO ESPIRITO SANTO DO ESTADO DA CALIFORNIA (FARIA et al., Interpleaders). (Civ. 3066.)

(District Court of Appeal, First District, Division 1, California. Oct. 25, 1919. Hearing Denied by Supreme Court Dec. 22, 1919.)

1. INSURANCE ⊂⊃784(1)—METHOD OF CHANGING BENEFICIARIES.

Where the by-laws or constitution of a mutual benefit society provide a method of making a change of beneficiary, a member in making a change must follow substantially the method prescribed.

2. INSURANCE ⊂⊃780—BENEFICIARY MAY BE CHANGED AT WILL.

A member of a mutual benefit society may change his beneficiary and name a new beneficiary whenever and as often as he pleases, provided he follows the steps required by the society's rules on the subject.

3. INSURANCE ⊂⊃784(6)—WHO MAY OBJECT TO MODE OF CHANGE OF BENEFICIARY.

If a mutual benefit society has waived a strict compliance with its own rules as to the method of making a change of beneficiary, and in pursuance of a request of an insured to change his beneficiary has issued a new certificate to him, the original beneficiary will not be heard to complain that the course laid down in the society's rules was not pursued.

4. INSURANCE ⊂⊃784(1) — IMPOSSIBILITY OF LITERAL COMPLIANCE WITH RULES AS TO CHANGE OF BENEFICIARY.

If it is beyond the power of a member of a mutual benefit society to comply literally with the regulations of the society in regard to a change of beneficiary, a competent court will treat the change as having been legally made; thus when the certificate is lost, or when it is in the possession of a beneficiary who will not surrender it, and it is therefor impossible for the member to comply with the rules, equity will enforce the change.

5. INSURANCE ⊂⊃784(2)—DEATH OF INSURED BEFORE COMPLETION OF CHANGE OF BENEFICIARY.

If a member of a mutual benefit society has pursued the course pointed out by the laws of the society to be followed in making a change of beneficiary, and has thus done everything devolving upon him to change the beneficiary, but before the new certificate was issued he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued.

6. INSURANCE ⊂⊃784(2)—DEATH OF MEMBER BEFORE COMPLETION OF CHANGE OF BENEFICIARY.

Where the rules of a mutual benefit society required a member desiring a change of beneficiary to indorse a direction on his certificate, or a duplicate certificate, to obtain which he must make an affidavit and request that a duplicate policy issue, and submit the same to the supreme directors, a member who lost his certificate and made out an affidavit to the effect that he wanted to change the beneficiary, and was told to first obtain a duplicate of his certificate, and he then sent in an affidavit, which entitled him to a duplicate policy, but before it was acted upon by the supreme directors he died, there was no change of beneficiary, nor had the member done all the things required of him to change the beneficiary, the things remaining to be done being more than mere ministerial acts on the part of the society.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Maria Da Floria Barboza against Conselho Supremo Da Irmandade Do Divino Espirito Santo Do Estado Da California,

in which Amelia Faria and others interplead. From a judgment in favor of the interpleading defendants, the plaintiff appeals. Affirmed.

J. Leonard Rose, of Oakland, for appellant.
Rose & Silverstein, of Oakland, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of the interpleading defendants for the amount of a policy of fraternal insurance.

The plaintiff is the surviving wife of Augusto J. Barboza, who died in the month of November, 1916, and the respondents are his three children, issue of a former marriage. In the year 1905 Barboza became a member of the fraternal society named in the title to this action, and there was issued to him at that time a policy or certificate in which the respondents were named as beneficiaries. In the month of October, 1916, he was ill, and had been so for some time, and, desiring to change the beneficiaries named in said certificate, which he had lost, he set about having issued to him a duplicate thereof, the immediate purpose of obtaining said duplicate being that he might indorse thereon the desired change, such indorsement being the first step prescribed by the rules of the society to be taken in making the change. In order to obtain this duplicate certificate he made and signed an affidavit upon the regular form provided by the society, but failed to fill in its blank spaces correctly. Instead of stating therein that his certificate was lost, and that therefore he desired to obtain a new one, he stated as a reason for making the affidavit that he desired to transfer the certificate to his wife. The secretary of the society returned this affidavit to Barboza as insufficient, stating with reference thereto, "He cannot change the beneficiaries in this document." He then made a second affidavit, which was accepted by the secretary and presented to the supreme directors, who met on November 13, 1916, in regular session. The deceased died on the same day, and notice of his death was given to the supreme directors while in session. After receiving such notice the supreme directors approved the second affidavit, and ordered that a duplicate certificate issue "to the within member applying for the same." The laws of the society provided that a member may change beneficiaries "by making the change on the back of the policy or a duplicate thereof," and that if the policy has been lost or destroyed, in order to obtain a duplicate he must make an affidavit for that purpose, and that before a duplicate policy can be issued the supreme directors "must give their permission and approval to the supreme secretary before the issuance of said duplicate policy, and direct said supreme secretary to issue a duplicate policy." The rules further provide that when the change of beneficiary has been properly indorsed upon the back of the original or duplicate policy the same must be filed with a designated body for approval or rejection.

[1-5] It is settled law that where the bylaws or constitution of a mutual benefit society provide a method of making a change of beneficiary a member in making a change must follow substantially the method prescribed. McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83. A member may change his beneficiary and name a new beneficiary whenever and as often as he pleases, provided he follows the steps required by the society's rules on the subject. To this rule of law there are three recognized exceptions, namely: (1) If the society has waived a strict compliance with its own rules, and in pursuance of a request of an insured to change his beneficiary has issued a new certificate to him, the original beneficiary will not be heard to complain that the course laid down in the society's rules was not pursued. (2) If it is beyond the power of the insured to comply literally with the regulations, a competent court will treat the change as having been legally made. Thus when a certificate is lost, or when it is in the possession of a beneficiary who will not surrender it, and it is therefore impossible for the member to comply with the rule, equity will enforce the change. (3) If the insured has pursued the course pointed out by the laws of the association, and has thus done everything devolving upon him to change the beneficiary, but before the new certificate issues he dies, a court of equity will decree that to be done which ought to have been done, and act as though the certificate had been issued. Supreme Lodge v. Price, 27 Cal. App. 607, 617, 150 Pac. 803.

[6] In the case at bar the deceased had been married to the appellant for over a year and a half, during which time he had done nothing to effect a change of beneficiary until his last illness and just before his death, when he filed the affidavits already referred to. The second affidavit being sufficient, he became entitled to have issued to him a duplicate policy, upon which when received he could, if so minded at that time, have indorsed the desired change of beneficiary, and sent it to the supreme directors of the society for their action. But he undertook these necessary steps too late. Nothing in the record, we think, brings the case within any of the exceptions. It does not fall within the first of those heretofore enumerated, for the reason that there was no waiver by the society of compliance with its rules; nor within the second, for beyond evincing an intention to make the change he had done nothing, except the preliminary step of setting in motion the machinery to obtain a duplicate of his policy, upon the receipt of which it still would have

been optional with him to take or not the first step in the procedure prescribed for making the change, namely, indorsement on the policy of the new beneficiary. Nor does the case fall within the third exception to the general rule referred to, for the simple reason that the deceased had not done all the things required of him under the policy, leaving only ministerial acts to be done by the society. There is a wide distinction between a member doing all that he can up to the time of his death, and doing all the things required of him by the by-laws of the society. The author of Bacon on Benefit Societies, at section 48, says:

"Much, however, depends upon the conditions expressed in the by-laws. * * * The general rule is that, if the member does all in his power, that is, does all things required of him under the contract to effectuate the change, it will be held complete, although the new certificate has not in fact been issued."

It follows from what we have said that the judgment should be affirmed; and it is so ordered.

We concur: RICHARDS, J.; BEASLY, Presiding Judge pro tem.

44 Cal. App. 3

MARTIN v. SOUTHERN PAC. CO.

(Civ. 2041.)

(District Court of Appeal, Third District, California. Oct. 28, 1919. Hearing Denied by Supreme Court Dec. 22, 1919.)

1. RAILROADS ⟸348(5)—EVIDENCE SHOWING EXCESSIVE SPEED BY RAILROAD'S MOTORCAR AT CROSSING.

In an action for injuries to an automobile passenger in collision with a railroad's gasoline motorcar at a crossing, evidence *held* sufficient to justify findings that defendant's motorcar was driven at an illegal rate of speed in excess of the eight miles an hour allowed by ordinance, and that the fact contributed to and brought about plaintiff's injury.

2. NEGLIGENCE ⟸93(1)—CHAUFFEUR'S NEGLIGENCE NOT CHARGEABLE TO AUTOMOBILE PASSENGER.

The fact that the chauffeur, hired by plaintiff, who had sole control and operation of the automobile, may have erred in judging the movement of a gasoline car at a railroad crossing, does not charge plaintiff as his passenger with negligence contributing to collision between the automobile and the gasoline car; plaintiff having done what he was reasonably expected to do to safeguard his own person.

3. NEGLIGENCE ⟸93(1)—AUTO DRIVER'S NEGLIGENCE NOT IMPUTABLE TO PASSENGERS.

The rule relative to the contributory negligence of drivers of automobiles and other vehicles does not apply to passengers therein.

4. TRIAL ⟸253(9)—INSTRUCTION IGNORING FACTS IS IMPROPER.

In an action for injuries to a passenger in an automobile in collision with defendant railroad's gasoline motorcar at a crossing, instruction on contributory negligence entirely overlooking the fact that plaintiff was a passenger, without control over the car in which he rode, which was in charge of a competent chauffeur, *held* properly refused.

5. NEGLIGENCE ⟸54—RAILROADS ⟸266—JOINT LIABILITY FOR INJURY TO AUTOMOBILE PASSENGER AT CROSSING.

If a railroad was negligent in operating its gasoline car at a crossing, and its negligence co-operated with the negligence of a chauffeur in causing a collision, the chauffeur's passenger could prosecute action and recover against both the chauffeur and the railroad, joint wrongdoers.

6. PLEADING ⟸403(4)—ALLEGATION OF RAILROAD'S NEGLIGENCE AIDED BY ANSWER.

In an action against a railroad for injuries in a crossing accident to plaintiff passenger in an automobile, complaint as aided by the second answer *held* to charge defendant railroad as well as its employés with negligence.

7. APPEAL AND ERROR ⟸1170(3)—NO REVERSAL FOR HARMLESS ERROR.

Defendant having in its answer set forth all the matter omitted from the complaint, it cannot be heard to say that it has suffered any injury by reason of the trial court's ruling in not sustaining demurrer to the complaint, and, it not having suffered any injury, reversal for such cause on appeal is not warranted under Code Civ. Proc. § 475, or Const. art. 6, § 4½.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Gus C. Martin against the Southern Pacific Company. From judgment for plaintiff and order denying its motion for new trial, defendant appeals. Affirmed.

J. T. Matlock, of Red Bluff, and George R. Freeman and Frank Freeman, both of Willows, for appellant.

William A. Fish, of Red Bluff, and Walter H. Linforth, of San Francisco, for respondent.

PLUMMER, Presiding Judge pro tem. On the 5th day of February, 1917, the plaintiff and one Clyde H. Vincent were traveling eastward in an automobile on Oak street in the city of Red Bluff, county of Tehama, and, in so doing, reached a point on said street crossed by the tracks of the defendant company. There a collision occurred with a gasoline motorcar being propelled northward on the tracks of said company, in which collision Vincent was killed and the plaintiff seriously injured. Plaintiff brought suit to recover for the losses incurred. The action was tried before a jury. A verdict was rendered for $7,500, and from the judgment entered thereon, and the order denying defendant's motion

for a new trial, defendant prosecutes this appeal.

It appears from the evidence that on the morning of the day in question the plaintiff, then being at the town of Corning, about 20 miles south of Red Bluff, engaged the services for hire of the said Clyde H. Vincent to transport him by automobile to the town of Red Bluff. The automobile was a five-passenger car, owned by the said Vincent, and was at all times on said trip operated and managed by him alone. The plaintiff occupied a seat alongside of and to the right of Vincent. It appears to have been a perfect spring morning, no wind and no rain. Oak street in the city of Red Bluff is in the heart of the city, and was a street with which the chauffeur Vincent was entirely familiar. The plaintiff had never crossed the railroad tracks at Oak street, knew nothing of the conditions thereof, and was not aware of the fact that a motorcar was at any time being operated on the lines of the defendant.

Some 40 minutes preceding the collision in question, a live freight train had been side-tracked in the city of Red Bluff to the westward of the main line belonging to the defendant, and cut in two and separated for a distance of some 40 feet at Oak street, for the purpose of allowing pedestrians and vehicles in the neighborhood passage across the tracks belonging to the defendant company. As the plaintiff and Vincent were proceeding easterly along Oak street, they observed the freight train, constituting two sections, as aforesaid, one section being to the south and the other to the north of Oak street, the ends of the two sections projecting out over Oak street, leaving a trifle more than one-half of said street unobstructed. When within about 25 feet of the tracks of said company, the chauffeur Vincent brought the automobile to a temporary stop, and looked in both directions to determine whether there was any approaching trains; the plaintiff likewise, on his own behalf, making such observations as he found possible under the circumstances. The approach of the motorcar not being observed, and neither sound of whistle nor ringing of bell being heard, the automobile was sent forward by the chauffeur in second speed at a rate of about 5 miles per hour, turning in its course slightly northward, where it appears to have suddenly increased its speed, until it reached the main line on which a gasoline motorcar was moving northward, at which point the collision occurred. The automobile was lifted some 3 feet from the ground, and hurled in a northerly direction a trifle over 30 feet, and wedged under one of the cars of the freight train in such a manner that it required the service of the engine of the freight train to pull the automobile from underneath the freight car. The occupants were rendered unconscious, and the plaintiff suffered severe injuries. It may be here stated that no point is made as to the amount of the judgment being excessive.

It is strongly contended by the appellant that the evidence is insufficient to support the verdict of the jury, that its preponderance is in favor of the defendant, and that for this reason a new trial should be granted herein. Other points are made upon this appeal, which will be subsequently noticed, but which appear to be only minor reasons urged in support of this appeal.

It is contended by the plaintiff and respondent that the motorcar was traveling at a very high rate of speed, from 25 to 35 miles an hour. On the part of the defendant it is contended that the car was running at only 8 miles per hour. It was admitted during the course of the trial that the legal rate of speed within the city limits of the city of Red Bluff was 8 miles per hour. It is also contended by the plaintiff that, by reason of the train of cars situated as aforesaid, the approach of the motorcar could not be observed at any considerable distance away. On the part of the defendant it is insisted that the motorcar could have been seen at a point 150 feet north of the intersection of the company's lines with Oak street from the point where plaintiff testifies the automobile was temporarily stopped to make observations of approaching trains, and that from this point the motorcar moved only at a speed of 8 miles per hour, and that, had the plaintiff used reasonable diligence to discover the approach of the motorcar, a sufficient opportunity was offered, after passing through the opening of the broken freight train, to stop the automobile before it reached the main line. On the part of the plaintiff it is contended that the freight train was side-tracked on a line parallel and next adjoining the main line on which the motorcar was operated. On the part of the appellant it is as strongly insisted that the freight train was side-tracked upon a line next westerly of the one claimed by the plaintiff, and that there was a vacant side-track, called track No. 3, between the switch occupied by the freight train and the track called the main line, on which the motor was traveling.

If the contention of the plaintiff is true, there would have been but a trifle over 3 feet between the overhang of the freight cars on the company's side track, and the motorcar traveling on the main line. Under these conditions, it scarcely seems possible that the automobile could have been lifted and hurled northward, as the physical facts show to have been the case, but in all probability it would have been taken up and practically ground to pieces between the two cars. The testimony of the witnesses, and the photographs of the car introduced in evidence, show that only the front portion of the automobile was seriously injured, the right front wheel, fender, etc., being knocked to pieces, the left fender being also torn and bent backward.

The remainder of the car, which in width is greater than the distance would have been between the overhang of the motorcar and the freight car in such a position, escaped practically uninjured. The plaintiff and Vincent were also hurled free from the automobile, and lay stretched on the ground near some object not identified by the witnesses, but apparently similar in size to an appliance used for throwing a switch.

The defendant maintains and operates, or did on the 5th day of February, 1917, maintain and operate six parallel tracks crossing Oak street, the main track on which the motorcar was running being track No. 4, counting from the west.

After a careful reading of the testimony by the respective witnesses, and consideration of the physical facts and circumstances attending the collision, it seems to us more probable that the freight train was in fact standing on the track called No. 2, being the second track, and not the first track west of the main line. Basing its argument upon the correctness of this contention, appellant claims that the plaintiff had ample opportunity to save himself from injury by the use of due diligence after crossing the track upon which the freight train was then standing; that, if necessary so to do, he could have leaped from the moving auto. The plaintiff testified, and it is also established by the witness himself, that a vehicle drawn by a horse preceded the auto through the opening made by the freight train and across the tracks of the company, at a distance of about 150 feet in advance of the auto. The driver of the vehicle testified that there was no flagman at the intersection, and no one was standing there to give warning of the approach of the motor. The plaintiff likewise testifies to the same state of facts. The brakeman of the freight train testifies that at this particular time he was engaged in adjusting a coupler upon a section of the train immediately north of Oak street; that he stepped out and gave a signal to the occupants of the motorcar to stop, but they passed him without paying any heed. This brakeman also testifies that the south section of the freight train had been started northward, and had come to a stop. The fireman of the freight train testifies that he had a violent stop signal from the brakeman at about the instant of the collision, which would indicate that the brakeman was in error as to his giving signals or doing anything to attract the attention of the occupants of the automobile, and that the signals were given to stop his train after the occurrence of the accident.

A number of witnesses gave what is called "negative testimony," in that they testified that they saw the approaching motorcar, but heard neither bell nor whistle. On the other hand, the engineer and fireman of the freight train, and the motorman on the motorcar, testified as to the sounding of the whistle and the ringing of a bell by the approaching motor. Upon this question the testimony is in sharp conflict, but from the fact that one part of the testimony is positive and the other is negative, the jury might very well have concluded that the whistle was sounded and that the bell was rung. Without the opportunity of observing the witnesses on the stand, it appears that the testimony predominates in favor of the contention that the whistle was sounded and the bell rung. But as the opportunity for judging the credibility of the witnesses cannot be had by the appellate court, it cannot be said that there was no substantial evidence to support the conclusion of the jury, assuming that their verdict turned wholly upon this point.

But there is a further circumstance involved in this case, which doubtless caused the jury and justified them in coming to the conclusion which they reached, even though they may have believed that the contended-for signals were given. The complaint alleges that the motorcar was driven at an excessive rate of speed. As heretofore stated, the admitted legal rate of speed was 8 miles per hour. The engineer and fireman of the freight train testified that the motor passed the engine upon which they were standing at 8 miles per hour. The motorman in charge of the car says his speed after reaching the city limits was only 8 miles per hour. The conductor on the motorcar likewise testified to a speed of eight miles per hour. His testimony, however, was based upon his knowledge of the city ordinances, as illustrated by the following questions and answers:

"Ques. When you reached the town limits you came along, you say, about 8 miles an hour? Ans. Yes. That is a city ordinance. Ques. You haven't any independent recollection of what rate you ran this morning, have you? Ans. No, sir."

The schedule made by the motor on the morning in question, from Corning to Red Bluff, shows that it was traveling in the neighborhood of 30 miles per hour. A passenger upon the motorcar stated that there was no perceptible diminution of speed upon reaching the city limits, and not until after the collision had occurred. Other disinterested witnesses testified that the motor was traveling at a high rate of speed. It was admitted upon the trial that a motorcar traveling under like conditions, at a rate of 25 miles per hour, could be stopped in 100 feet. The motorman on the motor car testified that his brakes held for 65 feet after the collision; that his brakes then ceased to hold, and his car coasted before coming to a stop northward to a point some 400 feet from the scene of the accident. If it be true, as testified by the motorman, that his brakes on his motorcar held for 65 feet, and it be also true, as it was admitted to be true, and must be accepted to be true, that the motorcar under the conditions then

traveling could be stopped in 100 feet when traveling at a speed of 25 miles an hour, then the jury had a right to conclude that it was not true that the motorcar at the time of the accident, or at any time preceding the accident after it entered the yards at Red Bluff, was traveling at a rate of speed not in excess of 8 miles per hour.

For purposes of illustration, the distance within which an automobile may be stopped traveling at different rates of speed, as published in trade journals, may be useful. It is there stated that an automobile traveling 10 miles per hour can be stopped in $9^2/_{10}$ feet; that the same automobile under the same conditions traveling at 25 miles per hour can be stopped in 58 feet. In other words, the added momentum to a moving vehicle by doubling or tripling the speed is such that it requires about six times the distance to stop an automobile running 25 miles per hour that it does to stop the same car when only running 10 miles per hour. These laws are not peculiar to automobiles. They apply to every moving body, and if the force applied to a moving motorcar traveling 25 miles per hour can stop it in 100 feet, the same force applied to the same car when traveling only 10 miles per hour would stop it in a trifle over 16 feet. A somewhat shorter distance would suffice if the car were only traveling 8 miles per hour. Then again the force with which the automobile was picked up and hurled northward was such as to reasonably lead the jury to the conclusion that the theory that the motor car was only traveling 8 miles per hour had, in fact, as the conductor said, nothing to support it, except that the ordinances of the city of Red Bluff limited the speed to that rate. From this it is clear that the jury had ample evidence before it to conclude that the motorcar was being operated at an illegal rate of speed.

[1] Then, again, it enforces another conclusion. The first four or five cars of the south section of the freight train against the south line of Oak street were gondola cars. The next four or five cars were ordinary box freight cars. Hence, if the speed materially exceeded 8 miles per hour from the point where Vincent stopped his automobile to take observations, it was not possible for the plaintiff to have seen the on-coming motorcar, as it would have been south of the line of visibility. All the testimony as to the visibility of the approaching motorcar was based upon the assumption that its speed was only 8 miles per hour, which assumption the jury could not have accepted without ignoring the circumstances and matters above set forth. We are thus brought to the conclusion that the jury had sufficient evidence to find that the defendant's motorcar was being driven at an illegal rate of speed, and that this fact contributed to and brought about plaintiff's injury.

There was some further testimony as to the speed of the respective cars, which may be mentioned. One or two members of the train crew testified that the automobile was moving 25 miles per hour, while the motorcar was traveling only eight. It is only necessary to say that if such had been the case there would have been no collision, as the automobile would have passed by long before the arrival of the motorcar.

Could the plaintiff have saved himself by leaping from the moving auto? Possibly so, but we have been pointed to no authority holding that passengers on autos or other vehicles are required at their peril to think quick enough to take this method of escaping injury resulting from another's negligence. The plaintiff was not in control of the automobile in which he was riding, It is barely possible that if he had displaced Vincent in the control of the car, and operated the levers, the accident might have been avoided. Again, we are not presented with any authorities holding that such a course is necessary.

[2] The jury were warranted in coming to the conclusion that the motorcar was being driven at an illegal, excessive, and dangerous rate of speed, and this especially so under the circumstances that it was coming down past a line of freight cars that had been broken to permit the passage of pedestrians and vehicles, where no flagman was stationed; and the fact that the chauffeur who had sole control and operation of the car may have erred in judgment in its movement does not charge the plaintiff, a passenger on the auto, with contributory negligence, where it appears that he had done what he was reasonably expected to do to safeguard his own person.

[3] A large number of authorities have been cited by counsel for the appellant, relating to the contributory negligence of drivers of automobiles and other vehicles, and it has been argued that the same rule applies to passengers. Such, however, is not the law in this state, and no useful purpose can be served by going over the long list of cases in appellant's brief upon this phase of the controversy.

The learned trial judge denied the motion for nonsuit, and based his ruling upon three cases decided in this court, and we agree with him that, under the facts shown in this case, they are decisive of the issues here involved. The three cases relied upon are Drouillard v. Southern Pacific Co., 36 Cal. App. 447, 172 Pac. 405, Ilardi v. Central Traction Co., 36 Cal. App. 488, 172 Pac. 763, and Ellis v. Central Traction Co., 174 Pac. 407.

All of these cases establish the law relating to the obligation or duty resting on a passenger so clearly that re-statement is unnecessary. We do not understand that appellant questions the correctness of any of these decisions, but only contends that the rule applicable to Vincent, under the circumstances

narrated, likewise applies with the same binding force and effect to the plaintiff in this action, and, if its contention in this particular is not correct, its conclusion is also erroneous.

[4, 5] The instructions given to the jury by the trial court appear to have been prepared with great care, and so presented as to state the law with unusual clearness, and, in fact, so directly and precisely that appellant, in his assignment of errors on this branch of the case, only refers thereto by numbers, specifying that they were along the line of the three cases above referred to, and the refused instructions were refused or modified because they were not applicable to a passenger. Under such circumstances, it has been frequently decided that an appellate court is not called upon to look for errors. We have, however, read every instruction given, and every instruction asked by the defendant and refused, and find no error in the action of the court. As stated by appellant, one instruction asked for, to wit, instruction No. 16, and refused by the court, illustrates all the contention made by the appellant in relation to the instructions given or refused by the court. The asked instruction is as follows:

"That if you find the defendant, or any of its employés, was or were negligent in handling the said motor which caused the accident, yet, if you further find that the accident could have been prevented if the plaintiff had caused the said automobile to stop at any time before it reached the track upon which the said motorcar was running at a place where said motor could have been seen or heard by the plaintiff or the driver of said automobile, your verdict shall be for the defendant."

This instruction entirely overlooks the fact that the plaintiff was a passenger; that the plaintiff was not exercising any control or management over the motorcar; that a competent chauffeur was in charge thereof, and the plaintiff was only charged as a passenger, and not as a person in charge of a motor vehicle; and that if the defendant was negligent, and the negligence of the defendant entered into and co-operated with negligence of the chauffeur, in which the plaintiff did not participate, then the plaintiff was nevertheless entitled to recover, because if the plaintiff were injured by the joint wrong of two persons he could have prosecuted his action against both of them.

[6, 7] After presenting all the questions which we have heretofore considered, the appellant, in its reply brief, urges the insufficiency of the complaint to state a cause of action, stating its contention in the following manner:

"A far more important question is, however, whether, on the face of the complaint, defendant was guilty of negligence at all."

It may be that technical construction was once more important than substantial facts, but under our reformed procedure we are not ready to accept unquestioningly any such statement. The point made by the appellant is that, in technical language, the defendant is not charged with negligence; that when so construed it only alleges negligence on the part of its employés. The complaint in paragraph 1 alleges the corporate existence of the defendant, and that it was engaged as a common carrier operating a railroad in the state of California, and through the city of Red Bluff, at the time of the injury of the plaintiff; that the employés of the defendant ran one of its motorcars in a northerly direction along its railroad and across said highway at a great rate of speed; "that the defendant's employés omitted to give any signal or warning of its approach to said crossing; that the employés of said defendant had, just prior to the time herein referred to, left certain freight cars upon said day west of and adjoining the track upon which said motorcar was approaching, and extending along said track in such a manner as to almost completely block the crossing at Oak street, and to prevent either the said Clyde H. Vincent or this plaintiff, as the said automobile approached said crossing, from obtaining a view of said motorcar approaching said crossing, as aforesaid. As said automobile reached said crossing, said motorcar, by reason of its negligent operation by the employés of the defendant in the manner aforesaid, and by reason of the high rate of speed at which it was being run by the employés of the defendant, and without any negligence whatever on the part of plaintiff or said Clyde H. Vincent, struck the automobile driven by said Clyde H. Vincent, and in which the plaintiff was riding as said passenger as aforesaid, causing said automobile to be demolished, killing the said Clyde H. Vincent and injuring the plaintiff in the manner hereinafter stated."

It may be admitted that technically and abstractly the defendant is not charged with negligence, and that its employés only are so charged. The appellant has, under the authorities hereafter cited, completely obviated this objection, if it be such. Paragraph 2 of the defendant's second answer alleges the necessary matter to help out the complaint, thus:

"That the said approaching motorcar was in plain view of plaintiff and the said Vincent, had they looked in the direction from which it was approaching said crossing, and that said motorcar was in full control of defendant's employés, and was approaching the said railroad crossing carefully, and with due regard to the rights of persons approaching said crossing, and that defendant's employés in charge of said approaching motorcar gave, as required by law, suitable and proper signals of the approach of the said motorcar to the said crossing, etc."

In Daggett v. Gray, 110 Cal. 172, 42 Pac. 569, the Supreme Court says:

"The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon, * * * even though a demurrer to the complaint for the want of this fact had been erroneously overruled."

To the same effect is Kreling v. Kreling, 118 Cal. 420, 50 Pac. 546; also, Shively v. Land & Water Co., 99 Cal. 261, 33 Pac. 848; Nolan v. Fidelity & Deposit Co., 2 Cal. App. 3, 82 Pac. 1119; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 Pac. 90.

From the fact that the defendant was not deceived or misled by reason of the omission in the plaintiff's complaint, and also from the further fact that it specifically alleges the omitted matter, it would seem that section 475, Code of Civil Procedure, and section 4½ of article 6 of our state Constitution, would apply to this case and prevent any reversal on account of any such alleged defect in the pleadings. The demurrer interposed by the appellant does not call attention to the alleged defect, the first specification being a general demurrer. The second is as follows:

"It appears upon the face of the complaint that said complaint does not state a cause of action, in this, first, the collision described in the complaint which resulted in the injuries of the plaintiff on February 5, 1917, etc."

Without any specification whatever that the negligence set forth in the complaint is not directly charged to have been the negligence of the appellant, rather than its employés.

However, the following cases hold that to charge the ownership of the motor by the defendant and its operation by its employés establishes prima facie that the car was run by the defendant: McWhirter v. Fuller, 35 Cal. App. 288, 170 Pac. 417; Grantham v. Ordway, 182 Pac. 73; Ferris v. Sterling, 214 N. Y. 253, 108 N. E. 406, Ann. Cas. 1916D, 1161; Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; Trabing v. California Navigation & Improvement Co., 121 Cal. 137, 53 Pac. 644.

A review of these cases and a number of others cited in the briefs would justify the court in holding that the complaint is sufficient, even though, for purposes of clearness, the pleading would have been better had the negligence been charged in the form claimed to have been necessary by the appellant.

In any view of the case the appellant, having in its answer set forth all the matter omitted from the complaint, it cannot be heard to say that it has suffered any injury by reason of the ruling of the trial court in not sustaining its demurrer, and, not having suffered any injury, a reversal for this cause would not be warranted under the provision of our state Constitution above referred to.

Being of the opinion that there was sufficient evidence to warrant the verdict of the jury, and not having been pointed to any errors sufficient to justify a reversal, the judgment of the trial court is hereby affirmed.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 48

FARIS v. AMERICAN NAT. ASSUR. CO.

(Civ. 1992.)

(District Court of Appeal, Third District, California. Oct. 31, 1919.)

1. INSURANCE ⊂=134(1)—POLICY APPLICATION, AND PREMIUM NOTE CONSTITUTE CONTRACT.

A life insurance policy including the application and note given for first premium together constitute the contract.

2. INSURANCE ⊂=138(1)—TERMS OF CONTRACT VALID IF NOT IN CONFLICT WITH LAW OR PUBLIC POLICY.

The parties to an insurance contract may incorporate therein whatever conditions they please, provided they are not in contravention of law or public policy.

3. INSURANCE ⊂=146(3)—AMBIGUOUS PROVISION WILL BE CONSTRUED AGAINST INSURER.

Ambiguous provisions in an insurance policy providing for a forfeiture of assured's interest will be strictly construed against the insurer, and the rule applies to life policies as well as to accident, fire, and marine insurance.

4. INSURANCE ⊂=392(10) — FORFEITURE OF LIFE POLICY FOR NONPAYMENT OF PREMIUMS WAIVED BY COLLECTING NOTE AFTER MATURITY.

Where a note given in part payment of a life insurance premium provided that nonpayment of the note should terminate policy and that it might be collected without reviving the policy, while the application provided that only that part of the premium paid in cash should be retained by insurer, *held* that, under rule of strict construction, the provision in application governed, so that collecting note after maturity waived the forfeiture.

5. INSURANCE ⊂=372—INSURER MAY WAIVE FORFEITURE FOR NONPAYMENT OF PREMIUMS.

A provision of a life insurance contract forfeiting the policy upon nonpayment of a note given in part payment of a premium is for the insurer's benefit and may be waived by it.

6. INSURANCE ⊂=388(3)—FORFEITURE WAIVED BY RECOGNITION OF CONTINUED EXISTENCE OF POLICY.

A provision of a life insurance contract that the policy should ipso facto terminate upon insured's default in paying premium note *held* waived by correspondence between the parties in which the insurer recognized the policy's continued existence and discussed insured's desire to reduce it in amount.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Minnie B. Faris, as administratrix of the estate of John B. Faris, deceased, against the American National Assurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Oscar Lawler, of Los Angeles, and Nilon & Nilon, of Nevada City, for appellant.

Hennessy & Peterson, of Grass Valley, for respondent.

BURNETT, J. The action was brought to recover the sum of $3,000, the amount of an insurance policy issued on the life of said John B. Faris. There is no controversy about the facts, most of them being covered by an agreed statement and the others are contained in the deposition of one witness. On July 27, 1916, Faris made application to the company for insurance on his life for the sum of $3,000. Said application contained, among others, the following stipulation:

"(3) That if for the first premium of the policy hereby applied for, or for any part thereof, any note shall be given to said company or to any agent thereof, then, if and when said note is not paid at its maturity, the insurance granted by such policy shall ipso facto cease and determine, notwithstanding any provision in the policy to the contrary, and that such part of said premium as may have been paid in cash shall be retained by the company as earned premium for the term ending with the maturity of such note."

On July 28th following, the first premium, amounting to $84.09, was paid in the following manner: $28.03 in cash, and Faris' promissory note for the balance in the following form:

"$56.06. Grass Valley, Cal., 7/28/1916.

"Sixty days after date (without grace), for value received, I promise to pay to the American National Assurance Company $56.06 with interest at 6 per cent. per annum until paid.

"This note is given in part payment of the first annual premium on policy No. 4965, issued to me by said company. If this note is not paid at maturity, said policy and all rights secured thereby shall terminate and said policy shall become null and void, but the full amount of the premium on said policy shall be considered as the earned premium thereon, while said policy is in force and this note shall be payable without reviving said policy.

"[Signed] Dr. John B. Faris.

"Grass Valley, Cal."

On August 1, 1916, the defendant issued and delivered to Faris its policy No. 4695. The provisions therein material to this controversy are as follows:

"This policy and the application theretofore made constitute the entire contract between the parties hereto. * * *

"All premiums are payable either at the home office of the company or to such agent as shall be designated by the company upon delivery of a receipt signed by the president, vice president or secretary and countersigned by the agent designated. If any premium or installment thereof is not paid when due this policy shall be ipso facto null and void and all premiums forfeited to the company except as herein otherwise provided.

"This policy may be reinstated in the event of default of premium payments unless the cash surrender value has been paid, at any time upon presentation at the home office of evidence of insurability satisfactory to the company and payment of all past due premiums. * * *

"This insurance is granted in consideration of the application therefor, a copy of which is hereto attached and made a part of this contract and of the payment in advance of $84.09, being the premium to provide the legal reserve and for term insurance for the first policy year ending on the first day of August, 1917.

"The first year's insurance under this policy is term insurance.

"This contract will be continued as a limited payment life policy upon payment of the annual renewal premium of $84.09 on or before the first day of August, 1917.

"The American National Assurance Company * * * agrees to pay $3,000.00 * * * to the beneficiary upon receipt of due proof of the death of the assured during the continuance of this policy.

"Only the president, vice president or secretary has power on behalf of the company (and then only in writing) to make or modify this or any other contract of insurance or to extend the time for paying any premium and the company shall not be bound by any promise or representation hereafter given by any agent or person other than the above."

At a date not shown by the evidence, but prior to its maturity, the defendant company notified Faris by mail of the date of the note and requested remittance. In reply, Faris from Grass Valley, Cal., wrote the company at St. Louis, Mo., under date of September 28, 1916, that he was unable to pay the note, and he suggested returning the policy and a reduction thereof from $3,000 to $1,000, and offered to pay the interest "for the time note has run." This letter was answered by Assistant Secretary Redmond of the company, in which he stated among other things:

"We are advising Mr. Larrabee of your desire to reduce the policy and instructing him to take the matter up with you."

On October 7th following, Larrabee wrote to Mr. Redmond and also to Mr. Farris. The letter to Redmond was as follows:

"Your favor of October 3d re policy No. 4695, Dr. J. B. Faris, of Grass Valley, asking that the policy be reduced from $3,000 to $1,000 is received.

"I am not at all in favor of any such arrangement as this, and I am inclosing you a copy of the letter that I am to-day writing the doctor. I am quite familiar with the doctor's circumstances, and he is entirely able to pay any obligation of this kind, I am quite certain. Furthermore, we cannot adopt such a policy,

or establish any such a precedent as to allow people to keep their policies two or three months, and then at will, to decide that they do not want them, or desire to cut them down to suit themselves.

"If I had to cut this policy down in the end, well and good, but I shall not do so until I have adopted the procedure outlined in my letter of which I am enclosing you a copy."

Said Larrabee, the general agent of the company at Los Angeles, Cal., writing on behalf of defendant corporation on October 7, 1916, sent a letter to Faris, in which he acknowledged receipt of said letter of September 28th and containing the following instructions:

"It is out of the question to have the policy reduced after the premium has once been paid or within 30 days thereafter. * * * Therefore, no change can be made. Therefore, doctor, it will be necessary for you to pay the balance due on your premium and reduce it next year if you choose. If you are not in a position to pay your note at the present time, I am authorized to inclose you a new note, which length of time is not stated therein and you can fill in such time as you desire, but no longer than 60 days."

On October 9th, following, Faris replied to Larrabee's letter of October 7th, saying, in effect, that he did not have the $59.65, or any part of it, and $3,000 was all the insurance he could possibly carry. In explanation of this latter statement it may be said that Faris was at the time carrying a policy for $2,000 with another company. On October 11th Larrabee wrote to Faris a letter as follows:

"Your letter of October 9th is duly received, and contents I have carefully noted. My previous letter to you holds good. This policy cannot be reduced until the beginning of the second year, and I shall expect you to pay the amount of your note. As I told you before, if you are not able to pay it now pay some part of it, and I will extend the balance. You say in your letter 'you ought to know your business best.' I quite agree with you and you should have known what you were doing when you gave your note promising to pay this amount of money, and there is no argument necessary whatever. We simply shall expect you to pay the balance due on your premium. You are therefore requested to sign the note that I sent to you in my previous letter and pay whatever you can. This is the best proposition that it is possible for you to be offered.

"Very sincerely yours."

To this letter Faris made no reply. In connection with these letters it may be observed that certain instructions were sent by Assistant Secretary Redmond to Larrabee after the former received Faris' letter, but the record does not disclose what those instructions were. In regard to those instructions the record shows:

"It was stipulated and agreed in open court that plaintiff had made, prior to the trial of the cause, a proper demand upon defendant for production of the written instructions under date of October 3, 1916, written by the home office of the defendant corporation to George Larrabee, agent of said corporation, at the city of Los Angeles, Cal.; that defendant was unable to produce such written instructions as requested and did not produce the same at the trial."

On November 8, 1916, nothing further having been done, Larrabee sent the unpaid note to the Nevada County Bank for collection, and on November 20, 1916, the bank collected the same. The transaction between the bank and Faris consisted merely in the receipt by the bank of the money and the delivery of the note to the payor thereof duly canceled. Faris died December 23, 1916; plaintiff was duly appointed administratrix of his estate, and in that capacity made proofs of death to defendant and demanded payment of the policy. Defendant declined to pay and hence the action. The superior court found:

(2) "That that certain policy of insurance, a copy of which is annexed to the complaint on file therein and marked 'Exhibit A' thereof, did not cease or determine on or about the 26th day of September, 1916, or at any other time or at all. That defendant waived any or all rights that existed or might have existed on the 26th day of September, 1916, or at any other date, to determine said policy or contract of life insurance."

(3) "That said policy or contract of life insurance was a valid and subsisting contract of insurance, and was in full force and effect to and including and on the 23d day of December, 1916."

Judgment was accordingly rendered for plaintiff in the amount stated, and the appeal is from said judgment.

Preliminarily, it is taken for granted that said Redmond and Larrabee were fully authorized to represent the assurance company in the correspondence and negotiation had with said Faris. This point is fully covered either by stipulation or the uncontroverted evidence in the case. In fact, it is not disputed by appellant in its closing brief, and therefore we shall give that proposition no further consideration.

[1, 2] Again, it is assumed, because well settled by the authorities, that—

(a) "The policy (including application) and note given for the first premium thereon together constitute the contract.

(b) "The parties to an insurance contract may incorporate therein whatever conditions they please, provided the same be not in contravention of law or public policy."

Keeping these considerations in view, it is apparent that we are called upon to determine the effect of an ambiguity created by the terms of the application and of the note. Under the provisions of the former, it ap-

pears that such part of the premium as may have been paid in cash "shall be retained by the company as earned premium for the term ending with maturity of such note." The amount so paid in cash, as we have seen, was $28.03. The effect of said provision was therefore that the earned premium for the term of 60 days should be $28.03. But the note provided that—

"The full amount of the premium on said policy shall be considered as the earned premium thereon while said policy is in force."

This full amount is, as we have seen, $84.09. We have therefore this situation: In one part of the contract between the parties it is clearly provided that $28.03, and in another part of the contract that $84.09, shall be the earned premium for the said term of 60 days. Of course, it is true, as contended by appellant, that the whole contract of the parties should be considered and its various terms should be reconciled, if possible. But these two provisions are hopelessly in conflict. A certain amount is stated in the application as constituting the earned premium. This necessarily implies that no additional sum is included therein. The note, however, mentions a larger sum as the earned premium. The case would be no different if the consideration for a contract were stated in one portion thereof to be a certain sum and in another portion to be an entirely different sum. For instance, if, in a contract between A. and B. for the sale of horses, it was recited in one part thereof that the price was $28 and in another that it was $84, could effect be given to both recitals?

[3] The court below, therefore, was called upon to determine the effect upon the rights of the assured of these two conflicting provisions, and in doing so it was guided by the well-settled rule as declared in many decisions of the Supreme Court of this state and of other courts in various jurisdictions. As to this it may be said that the rule in relation to accident, fire, marine, and life insurance is the same. In a fire insurance case it was said:

"It is well established that conditions which provide for a forfeiture of the interest of the assured or other persons claiming under the policy are to be strictly construed against the insurance company, and if there is any ambiguity in a policy which may reasonably be solved by either one of two constructions that interpretation shall be adopted which is most favorable to the assured." Welch v. British American Insurance Co., 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396.

In a life insurance case the Supreme Court said:

"If this be so, no further argument is needed to establish the conclusion that under the settled rule policies of insurance are to be construed against the insurer. * * * Anderson v. Mutual Life Insurance Co. of New York, 164 Cal. 712, 130 Pac. 726, Ann. Cas. 1914B, 903.

In the case of Williamsburg v. Williard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103, the United States Circuit Court of Appeals for the Ninth Circuit, in a California case, referred to the rule as a maxim as follows:

"Applying the maxim that in construing the terms of an insurance policy, if there be any ambiguity, it must be construed most strongly against the insurers, since the language * * * is their own. * * *"

Other decisions to the same effect are Berliner v. Travelers' Insurance Company, 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49; Mackintosh v. Agricultural Insurance Co., 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234; Goorberg v. Western Assurance Co., 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801; O'Neil v. Caledonian Insurance Co., 166 Cal. 310, 135 Pac. 1121; Victoria S. S. Co. v. Western Assurance Co., 167 Cal. 348, 139 Pac. 807.

[4] Construing said conflicting provisions in favor of the insured we must conclude that the collection of the note by the insurance company was a waiver of the alleged forfeiture. This position is supported by numerous authorities, among which we may quote from Cohen v. Continental Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24, as follows:

"It may * * * be considered as settled law that when a policy provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that upon such failure the overdue premiums shall be considered as earned, a demand and payment of such premium constitutes a waiver of the forfeiture. Joliffe v. Madison Mutual Ins. Co., 39 Wis. 111 [20 Am. Rep. 35]."

As we are required to view the case it appears therefore that the insurance company agreed that the earned premium for the said period of 60 days should be only $28, and after the expiration of said period it collected the additional sum of $56 covered by said note. In other words, it claimed and received the benefit of the payment of the premium for the entire period of one year but sought to limit its responsibility to the said period of 60 days. Under the authorities and according to the plain principles of equity, this it cannot do.

[5, 6] Again, the forfeiture provision of the contract was solely for the benefit of the insurer and as such could be waived by the company if it chose to do so. It is true that the policy provided that the insurance should ipso facto cease and determine upon the default of the insured; but, nevertheless, by the decisions of the Supreme Court of this state it has been held that, under similar provisions, if the insurance company, aft-

er knowledge of said default, enters into negotiations or transactions with the assured which recognize the continued validity of the policy, and treats it as still in force, the right to claim a forfeiture for such previous default is waived. Murray v. Home Benefit Life Association, 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133.

In Knarston v. Manhattan Ins. Co., 140 Cal. 62, 73 Pac. 740, the court decided that a waiver of forfeiture could be proven by parol. In the decision of the question, referring to the provision in the policy that upon a failure to make payment at the given dates the policy will be void, the court said:

"This latter provision, however, is one common to insurance policies, and is solely in favor of the company, and being so in its favor may be waived."

It is further stated that the contract continues in force by the election of the company not to avail itself of the reserved right of forfeiture and that the policy is similar to a lease or vendor's contract with condition of forfeiture contained therein in reference to which it has been invariably held that the right to declare a forfeiture, being a matter entirely for the benefit of the lessor or vendor can be, even by parol, effectually waived by either. Among other decisions holding that such provision in a policy means only that the policy shall be voidable at the option of the company, we may cite Noem v. Equitable, 37 S. D. 176, 157 N. W. 308; Smith v. St. Paul F. & M. Ins., 3 Dak. 80, 13 N. W. 355; Grigsby v. Russell, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, Ann. Cas. 1913B, 86. In other words, it seems to be well settled that a policy containing a forfeiture clause like the one in this case is not rendered ineffectual and inoperative by the mere default of the insured in payment of the premium unless the insurer desires to so treat and consider the policy; but, if the insurer elects to recognize the policy as existing and in force subsequent to the date of the breach, then the policy continues as an existing and operative insurance for the benefit of the insured.

Applying the foregoing principle to the facts of this case, there can be no doubt that the correspondence between the parties, which we have hereinbefore set out, was so intended and amounted to the recognition by the insurance company of the continued force and effect of said policy, and that it cannot be properly said, as contended by appellant, that said correspondence amounted to mere suggestions which were neither accepted nor acted upon. In other words, it seems plain, we think, that under a fair construction of said correspondence and negotiation there was an express waiver on the part of insurer of its right to declare the policy null and void on account of the insured's failure to pay the premium note on the 26th of September, 1916. The case falls clearly within the doctrine of Murry v. Home Benefit Life Association, supra. The policy therein contained a forfeiture provision in the event that the insured should neglect or omit to pay the last assessment that might be levied on the certificate within 30 days from the date of notice thereof. On September 1, 1886, the assessments which had fallen due on June 1st and August 1st of that year were still unpaid, and the defendant on that day addressed a note to said Murry, calling his attention thereto, with a request that he remit the amount due. At or about the same day it also addressed to him this letter:

"According to the conditions of your certificate of membership, No. 8361, an assessment amounting to $29.40 will be due and payable at this office on the 1st of October, 1886. Remittances should always be made payable to Home Benefit Life Association, San Franscisco, Cal."

On September 22d, the insured sent a third person to the office of the company with the amount of the delinquent payment. The president of the company would not accept the payment, but stated he "would be only too happy to do so" when insured should come and tender it himself. The insured died on September 30, 1886, without having paid the premium. The sole question was whether there was a waiver of the forfeiture on the part of the insurance company. In discussing the question the court declared that the failure of the deceased to pay the assessment of June and August would have released the company from all further liability if the defendant company had so elected. After stating the general rule as to waiver, which we have before set out, the court proceeds:

"The respondent, while not disputing the general rule that a forfeiture may be waived at the option of the person entitled to enforce it, insists that the letters of the defendant, above referred to, show only an offer by it to waive the previous default in the payment of the June and August assessments upon condition that such past-due assessments were immediately paid, and while the insured continued in the same state of health."

After stating that there were no such conditions in the letter and that a tender within a reasonable time with the amount due would have been sufficient to continue the policy in force, the court further said:

"But the letter notifying the insured that an assessment would be due and payable on October 1st, and in substance requesting payment, of itself constituted a waiver of the previous default, and must be construed as an unconditional offer to accept payment of that assessment on or before the date named. It was, in effect, an assertion that the certificate was still in force, and, notwithstanding previous defaults known to the defendant, would remain

in force until the date therein named for such payment."

The point is also covered by the two decisions of the Supreme Court in Knarston v. Manhattan Life Ins. Co., 124 Cal. 74, 56 Pac. 773, and 140 Cal. 57, 73 Pac. 740. Therein is quoted with approval the following statement of the rule in Titus v. Glenn Falls Ins. Co., 81 N. Y. 419:

"But, it may be asserted broadly that if, in any negotations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

In the second decision in the Knarston Case the Supreme Court reiterates and reaffirms the rule:

"When an insurance company, with full knowledge of all the facts, enters into negotiations with the assured, recognizing the continued validity of the policy, the right to forfeiture of the previous default, which may be asserted, is waived"—and in confirmation of said doctrine many cases from other jurisdictions are cited therein.

In the Noem Case, supra, there was a default on the part of the insured, and thereafter the company wrote him as follows:

"We note that the premium due June 18, 1913, on your policy in our company No. 72,972 is still unpaid, and we write to remind you of the matter, as we are inclined to think you have simply overlooked it. The contract has many liberal features, and we are sure you do not wish to forfeit the protection it affords. * * * Kindly complete this health certificate and return to us with a remittance for the amount of the premium."

The health certificate was not furnished, and the court held the insurer liable on the policy by reason of the fact that said letter indicated an intention on the part of the company to treat the contract as in force, and therefore it amounted to a waiver of the default.

It is quite plain from the correspondence herein that the insurance company continued to recognize the existence of said policy after said default of September 26th. For instance, on October 3d, six days after the insured was in default, in a letter to him, the assistant secretary of the company, acknowledging the receipt of the insured's letter of the 28th of September, stated:

"We are advising Mr. Larrabee of your desire to reduce the policy and instructing him to take the matter up with you at once."

The letter contained no statement that the policy was forfeited, nor did it intimate in the slightest degree that the company regarded it as having lapsed. On the contrary, it clearly implied that the company recognized it as still in force and would consider the insured's proposal for a change in the policy. Again, on October 7th, eleven days after the default, Mr. Larrabee, the general agent of the company, virtually admitted that the policy was still in force by stating to the insured that "it would be necessary for you to pay the balance due on your premium and reduce it next year, if you choose." There could scarcely be any more emphatic recognition of the continued existence of the policy and of the intention and purpose of the company to give the insured a further opportunity to pay the premium or to enter into a new contract for the modification of said policy than is found in the language of these letters. It may be said that this conclusion is further strengthened by the said letter of October 11th, in which the insured was told that he could pay some part of the premium and that the balance would be extended, and also that the policy could not be reduced until the "beginning of the second year." This language implies that the insured would have the privilege of reducing the policy at the end of the first year. This, of course, is entirely inconsistent with the theory that the policy had become null and void by reason of the default of the insured. We deem it unnecessary to cite further authorities upon the question herein presented. We think that the position taken by respondent is in accordance with law and the facts of the case. This conclusion may be based upon any or all of the propositions stated substantially in the language of respondent as follows: First, under a proper construction of the contract, giving due regard to the earned premium provisions of said application, the collection of the note by the insurer was a waiver of the alleged forfeiture, if such forfeiture had ever existed. Second, the policy did not lapse and the company's liability thereunder did not end because of nonpayment at maturity of the note dated July 28, 1916, and due September 26, 1916, but, on the contrary the condition in the policy that it should be void if the premium note was not paid when due meant only that it should be voidable at the option of the company; that the company waived the forfeiture and by accepting the balance of the premium treated the contract as subsisting after the breach. Third, the said correspondence constituted a waiver on the part of the insurer of any right that theretofore may have existed to forfeit the policy.

We think the judgment is just and in accordance with the requirement of the law and the contract of the parties, and it is therefore affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

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181 Cal. 732

THILL v. MOULTHORP et al. (L. A. 5331.)

(Supreme Court of California. Dec. 23, 1919.)

MUNICIPAL CORPORATIONS ⟸982—RECITALS IN TAX DEEDS UNDER LOCAL IMPROVEMENT ACT NOT PRIMA FACIE EVIDENCE OF REGULARITY.

In action to determine adverse claims to real estate under Code Civ. Proc. § 738, plaintiff, claiming under tax deeds issued under Local Improvement Act of 1901, had burden of proving compliance with statutory requirements as to proceedings leading up to tax levy, the recitals in deeds, in absence of provision in such statute to such effect, not being prima facie evidence thereof, notwithstanding Pol. Code, § 3786, such statute applying only to state taxes, and notwithstanding Municipal Incorporation Act, § 871, as amended in 1905 (Stats. 1883, p. 273; Stats. 1905, p. 89), such statute applying only to proceedings under such statute.

Department 2.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Andrew Thill against George Moulthorp, Sylvester Kipp, and others. Judgment for plaintiff, and last-named defendant appeals. Reversed.

Sylvester Kipp, of San Diego, in pro. per.

F. L. Richardson, of San Diego, for respondent.

LENNON, J. This is an action under section 738 of the Code of Civil Procedure to determine adverse claims to real estate. Defendant Kipp answered the complaint, denying the facts relied upon to establish plaintiff's interest in the property and setting up an estate therein in himself. Plaintiff based his right to recover judgment upon certain tax deeds and relied upon the recitals in the said deeds as prima facie evidence of compliance with the requirements of the statute pursuant to which the proceedings leading up to the levy of the tax had been had, namely, the Local Improvement Act of 1901 (Page 34). Judgment was entered in favor of plaintiff, and defendant Kipp appeals on the ground that the recitals in the said deeds are not prima facie evidence of compliance with the requirements of the statute in question.

The provisions of the Political Code by which tax deeds are made prima facie evidence of compliance with the requirements of the statute pursuant to which the proceedings leading up to the levy of the tax have been had, by their own terms, apply only in the case of state taxes. Pol. Code, § 3786. Plaintiff and respondent contends, however, that these provisions are applicable in the present case by virtue of section 871 of the Municipal Incorporation Act. St. 1883, p. 273; St. 1905, p. 89. That section, as amended in 1905, provides that—

"All deeds made upon any sale of property for taxes or special assessments under the provisions of this chapter shall have the same force and effect in evidence as is or may hereafter be provided by law for deeds for property sold for nonpayment of state taxes."

The difficulty with plaintiff's contention lies in the fact that this provision, by its plain terms, applies only to tax deeds "made upon any sale of property for taxes or special assessments under the provisions of this chapter," while the recitals of the tax deeds here in question show conclusively that the said deeds were issued and all proceedings resulting in their issuance were had under the Local Improvement Act of 1901. Such being the situation, if the deeds here in question are prima facie evidence of the proceedings prior thereto, it must be solely by reason of a provision to that effect in the Improvement Act itself. Phelan v. San Francisco, 120 Cal. 1, 52 Pac. 38; Haines v. Young, 132 Cal. 512, 64 Pac. 1079. It is not claimed that any provision of the Local Improvement Act of 1901 has the effect of making the said deeds prima facie evidence of the proceedings prior thereto. It was therefore incumbent upon plaintiff to prove these proceedings.

There is no basis for the contention that the re-enactment of the sections of the Political Code relative to the effect of tax deeds as evidence subsequent to the decision in Phelan v. San Francisco and Haines v. Young, supra, had any effect upon the authority of these cases.

The judgment is reversed.

We concur: WILBUR, J.; KERRIGAN, Judge, pro tem.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

181 Cal. 730

CONNELL v. HOGG. (L. A. 5339.)

(Supreme Court of California. Dec. 23, 1919.)

1. REPLEVIN ⟸103(1) — JUDGMENT FOR DEFENDANT LIMITED TO AMOUNT OF LIEN FOR REPAIRS.

In replevin of automobile, where defendant claimed a lien for repairs, he was entitled to judgment for no greater sum as damages than the amount due him for repairs, and judgment for the value of the machine was error.

2. PLEADING ⟸36(3)—ADMISSIONS IN ANSWER TO BE CONSTRUED WITH VIEW TO WHOLE PLEADING.

Finding for defendant was not against an admission in the pleading because statements therein, if standing alone, would constitute admissions, since such statements should be construed in view of the whole pleading.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Replevin by J. F. Connell against J. N. Hogg. Judgment for defendant, and plaintiff appeals. Affirmed in part and reversed in part.

R. L. Horton, of Los Angeles, for appellant.

Hickcox & Crenshaw, of Los Angeles, for respondent.

LENNON, J. Replevin for an automobile, upon which defendant claims a lien for repairs. Judgment was entered for defendant, and plaintiff appeals on the judgment roll alone.

Defendant rendered a bill for repairs upon the machine in question amounting to the sum of $449. Plaintiff paid $122 on account, and tendered the sum of $150 as payment in full of the balance due, asserting that the reasonable value of the repairs was not in excess of $272. Defendant refused to accept the sum so tendered. Plaintiff thereupon instituted this action, alleging that $449 was grossly in excess of the reasonable value of the repairs, and that the said repairs were not reasonably worth any sum in excess of $272. The court failed to find the true amount of defendant's lien, but found that it was in excess of $272, and thereupon made its conclusion of law that defendant was entitled to judgment against plaintiff for the possession of the automobile or for the value thereof in the amount of $2,999.99. Judgment was rendered accordingly.

[1] This was error. Defendant, at most, had no more than a lien upon the machine for the balance due him for the repairs made. In such case, if he could not recover the machine, he was entitled to no greater sum as damages than the amount so owing to him. Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679; Griffith v. Reddick, 182 Pac. 984. The cause must therefore be remanded for a determination of the amount due to defendant for the labor and materials expended by him.

We see no reason, however, why that portion of the judgment which requires a return of the machine should not be affirmed if the amount due is substantially in excess of $272. The defendant, in his answer, denied that the sum of $449 was grossly or at all in excess for the said repairs, alleging that the services performed and the materials furnished were reasonably worth in excess of $272, and denying that $272 was the reasonable value of said services and materials. The court found:

"That the services performed upon said automobile by said defendant were of the reasonable value of a sum in excess of $272, and that the balance due to said defendant by reason thereof was in excess of the sum of $150."

[2] Construed in the manner which will support the judgment, the finding is, in effect, that the reasonable value of the repairs was a sum substantially in excess of $272. Appellant insists that, so construed, the finding is against defendant's admission in the pleadings that the reasonable value of the repairs was substantially $272. That part of the answer which avers that the services performed and the materials furnished were reasonably worth in excess of $272, and which denies that $272 was the reasonable value of said services and materials, torn from its context and standing alone, does, without doubt, amount to an admission that the services and materials in question were not worth a sum substantially in excess of $272. The answer cannot, however, be so construed. Read in the light of the context, the statements are, in effect, that the services performed and the materials furnished were reasonably worth in excess of $272, namely $449, and that the reasonable value of said services and materials was not $272 or any other sum than $449. So construed, the statements cannot be said to amount to an admission that the repairs were not worth a sum substantially in excess of $272. The finding is not therefore against an admission in the pleadings.

The judgment is affirmed as to all matters excepting the alternative that defendant recover the sum of $2,999.99 in case redelivery of the machine cannot be had. That portion of the judgment is reversed, and a new trial ordered solely as to the issue of the amount of defendant's lien, unless the parties agree that the court may enter findings on this issue upon the evidence already before it.

We concur: WILBUR, J.; KERRIGAN, Judge pro tem.

(181 Cal. 667)

In re BRIX'S ESTATE.

Appeal of CHAMBERS, State Controller.

(S. F. 8778.)

(Supreme Court of California. Dec. 10, 1919.)

1. TAXATION ⊂⊃861—TAXABILITY OF TRANSFER DETERMINED BY LAW WHEN TRANSFER WAS MADE.

Taxability under the inheritance tax laws of a transfer made by a decedent in his lifetime must be determined by the law in effect at the time the transfer was made.

2. TAXATION ⊂⊃879(1) — TRANSFERS NOT TAXABLE UNLESS WITHOUT VALUABLE AND ADEQUATE CONSIDERATION.

Under St. 1911, p. 713, § 1, imposing a tax on transfers without valuable and adequate consideration, in contemplation of grantor's death, or intended to take effect in possession at or after such death, the transfer must be without an adequate consideration, as well as without a valuable one, to be subject to the tax, and must be made either in contemplation of death or intended to take effect in possession or enjoyment at death.

3. TAXATION ⊂⊃893—REVIEW OF DECISIONS AS TO TAXABILITY OF TRANSFERS AS AFFECTED BY SUFFICIENCY OF EVIDENCE.

On appeal from an order declaring a transfer of certain property made by decedent in his lifetime not subject to an inheritance tax under St. 1911, p. 713, § 1, the finding of the lower court must be upheld if it can be supported upon any reasonable view of the evidence, even where such evidence is not conflicting.

4. TAXATION ⊂⊃879(1) — INHERITANCE TAXES; ADEQUACY OF CONSIDERATION FOR TRANSFER.

In determining whether there is adequate consideration for a transfer by a decedent under St. 1911, p. 713, § 1, imposing a tax on transfers in contemplation of death and without valuable and adequate consideration, the rule applicable in specific performance cases must control.

5. TAXATION ⊂⊃893—ADEQUACY OF CONSIDERATION FOR TRANSFER TO TAKE EFFECT IN POSSESSION AT GRANTOR'S DEATH.

A transfer by a husband and his wife of certain realty to their children, subject to a life estate in the husband, *held*, under the evidence, supported by adequate and valuable consideration within St. 1911, p. 713, § 1, imposing a tax on transfers to take effect in possession or enjoyment at grantor's death, where it appeared that the actual consideration was not only a waiver by the wife of all her interest in the community property, but constituted a complete alteration of the relation between husband and wife, as authorized by Civ. Code. § 159, notwithstanding that part of the consideration was not susceptible of exact valuation in money.

Department 1.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceedings to collect an inheritance tax from the estate of Herman Hugo Brix, deceased. From an order declaring that a certain transfer was not subject to the tax, John S. Chambers, as State Controller, appeals. Affirmed.

Robert A. Waring, State Inheritance Tax Atty., of Sacramento, and J. Paul Miller, Asst. Inheritance Tax Atty., of San Francisco, for appellant.

M. B. Harris, E. M. Harris, and Harris & Harris, all of Fresno, for respondent.

SHAW, J. This is an appeal by the state controller from an order declaring that a transfer of certain property made by the decedent, Herman Hugo Brix, in his lifetime, is not subject to an inheritance tax.

The transfers were made in the year 1913 and Brix at that time was about 48 years of age and in good health. He and his wife, Helena S. Brix, had been married more than 20 years before the transfers and had accumulated a large amount of community property, real and personal. They had three children, Emma M. Brix, who was born November 17, 1893, and two other children, Carl H. Brix and Theodore F. Brix, both of whom are minors. The decedent and his said wife were living together at the time, but the relations between them were strained, and she filed a suit against him for divorce about a year afterwards and obtained the divorce sued for.

The transfers in question consist of the following documents, which, for convenience of reference, we have numbered.

(1) A deed executed by Herman H. Brix, as grantor, conveying to Helena S. Brix, his wife, a life estate in three lots in Fresno, and to said three children the remainder therein after said life estate. This deed was dated March 3, 1913, and was recorded March 4, 1913.

(2) A deed executed by Herman H. Brix and Helena S. Brix, as grantors, conveying six lots in Fresno to Emma M. Brix, subject to a life estate reserved to Helena S. Brix. This deed is dated May 26, 1913, and was recorded June 9, 1913.

(3) A deed executed by Herman H. Brix and Helena S. Brix, as grantors, conveying seven lots in Fresno to said three children, subject to a life estate reserved to Herman H. Brix. This deed is dated May 26, 1913, and was recorded June 9, 1913.

(4) An agreement between Herman H. Brix and Helena S. Brix dated May 27, 1913. This refers to other papers executed by the parties "for the purpose of effecting a settlement of the property rights between said

parties," and states that its recitals "are a part and portion of the agreements by which the parties hereto have mutually settled their respective property rights." It contains a covenant by Herman H. Brix to pay during his lifetime the sum of $500 per month to his said wife so long as she shall live, and after her death to the said children. It also mortgages the life estate of Herman H. Brix in the property described in deed (3) to secure payment of these monthly sums.

(5) A deed executed by Helena S. Brix, as grantor, dated May 27, 1913, by which she granted to Herman H. Brix, "his heirs and assigns forever, all the right, title, and interest which the grantor herein may have or acquire in any property hereinafter acquired by conveyance, bequest, or otherwise by the grantee herein and which is so received in the name of said grantee." This deed was recorded June 3, 1914.

(6) An agreement executed by Herman H. Brix and Helena S. Brix and dated May 27, 1913. This agreement recites that the parties are husband and wife and are living together as such and have accumulated properties and property interests, that they desire to divide their property interests and arrange that each shall have a separate income, and that certain properties shall, on the death of the respective parties, or either of them, revert to their children. It also declares, at some length, that this agreement is to be binding whether the parties continue to live together as husband and wife or separate, and whether either of them shall secure a divorce for any reason, or shall remain husband and wife, and that it is not made in contemplation either of a divorce or of their remaining husband and wife. It also recites that the above-mentioned documents, which we have numbered (1), (2), (3), (4), and (5), have been executed to carry out the agreement of the parties, and provides that the parties "do by these presents expressly waive any and all claims which they or either of them may have to any and all property now owned by either of said parties, and each of them do further expressly waive any and all claim to any and all property which either of them may acquire in any wise," and that "either of said parties may execute and deliver good and sufficient transfers of any and all property which they may own or may hereafter acquire, without the signature of the other party thereto, and such transfers shall be treated and considered as passing a good and sufficient title to such properties, regardless of the consideration of said transfer, and each of said parties hereto do expressly waive hereby any and all interest which they, or either of them, may have in or to any or all property, real or personal, now or hereafter owned by them, or either of them, or in which they or either of them may acquire any interest whatsoever." The agreement further declares that it is a complete settlement of all interests which either party may have or acquire in the property of the other, and that each party releases the other from payment of any costs, attorney's fees, or judgment which either might receive in any proceeding instituted by one against the other, and that Helena S. Brix waives any and all claims for alimony, attorney's fees, separate maintenance, and other costs in any divorce suit, or other suit, that may be brought by either, and waives any claim for further division of the property. It then provides again that it shall be binding, independent of whether the parties live togother or live separate without a divorce, or a divorce proceeding is instituted by either.

Helena S. Brix testified that the reason her husband gave her for the execution of the agreement was that it was done so that he would not have to consult her about his business matters, and that there was nothing said by him to her about a divorce or separation in connection with the agreement, at or before its execution. N. B. Harris, who was the attorney for Herman H. Brix in the matter, testified that Brix stated to him that his purpose was that he might be freed from the objections of Mrs. Brix to his handling is property, and that if she did not get a divorce he proposed to get one himself.

The inheritance tax appraiser, to whom the matter was first submitted, made a report finding that the above-mentioned transfers (1), (2), and (3) were not taxable as to the interest passing to Helena S. Brix thereby, but that as to the remainders passing to the children they were taxable. Upon objections by the children, the matter was heard by the superior court, and it adjudged that none of the transfers to the children made by said deeds (1), (2), and (3) was taxable. The controller has appealed from the whole of this judgment, but states in his brief that the appeal is not prosecuted as to the transfers numbered (1) and (2). This leaves only transfer No. (3) for consideration.

[1] As already stated, this transfer was made May 26, 1913. The deed appears to have been fully delivered and effective at the time it bears date. The taxability of the transfer must therefore be determined by the law in effect at that time. Hunt v. Wicht, 174 Cal. 209, 162 Pac. 639, L. R. A. 1917C, 961; Estate of Felton, 176 Cal. 669, 169 Pac. 362. The law in force at that time was the act of 1911. Stats. 1911, p. 713. That act imposes a tax on transfers "by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor, or donor, or intended to take effect in possession or enjoyment at or after such death." Section 1. The court found that the transfer under

consideration was made for a valuable and adequate consideration, that it was not made in contemplation of the death of the decedent, but that it was intended to take effect in possession and enjoyment at his death.

[2] The statute clearly requires two things to subject such a transfer to the tax: First, that it be without valuable and adequate consideration; and, second, that it be either in contemplation of death, or intended to take effect in possession or enjoyment at death. This transfer, being subject to a life estate in the decedent, fulfills the second requirement in its second alternative, but the question is: Does it fulfill the first requirement; that is, was it made without valuable and adequate consideration?

Appellant does not deny that the consideration was valuable, but rests his case entirely on the contention that it was not adequate. The question thus arises: What does the statute mean by an adequate consideration? We are cited to Estate of Reynolds, 169 Cal. 600, 147 Pac. 268, as answering this question. The clause relating to the consideration first made its appearance in our inheritance tax law when the statute of 1911 was passed, but, as noted in the Reynolds Case, this addition to the statute did not actually change the law, but merely inserted in the statute the construction which the courts had already put upon the law without that phrase. In the Reynolds Case the deceased had given to his son a store business and property worth $100,000, and in return therefor the son had assumed his father's debts, amounting to $30,000, and agreed to pay his father an income of $600 per month during the father's life. At that time the father was, to the knowledge of all the parties, suffering from a mortal disease, from which he died about for months later. The lower court held that this transfer was made without valuable and adequate consideration. This court, in upholding the finding, said:

"If it can be said there was any element of valuable consideration received back by the father for his transfer to the son, it was certainly not adequate *from any commercial point of view.*" (Italics ours.)

Appellant bases his argument largely on the words italicized. He also cites Abstract & Title Guaranty Co. v. State, 173 Cal. 691, 161 Pac. 264, and Estate of Felton, 176 Cal. 663, 169 Pac. 392. In the first of these cases the decedent, in his lifetime, had transferred all his property to a corporation owned by his sons, in consideration of the agreement of the corporation to care for and maintain him during the balance of his life. At the time of the transfer the grantor was 80 years of age and very feeble, and his physical condition was such that his death was likely to occur at any time, and it did occur about six months afterwards. The lower court found that this transfer was made without valuable and adequate consideration, and this court declared that the finding was sustained by sufficient evidence, but did not discuss the meaning of the statute. In the Felton Case a father had given to his son a certificate of stock in a corporation, reserving to himself the dividends thereon during his lifetime. The certificate was for 990 shares, but it appeared that prior to the transfer 136 of them really belonged to the son, only 728 to the father, and the balance to others. The trial court found that there was no adequate consideration for the transfer. On appeal it was argued that the surrender by the son to the father for his life of the dividends to accrue on the 136 shares belonging to the son was an adequate consideration for the transfer of the 728 shares owned by the father. This court upheld the finding that it was not adequate, citing Estate of Reynolds, supra, and said that, while the consideration granted might be valuable, it would not be adequate.

[3] In all of these cases it must be noted that the lower court held the consideration inadequate, and this court upheld the finding in each case; but here the lower court has found that the consideration was adequate, and this presents the matter to us in a different aspect. Even where there is no conflicting testimony, we are bound to uphold the finding if it can be supported upon any reasonable view of the evidence, although we might be inclined to think that the finding should have been the other way. The facts in the case cited are not at all like the present case, and none of them can be regarded as controlling here.

[4] The statement in Estate of Reynolds, supra, that the consideration was not adequate from a commercial point of view was not intended as a complete definition of adequacy of the consideration, but merely to indicate that the particular transaction there considered, being a sale of a going business, must be regarded from the same point of view as any commercial transaction. The inheritance tax act of 1917 defines the phrase "valuable and adequate consideration" as "a consideration equal in money or in money's worth to the full value of the property transferred." Stats. 1917, p. 882, § 2, subd. 3. Appellant claims that this amendment like those considered in Estate of Reynolds, supra, serves but to clarify without changing the pre-existing law. If the provision that such consideration must be "equal" in money or money's worth to the full value of the property does in any wise change the previous rule on the subject, the amendment cannot be applied to this case, which arose before its enactment. The use of the word "valuable" in the act of 1911 excludes considerations of love and affection such as were referred to in O'Hara v. Wattson, 172 Cal.

525, 157 Pac. 608, and in Magee v. Magee, 174 Cal. 281, 162 Pac. 1023, both of which were equity cases. But in other respects the court must view the transactions as they appeared to the parties and consider the conditions under which they acted and their purposes in the matter. We think the rule applicable in specific performance cases, so far as the mercenary side of it is concerned, should control. Considering the transactions in that light, this transfer, as will be shown, was made for an adequate consideration "in money's worth."

A contract cannot be specifically enforced against a party unless he has received an adequate consideration therefor. Civ. Code, § 3391. But it is well established that this section does not require exact equality of consideration. In Dore v. Southern Pac. Co., 163 Cal. 196, 124 Pac. 822, we said the rule as to adequacy of consideration requires—

"that the value of the land and the price to be paid are in reasonable approximation to equality. [Citing cases.] If the other party, with knowledge of such inequality as there may be, nevertheless desired to and freely did enter into the contract without any unfair advantage being taken of him, it will not be deemed inequitable as to him."

In O'Hara v. Wattson, 172 Cal. 525, 157 Pac. 608, the matter of adequacy of consideration, as it relates to the specific performance of contracts, was carefully considered by this court, and we there said on rehearing:

"It will not do to say that the consideration must be held inadequate unless the value of the property at the time of the contract, as the court finds it to be, exactly or even substantially equals the price fixed by the contract. The court must ascertain the value from the evidence, which ordinarily consists mainly of the opinions of witnesses. There are few subjects on which witnesses are more likely to differ than that of the value of property, and few are more difficult of satisfactory determination. Exact accuracy is not to be expected. And after the value is determined, the question of adequacy is not necessarily settled thereby, for other circumstances may affect the question. Undoubtedly the relations of the parties, and their love, affection, or regard for each other, as well as the object to be attained by the contract, may be given some effect. Just how far such matters should incline a court, in its sound discretion, to conclude that a price less than the value as found, is nevertheless adequate to justify specific performance, we cannot state by any general formula of words."

Again, in Schader v. White, 173 Cal. 446, 160 Pac. 560, where the lower court had found the consideration to be adequate, this court affirmed the decision, saying:

"Adequacy of price does not mean equality of price. An adequate consideration does not mean a consideration measuring to the fullest extent up to the value of the property. Each case must rest for determination upon its own facts, and equity will find adequacy or inadequacy after considering all of the circumstances appearing in each particular case."

[5] Turning now to the facts of the case, appellant claims that the only consideration received by the decedent for the transfer in question was a waiver by his wife of all her interest in the community property, and that this is not an adequate consideration, calling our attention in this connection to Spreckels v. Spreckels, 172 Cal. 775, 158 Pac. 537, and Dargie v. Patterson, 176 Cal. 714, 169 Pac. 360, and other earlier cases, holding that the title to the community property is in the husband, and that the wife has, during coverture, no more than a mere expectancy like that of an heir. This rule is not determinative of the present case. While the wife has no title to the community property nor estate or interest therein, yet she has rights in relation thereto, the surrender of which may constitute a valuable and, according to the circumstances of the case, an adequate consideration for the transfer. She has a "possible interest in whatever remains upon the dissolution of the community otherwise than by her own death." In re Burdick, 112 Cal. 393, 44 Pac. 735. Upon the death of the husband she takes one-half of the community property, and upon a divorce she may in a proper case be awarded even the whole of it. Civ. Code, §§ 1402, 146. If a divorce is granted without any disposition of the community property, the former wife becomes the owner of one-half of the community property as tenant in common with her former husband. De Godey v. De Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35, 32 Pac. 803, 35 Am. St. Rep. 141; Kirschner v. Dietrich, 110 Cal. 502, 42 Pac. 1064. If the husband makes a gift of community property without the wife's consent, she may upon his death recover from the donee one-half of the property so given. Civ. Code, § 172; Dargie v. Patterson, supra. The fact that she may thus attack a conveyance by the husband made without her consent, on the ground that it was a gift, has a practical application that renders it a great disadvantage to a husband not in cordial relations with his wife. It has become the universal custom with purchasers of real property to insist on her signature to all contracts relating thereto. The custom is so general that it is a matter of common knowledge of which the court may take judicial notice. 16 Cyc. 873; Irwin v. Phillips, 5 Cal. 146, 63 Am. Dec. 113; Goldsmith v. Sawyer, 46 Cal. 212; Storrs v. Los Angeles Traction Co., 134 Cal. 94, 66 Pac. 72; Grogan v. Chaffee, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395. In the actual dealings of the husband in community real estate this gives her practical control or power of interference which may be a great burden to

him. Where a husband and wife are not in accord, but live in strained relations, as was the case here, the adjustment of their relationship as to property so that this power of the wife to control, object, or interfere is taken away may be a consideration of very great pecuniary value to the husband and fully dequate for a transfer of valuable real estate.

The agreement pursuant to which the transfer in question was made amounted to more than a mere surrender by the wife of her interest in the community property. It was a complete alteration of the property relations between the parties, as authorized by section 159 of the Civil Code. Taking all the various documents together, they constituted an entire transaction by which the decedent and his wife provided for her support, divided their property interests, and settled and released all claims which either might or could have in the property of the other. The wife also thereby gave up the right which she would have by law to support out of her husband's property, other than that provided by the agreement, and her rights to alimony, costs, and attorney's fees in any divorce suit or separate maintenance or other suit between them. The testimony and the language of the agreement itself, coupled with the fact that their relations were strained, show that the parties contemplated a divorce as a possibility. In fact, the wife did obtain a divorce a little more than a year afterwards. If this agreement had not been made, she could have maintained a claim in her divorce suit for an award of at least one-half of the community property, besides attorney's fees, costs, and alimony. The evidence shows that the decedent at that time was possessed of property worth between $500,000 and $600,000. He died only two years and four months afterwards. The property transferred to the children, subject to a life estate in the wife, was worth $45,000, that transferred to the daughter, subject to a life estate in the wife, was worth $30,000, and the property transferred to the children, subject to a life estate in the decedent by deed (3) was worth $240,000. At his death the property still remaining in his hands was appraised at $259,000, making a total of $574,000. Of this estate he conveyed the whole fee in property worth only $75,000, agreed to pay an allowance of $500 per month during his life, and parted with the remainder here in question in property worth $240,000; while, on the other hand, he retained in sole ownership property worth $259,000, retained a life estate in property worth $240,000, and obtained a release of his wife's claims, not only to the property he retained, but to all other property which he might thereafter acquire, and became free from her interference in any dealings he might wish thereafter to make in property. We have no evidence of the value of the life estate of the decedent or of the annuity which he agreed to pay, but if it is computed according to the mortality tables on a 5 per cent. interest basis, taking the age of the decedent at 47 years, the present value in May, 1913, of the decedent's life estate would be $144,240, and that of the annuity of $600 per year would be $72,120. The value of the remainder is the difference between the whole value of the property transferred, $315,000, and that of his life estate, $144,240, which amounts to $170,760. The summary of the matter is that he parted with property worth $170,760, and assumed an obligation to pay sums equivalent to a present payment of $72,120, in consideration whereof he got a release from all of his wife's claims and power of interference, and retained property valued at $403,240. We think the foregoing facts are sufficient to support the finding that there was a valuable and adequate consideration for the transfer in question. A part of the consideration is not susceptible of exact valuation in money. Who can say how much it was worth to him in money to have his marital troubles settled in this way? He had a just expectancy of many years of life. It is apparent that the parties looked at the transaction from a pecuniary, and not a sentimental, standpoint. They evidently regarded the consideration as adequate, and they were in a much better position to place a value thereon than is this court.

Appellant seems to concede that the transfers made by deeds (1) and (2) were supported by an adequate consideration; for he makes no attack on the finding with regard thereto, but confines his objection to deed (3). No such distinction can be drawn between these various deeds. They constitute, with the other documents mentioned, a single transaction, to all parts of which the consideration extends in equal measure. No line can be drawn enabling us to say that, while one part of the transaction is supported by an adequate consideration, another part lacks such support.

Appellant also argues that the consideration for the transfer has failed because the former wife of the decedent is now claiming the share of his property which he gave her by his will. In support of this argument he makes several assertions of fact which do not appear in the record, and which, of course, we cannot consider. The record shows only that the decedent left a will, made before the property settlement, by which he gave all his property to his wife, but declared that the children were to have their share as soon as they became of age, and that the inheritance tax appraiser has found that the wife takes one-half of the property passing by the will and has assessed an inheritance tax against it. This is not sufficient to show that she is claiming under

the will. She would have a right to one-half of the community property regardless of the will. At all events her claim against the property now is one made in fact against the heirs, and her mere effort to obtain property to which, under the agreement, she is not entitled, would not constitute a breach of the agreement on her part. It contains no covenant that she will not make or assert any unfounded claim.

The judgment is affirmed.

We concur: OLNEY, J.; LAWLOR, J.

181 Cal. 738

McCARTY v. MORE. (L. A. 5302.)

(Supreme Court of California. Dec. 23, 1919.)

1. JUDGMENT ⟸588—NOT RES JUDICATA OF STOCKHOLDER'S LIABILITY WHERE ISSUES WERE IRRELEVANT TO SUBSEQUENT ACTION.

Where, in suit against a corporation, judgment was had against a stockholder for the apparent amount of his statutory liability, but judgment against the stockholder was vacated, and judgment entered in his favor after a trial, it cannot be said, in a subsequent action against the stockholder to subject the unpaid portion of his subscription to the debt evidenced by the judgment against the corporation, that the former judgment in favor of the stockholder is a bar, where, so far as appears from the record, the former judgment may have been based solely upon plaintiff's failure to establish the statutory liability, and may have been determined altogether upon issues wholly irrelevant and immaterial in the present proceeding.

2. STIPULATIONS ⟸14(9) — STIPULATION SUFFICIENT TO PUT IN EVIDENCE LAWS OF OTHER STATE.

In an action to enforce statutory liability of a stockholder of a corporation formed in Nevada, where plaintiff failed to plead the corporation laws of that state, it cannot be said that a finding of due incorporation is unsupported, and that there was no foundation for admission in evidence of articles of incorporation, where a copy of the laws of Nevada was submitted to the trial judge following the submission of the case, it being stipulated that the document submitted contained a full and correct copy of laws relative to the facts necessary to be set forth in articles of incorporation, the fair intendment of such stipulation being that the said copy of laws should be considered as in evidence.

3. CORPORATIONS ⟸243(2)—RECORD STOCKHOLDER LIABLE TO CREDITORS.

One who appeared on the books of a corporation as owner of a certain number of shares of stock was the legal owner of the shares, and was liable as such to the creditors of the corporation, although he had surrendered his stock for cancellation.

4. CORPORATIONS ⟸261 — DEMAND ON DIRECTORS TO LEVY ASSESSMENT UNNECESSARY TO ENFORCE STATUTORY LIABILITY OF STOCKHOLDERS.

Where a judgment is had against a corporation and execution is returned unsatisfied, a demand on the directors of the corporation to levy an assessment to meet the obligation on the judgment is not necessary before bringing suit against a stockholder, on the theory that the unpaid portion of the stockholder's subscription to the capital stock is an asset which can be reached to satisfy the debt.

5. CORPORATIONS ⟸216 — STOCKHOLDER'S LIABILITY FIXED BY LAW OF STATE OF INCORPORATION.

The obligation of a stockholder in a corporation is fixed by the law of the state under which the corporation was formed.

6. CORPORATIONS ⟸89(4) — CALLS MAY BE MADE ON STOCK WHEN AMOUNT SUBSCRIBED AUTHORIZES CORPORATION TO DO BUSINESS.

The provision in the Nevada law (Rev. Laws, § 1108) that authorizes a corporation formed thereunder to commence business when $1,000 of the capital stock is subscribed if the corporators express an election to do so in the articles of incorporation is tantamount to an authorization to levy assessments on unpaid subscriptions when $1,000 of the capital stock is subscribed, and it is the will of the corporators that business be then undertaken, as authority to do business implies authority to contract debts, and authority to contract debts implies authority to make calls to satisfy them.

7. CORPORATIONS ⟸224—AMOUNT OF SUBSCRIPTIONS NECESSARY TO RENDER STOCKHOLDERS LIABLE FOR DEBTS.

Where the articles of incorporation under the laws of Nevada (Rev. Laws, § 1108), state facts raising an irresistible inference that corporators intended to commence to do business with $1,000 of subscribed capital stock, there was at least a substantial compliance with the requirement of the statute that the articles of incorporation should set forth the amount of subscribed stock with which the corporation was to commence business, and the stockholders became liable to assessments to pay debts of the corporation on unpaid subscriptions when $1,000 of the capital stock was subscribed.

Department 2.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Charles R. McCarty against John F. More. Judgment for plaintiff, and defendant appealed. Defendant dying during the pendency of the appeal, his administrator, John F. More, was substituted in his place. Affirmed.

Wm. G. Griffith, of Santa Barbara, for appellant.

Earl Curtis Peck, of Los Angeles, for respondent.

LENNON, J. This is an appeal from a judgment for the plaintiff. The original de-

fendant herein, John F. More, has died during the pendency of the appeal, and John F. More, the administrator of the estate of the deceased, has been substituted in his place.

On May 13, 1915, plaintiff, as assignee of various creditors of the Black Hawk Mining Company of New Mexico, recovered judgment against the corporation in the sum of $2,115.59. In the same action judgment was recovered against the deceased in the sum of $374.45, this sum apparently having been considered as the amount of the statutory liability of the deceased as a stockholder in the corporation. An order was made, vacating the judgment against More, and, after a trial of the action, judgment was entered in his favor. In the meantime execution had been issued against the corporation, and had been returned unsatisfied. Plaintiff thereupon instituted the present action against More, wherein he sought to recover on the theory that the unpaid portion of More's subscription to the capital stock of the corporation was an asset which could be reached by him to satisfy the debt evidenced by the judgment against the corporation.

[1] We cannot say that the judgment in favor of More in the action instituted by the plaintiff against the corporation and More is a bar to the present action. So far as appears from the record herein, that judgment may have been based solely upon plaintiff's failure to establish More's statutory liability, and may therefore have been determined altogether upon issues wholly irrelevant and immaterial in the present proceeding. In such case the doctrine of res judicata would obviously have no application.

[2] It is claimed that, by reason of plaintiff's failure to plead or prove the laws of the state of Nevada pursuant to which the corporation was formed, the finding of the due incorporation of the Black Hawk Mining Company of New Mexico is unsupported by the evidence, and that there was no foundation for the admission in evidence of the articles of incorporation of said company. It appears from the record, however, that a copy of the laws of Nevada was submitted to the trial judge following the submission of the case, it being stipulated that the document submitted contained a full and correct copy of the laws of the state of Nevada, relative to the facts necessary to be set forth in the articles of incorporation of corporations organized under the laws of said state. The fair intendment of this stipulation was, we think, that the said copy of the laws of the state of Nevada should be considered as in evidence in the case.

[3] Appellant also contends that the evidence does not support the finding that More was at all times since the 20th day of March, 1913, a subscriber to and the owner of 8,750 shares of the stock of the corporation. In this behalf reliance is placed upon testimony to the effect that before May 13, 1915, More had surrendered his stock for cancellation. It appears, however, that More appeared on the books of the corporation as owner of 8,750 shares of stock from March, 1913, down to the date of the trial. During this time he continued, of course, to be the legal owner of the shares, and was liable as such to the creditors of the corporation.

[4] It is insisted that plaintiff should have pleaded and proved a demand on the directors of the corporation to levy an assessment to meet the obligation on the judgment. It is well settled that such a demand is not necessary. Daggett v. Southwest Packing Co., 155 Cal. 762, 764, 103 Pac. 204.

[5-7] Defendant finally contends that plaintiff should have alleged and proved that at least one-fourth of the stock of the corporation had been subscribed, such subscription being, so it is urged, a condition precedent to the liability of a stockholder to pay for his stock. Conceding, without undertaking to decide the point, that such might be the rule in the case of a California corporation, and that if the obligation of a stockholder in this behalf were to be tested by the common law it should appear that all of the stock had been subscribed in order to show a liability on his part to make payments on his contract of subscription, nevertheless the fact remains that the obligation of More in the instant case was fixed by the Nevada law, and that that law authorizes a corporation formed thereunder to commence business when $1,000 of the capital stock is subscribed if the corporators express an election to do so in the articles of incorporation. This provision is tantamount to an authorization to levy assessments on unpaid subscriptions when $1,000 of the capital stock is subscribed and it is the will of the corporators that business be then undertaken. Authority to do business implies authority to contract debts, and authority to contract debts implies authority to make calls to satisfy them. Plaintiff alleged and proved that much more than $1,000 of the capital stock had been subscribed, and, while the articles of incorporation do not contain an express statement of intent on the part of the corporators to commence to do business with $1,000 of subscribed capital stock, that such was in fact their intent is an irresistible inference from the facts and figures set forth by them. Taken as a whole, the articles of incorporation evidence an unquestionable intent to embark at once upon the business contemplated by the corporators, while from the fifth paragraph of the articles it appears that $1,000 of the capital stock had been subscribed. This unmistakable expression of intent to commence business with $1,000 of subscribed capital stock was at least a substantial compliance with the requirement of the statute that the articles of incorporation

should set forth the amount of subscribed capital stock with which the corporation was to commence business. It follows that from the very moment of its existence the corporation was authorized under the Nevada law to do business and contract debts and the stockholders were liable to respond to calls to satisfy those debts. Plaintiff has therefore sufficiently established More's liability to make payments upon the unpaid portion of his subscription to the stock of the company to meet the claims of its creditors.

The judgment is affirmed.

We concur: WILBUR, J.; KERRIGAN, Judge pro tem.

181 Cal. 692

HURLBERT v. TITLE INSURANCE & TRUST CO. (L. A. 5343.)

(Supreme Court of California. Dec. 16, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⟸118—EXECUTOR NEED NOT PAY ASSESSMENT ON STOCK PASSING TO JOINT TENANT BY SURVIVORSHIP.

The executor of a deceased joint tenant who lists in the inventory corporate stock purchased by deceased with funds belonging to the joint tenants does not have the legal title and owes no duty to the survivor to protect the stock from sale for nonpayment of assessments levied during pendency of a suit by the survivor against the executor in which the survivor established his title.

2. JOINT TENANCY ⟸6—SURVIVOR'S TITLE DATES FROM PURCHASE.

The survivor's title to corporate stock *held* in joint tenancy does not vest in him on the death of his cotenant, who purchased the property with funds belonging to them, but his title exists from the time of the purchase.

3. EXECUTORS AND ADMINISTRATORS ⟸118—RELATION TO SURVIVING JOINT TENANT IMPOSING NO DUTY TO PAY ASSESSMENTS ON STOCK.

Though executor of deceased joint tenant listed in the inventory stock purchased by deceased with funds belonging to the joint tenants, the relation of executor and legatee did not exist between survivor and executor prior to judgment in suit against executor establishing survivor's title, and therefore executor owed no duty to the survivor to protect the stock from sale for nonpayment of assessments levied pending the suit.

4. EXECUTORS AND ADMINISTRATORS ⟸118—EXECUTOR NOT BAILEE OF STOCK PASSING TO SURVIVING JOINT TENANT.

Though executor of a deceased joint tenant listed in inventory stock purchased by deceased with funds belonging to the joint tenants, and had official custody of the muniment of title, he was not a bailee liable to the survivor for loss resulting from failure to pay delinquent assessments, during pendency of a suit in which the survivor established his title.

Department 2.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Theron L. Hurlbert against the Title Insurance & Trust Company. From a judgment entered after demurrer to his complaint had been sustained without leave to amend, plaintiff appeals. Affirmed.

Charles M. Ackerman and Julius Smidt, both of Los Angeles, for appellant.

Erle M. Leaf, of Los Angeles, for respondent.

MELVIN, J. Plaintiff appeals from a judgment entered after demurrer to his complaint had been sustained without leave to amend.

In the complaint the following facts were, in substance, alleged: During the lifetime of Lillian D. Hoag, now deceased, she and her brother, the plaintiff, held certain property in joint tenancy over which she, with plaintiff's consent, assumed entire control. Without his knowledge she had used some of the joint funds to purchase 21 shares of stock in El Sobrante Land Company (a corporation), of the par value of $2,100. On May 14, 1914, she died testate, and on June 13, 1914, her will naming defendant as executor was duly admitted to probate and letters testamentary were issued. Thereafter defendant filed an inventory of her estate in which the 21 shares of stock were listed. On October 22, 1914, an assessment of $3 a share was levied on the said stock, and on December 15, 1914, said stock was sold for failure to pay the said assessment. On November 15, 1914, plaintiff began an action for a decree that all the property listed in the inventory was in fact the identical property accumulated by him and his sister in joint tenancy. Thereafter he prevailed in said suit, establishing his sole ownership in all the property, including the stock, by right of survivorship. On June 17, 1916, defendant was discharged from the office of executor, and not until the following day did plaintiff acquire possession of his property and the papers which had been in the executor's possession. Plaintiff pleaded that he had no knowledge of the assessment or sale of the stock and no opportunity to redeem the shares, and that defendant resisted all his efforts to obtain control of the property until judgment was rendered in his favor. After the certificate came into his possession he discovered upon due and prompt investigation that it was worthless. At the time of sale (as alleged in the pleading), when the shares could have been redeemed, they were worth $150 a share. Negligence of the defendant was alleged upon the ground that it failed to pay the assessment, having ample means in the estate with which to discharge it, that it neglected to protect the stock from sale, and that it failed to redeem said stock

while resisting plaintiff's lawful demand for the property. The amount prayed for as damages is $3,150, the alleged value of the shares lost to him.

Respondent invokes the doctrine that there can be no actionable negligence without the existence of a corresponding duty upon the part of the persons against whom the negligence is charged, citing in that behalf Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580; People v. Perkins, 85 Cal. 509–511, 26 Pac. 245; Toomey v. Southern Pacific R. R. Co., 86 Cal. 374, 24 Pac. 1074, 10 L. R. A. 139; Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153; and Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88.

[1-3] It is clear from the facts pleaded that the defendant, neither as executor of the estate of Lillian D. Hoag nor as bailee of the stock for appellant, owed any duty to Theron L. Hurlbert in the matter of preserving the stock from sale by paying the assessment. Appellant contends that the legal title was in respondent until the termination of his suit for possession of the property held in joint tenancy. This contention is without merit. The legal title did not even vest in plaintiff on the death of his joint tenant. His title existed from the beginning. Hannon v. Southern Pacific R. R. Co., 12 Cal. App. 350–355, 107 Pac. 335; Estate of Gurnsey, 177 Cal. 211, 170 Pac. 402. In no true sense, therefore, did the relation of executor and legatee exist between the parties hereto prior to judgment in the action of plaintiff in which his standing as joint tenant with his sister was judicially established. By his action he was strenuously asserting his title. Defendant, without fraud, was resisting his claims because it was bound so to do as executor of the estate of Hoag. Defendant was not responsible for plaintiff's ignorance of the facts regarding the stock and its value. It had listed the stock in its inventory. It is true that defendant had custody of the certificate, but the certificate is not the stock. It is merely an evidence of the title. By his pleading appellant alleged that the stock stood in the name of his sister, and that a notice of assessment was mailed to Lillian D. Hoag at her last-known place of residence. It therefore appears that the stock was never transferred to respondent on the books of the corporation. Appellant became the sole owner of the stock upon the death of his sister. He so asserted. He so sued. And he so prevailed in his action against the executor. His whole claim was inconsistent with any real relationship of beneficiary under the will and executor subsisting between him and defendant. Respondent therefore owed no duty to appellant in its capacity as executor.

[4] Respondent was not a bailee of the stock, although it had official custody of the muniment of title. But it held neither title nor possession of the property itself. While the stock was yet unsold and might have been redeemed plaintiff sued respondent, alleging that he was the owner of this identical property. He eventually established that fact, yet he now complains because respondent failed to deal with the property in a manner which would have been justified only, if at all, by the fact that it was of the assets of the estate. True, it took a long time for plaintiff to establish his rights as a joint tenant, but respondent was not responsible for "the law's delay." It was the plaintiff's privilege to assume the payment of the assessment or to do anything else for the protection of his stock. The mere fact that his sister's death left him as the sole owner of the property could not relieve him of his responsibilities as the owner and cast them upon respondent, whose only claim was due to the fact that plaintiff himself had permitted the stock and all other property jointly owned by him and his sister to be held in her name only.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.

181 Cal. 706

MURPHY v. DAVIDS et al. (L. A. 5280.)

(Supreme Court of California. Dec. 17, 1919. Rehearing Denied Jan. 15, 1920.)

1. EMBEZZLEMENT ⊂⊃44(2)—ACQUITTAL SUSTAINED BY EVIDENCE.

Evidence in a prosecution for felony embezzlement *held* to justify the jury in finding that no criminal intent was proven on the part of the accused, and that the application of moneys in his hands was with the full knowledge and acquiescence of all persons concerned.

2. MALICIOUS PROSECUTION ⊂⊃71(4) — BONA FIDES OF ACTION UPON COUNSEL'S ADVICE QUESTION FOR JURY.

In an action for malicious prosecution, whether or not defendants acted bona fide upon counsel's advice concerning the arrest of plaintiff *held* for the jury.

3. MALICIOUS PROSECUTION ⊂⊃21(2)—ADVICE OF COUNSEL NO DEFENSE IF CLIENT DOES NOT BELIEVE IN GUILT.

Advice of counsel is no defense in an action for malicious prosecution, if the person who pretends that he acted upon it did not believe the accused was guilty.

4. MALICIOUS PROSECUTION ⊂⊃64(1) — DEFENDANT'S INSTIGATION OF PROSECUTION NOT SHOWN.

In an action for damages for malicious prosecution, evidence *held* sufficient to justify a finding that a defendant who appeared as a witness in the criminal case was the real instigator of the prosecution.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. EVIDENCE ⊂⊃211—TESTIMONY IN ANOTHER PROCEEDING ADMISSIBLE AS ADMISSION.

In an action for malicious prosecution, where defendant denied that he did take part in the prosecution, but was a mere witness, parts of the testimony of defendant, taken at the preliminary examination in the prosecution, was admissible, where it contained admissions regarding defendant's connection with the institution of the transaction, under Code Civ. Proc. § 1870, subd. 3.

6. MALICIOUS PROSECUTION ⊂⊃59(4) — PROOF OF GOOD REPUTATION OF PLAINTIFF ADMISSIBLE ON QUESTION OF PROBABLE CAUSE.

In suits for malicious prosecution, the good reputation of the plaintiff may be proven in chief as having a direct bearing on the question of probable cause, especially when such reputation is known to the defendant.

7. MALICIOUS PROSECUTION ⊂⊃59(9) — TESTIMONY AS TO BELIEF IN GUILT ADMISSIBLE.

In an action for damages for malicious prosecution, defendant may testify that he believed plaintiff to be guilty at the time he instituted the criminal proceeding.

8. EVIDENCE ⊂⊃472(7)—CONCLUSION AS TO HONESTY OF DEFENDANT IN MALICIOUS PROSECUTION CASE INADMISSIBLE.

In an action for damages for malicious prosecution, the court properly sustained an objection, on the ground that it called for a conclusion of the witness, to the question to defendant, "Did you honestly in your conversation with them (attorneys) state to them everything that you knew or had learned touching that matter?" the question of defendants' honesty being for the jury.

9. TRIAL ⊂⊃296(2)—INSTRUCTION NOT ERRONEOUS AS TO PROBABLE CAUSE IN VIEW OF OTHER INSTRUCTIONS.

In an action for malicious prosecution, instruction was not erroneous as leaving to the jury the question of the existence of probable cause, there being other instructions telling the jury that the question of probable cause was one of law, with which they had nothing to do.

10. MALICIOUS PROSECUTION ⊂⊃21(2)—FACTS WHICH MUST BE PROCURED AND DISCLOSED TO ATTORNEY.

To avoid liability for damages for malicious prosecution, one is not required, in addition to stating to his legal advisor all the material facts of the case of which he has knowledge, to go further and use diligence in the procurement of other facts; but if he has reason to believe that there are other facts bearing upon the guilt or innocence of the accused, he must either disclose that belief, or himself make inquiry to ascertain the facts in relation to the matter.

11. TRIAL ⊂⊃89—REFUSAL TO STRIKE HEARSAY TESTIMONY PROPER IN VIEW OF INSTRUCTIONS GIVEN.

Where a witness testified as to a conversation with one of two defendants, in which such defendant stated that the other defendant had made certain statements, and the court told the jury that the conversation could not bind the other defendant, court did not err in subsequently refusing to grant a motion to strike such testimony.

Department 2.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by M. A. Murphy against E. M. Davids and another. Judgment for plaintiff and defendants appeal. Affirmed.

Paul W. Schenck, Joseph Citron, Swanwick & Donnelly, and Gray, Barker & Bowen, all of Los Angeles, for appellants.

Anderson & Anderson, of Los Angeles, Byron Waters, of San Bernardino, and Victor T. Watkins, of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from a judgment for $10,000 actual and $5,000 punitive damages in an action for malicious prosecution.

On August 11, 1915, E. M. Davids swore to a complaint, charging M. A. Murphy (respondent herein) and M. W. Findley with felony embezzlement. After a preliminary examination both Murphy and Findley were discharged. It was charged in the criminal complaint that the defendants therein, on October 25, 1913, being intrusted with and having in their control $4,000, as trustees and agents of the First National Bank of Los Angeles and Lycurgus Lindsay, feloniously embezzled, converted, and appropriated said sum of money to their own use, and to uses and purposes not in the due and lawful execution of their trust as such trustees and agents.

The complaint in the civil action set forth the circumstances of the charge against plaintiff and his arrest, examination, and discharge. It is alleged in this pleading that defendants maliciously and without probable cause instigated the criminal action; that all of the allegations therein were false; and that defendants were guilty of oppression and fraud in bringing the criminal action. There were elaborate allegations of damage by reason of the prosecution and its consequent publicity.

The answer of defendant Davids negatived the material allegations of the complaint, and further alleged that on or about April 28, 1913, and thereafter, M. A. Murphy and M. W. Findley were secretary and president, respectively, of the Independent Sewer Pipe Company; that they were acting as the managers and agents of that corporation; that as such managers and agents they had entered into a contract to furnish terra cotta for the Merchants' National Bank Building, in Los Angeles; and that while this contract was in full force Murphy and Findley assigned it, attaching to said contract the following agreement:

"Los Angeles, Cal., April 28, 1913.

"The Independent Sewer Pipe Company herewith transfers the within payments on terra cotta contract hereto attached (the original of which is now on file in the county clerk's office in Los Angeles County) to be furnished for the Merchants' National Bank Building, to be erected at the corner of Spring and Sixth Streets.

"It is understood and agreed that all payments on the attached contract shall be paid into the First National Bank, and the same shall be applied on payments of notes now held by the First National Bank.

"Independent Sewer Pipe Company,
"By M. W. Findley, President.
"By M. A. Murphy, Secretary."

It was further alleged that thereafter, and prior to the filing of the complaint in the criminal action, Findley and Murphy received $4,000 under the contract for furnishing terra cotta for the Merchants' National Bank Building, "which said $4,000 said Findley and Murphy, and each of them, failed, refused, and neglected to pay into or deposit with said First National Bank, but, on the contrary, said Findley and Murphy, and each of them, converted said $4,000 to other and different uses"; that thereafter Davids visited the office of Paul Schenck, Esq., an attorney at law; that he presented the several contracts and agreements to Mr. Schenck, "and also made a full, fair, and truthful statement of all the facts that had come to his knowledge at said time with reference to, and bearing upon, the question of the compliance of said Findley and Murphy with each and all of said contracts and agreements"; and that after Mr. Schenck read the contracts, heard the statement of defendant, Davids, and made some independent investigation into the facts of the case, the said attorney advised defendant, Davids, that the statement and facts showed that Findley and Murphy were guilty of embezzlement. There is a further averment that Mr. Schenck placed before the district attorney and his deputies the statement of facts obtained from defendant Davids and from his own independent investigation, and that after careful consideration of the facts so presented, the district attorney and his deputies gave to defendant Davids their opinions that the said facts and acts warranted the prosecution of Findley and Murphy on a charge of embezzlement; and that upon the opinion and advice of Mr. Schenck and the district attorney and his deputies, defendant Davids swore to the complaint in the criminal action.

Defendant Lycurgus Lindsay, by his answer, asserted that he did not influence or instigate or advise "the making, swearing to, or filing of said complaint" in the criminal action. He followed the answer of his codefendant Davids, in the allegations touching the assignment of the contract for terra cotta and the failure to pay the $4,000 collected by Murphy and Findley, and the advice of Mr. Schenck to said Davids.

The cause was tried upon the issues thus joined, and the jury, in response to special interrogatories, found that defendant Davids swore to the criminal complaint at the suggestion or with the knowledge of defendant Lindsay; that Mr. Schenck was acting as defendant Lindsay's attorney in advising defendant Davids to file the criminal complaint; that both defendants were actuated by malice; that neither of defendants stated to Mr. Schenck in full the facts and circumstances before the bringing of said criminal action; that Mr. Schenck did not make a complete investigation of the material facts, in addition to what was told him by one or both of defendants, before the criminal complaint was sworn to; that neither defendants nor Mr. Schenck stated to the district attorney all the material facts in the case before the criminal complaint was filed; that defendants did not rely entirely upon the advice of the attorneys in filing said complaint; and that neither of the defendants honestly believed M. A. Murphy guilty of the crime charged. The answer of the jury to a question involving the facts and circumstances which defendants failed to state to Mr. Schenck was as follows:

"They did not fully inform Mr. Schenck that Mr. Lindsay had agreed to furnish the money necessary to enable the Independent Sewer Pipe Company to carry through the contract with the Merchants' Fireproof Building Company.

"They did not fully inform Mr. Schenck that Mr. Lindsay, before going to New Orleans, had authorized Mr. Findley to telegraph him for more money in connection with the Merchants' Fireproof Building contract in case it was needed.

"They did not inform Mr. Schenck that Mr. Lindsay had telegraphed the First National Bank of L. A. that he expected to be able to take over the $7,000 loan by himself when he returned to Los Angeles.

"They did not inform Mr. Schenck that the resolution adopted by the Independent Sewer Pipe Company April 28, 1913, pledged to the First National Bank of Los Angeles the terra-cotta contract with the Merchants' Fireproof Building Company as collateral for the said note ($12,500), or any other liability or liabilities of the said corporation to the said First National Bank of Los Angeles due, or to become due, or that may be hereafter contracted."

Appellants contend: First, that embezzlement was committed by plaintiff; second, that in any event there was probable cause for defendant Davids to swear to the criminal complaint; third, that no malice towards Murphy or Findley was cherished by either defendant; and, fourth, that Lindsay had nothing to do with the matter except as a witness.

In support of their first contention appellants assert that Murphy and Findley want-

ed to borrow money for their company, the Independent Sewer Pipe Company; that they could not do so without Lindsay's indorsement; that he refused such indorsement unless offered some protection; that the corporation expected to collect in due course $33,990 under the building contract; that Murphy and Findley agreed that if Lindsay would indorse the corporation's note and the bank would loan $12,500 thereon, they would cause the corporation to hypothecate the building contract as collateral security to the bank for said note; that this was done, and thereafter Murphy and Findley collected all the money due under the contract, and despite the protests of Messrs. Lindsay and Davids, they placed it in the general account of the corporation, and checked it out for general expenses, including their own salaries. Further, they contend that it makes no difference whether or not the sum of $4,000 specified in the complaint in the criminal action was appropriated to the personal use of Messrs. Murphy and Findley or either of them, but that it is sufficient to satisfy the statute if (as they assert is the fact) it was appropriated to any use or purpose "not in the due and lawful execution" of the trust. Penal Code, § 506.

The trouble with the statement of facts set forth in the opening brief of appellants is that it omits many essential matters.

It appears from the record that there was testimony supporting the following conclusions as to matters of fact:

From the organization of the Independent Sewer Pipe Company in 1911 until February 16, 1915, M. W. Findley was president, Lycurgus Lindsay (one of the defendants herein) was vice president, and M. A. Murphy (plaintiff) was secretary and treasurer. Defendant Lycurgus Lindsay had been personally guaranteeing some of the loans made to the corporation. Money had been borrowed from the First National Bank, which was the holder of a note for $70,000, personally indorsed by Mr. Lindsay, Mr. Findley, and Mr. Murphy. A time came when there was the prospect of a large contract for terra cotta (the one afterwards secured). Mr. Lindsay went to the factory and talked to Mr. Findley, the president of the corporation, from whom he learned that the corporation had neither sufficient equipment nor funds with which to undertake the project. He agreed to furnish the money, and finally it was determined that the corporation should borrow $12,500. Before this transaction was consummated a resolution was duly passed, authorizing the borrowing of said sum and the pledging with the First National Bank of the contract for terra cotta as security for the corporation's note for $12,500, "or any other liability or liabilities of the said corporation to the said First National Bank of Los Angeles, due or to become due or that may be hereafter contracted." This resolution was thoroughly well known to both defendant Davids and to defendant Lindsay (who is the former's father-in-law). The note for $12,500 was indorsed like the one for $70,000, by the president, vice president, and secretary of the corporation. Subsequently, and before any payments on the terra cotta contract had been made, more money was needed by the corporation to carry on the business, and the president talked with Mr. Lindsay about raising it. The vice president was about to leave the city, but he said that if the necessary money could not be raised without his guaranty to wire him for it. This was done, and on October 9, 1913, the following telegram was received from New Orleans:

"First National Bank, Los Angeles, California.

"Findley wires me of needs for factory seven thousand dollars. I will guarantee same. Expect to be able to take lone over myself in return. L. Lindsay."

The money was loaned upon the corporation's note for $7,000, backed by the telegram. This note was not personally indorsed by either Mr. Murphy or Mr. Findley.

It will be seen from the foregoing that the assigned contract for about $33,000 was pledged as security equally for the notes for $70,000, $12,500, and $7,000.

On October 25, 1913, the first payment on the contract for terra cotta was made. The amount was for $4,000 (the very sum specified in the criminal complaint as embezzled by Messrs. Murphy and Findley). Subsequent installments were paid until the whole amount had been received by the corporation on April 9, 1914. This was all placed to the credit of the Independent Sewer Pipe Company in the First National Bank—a fact known to the defendants in this action. Indeed, E. M. Davids himself collected and deposited nearly $27,000 of this money. He and his father-in-law both were in a position to know that this money was used in the operation of the business of the corporation. Both knew that the $7,000 had been paid, before the arrest of the two officers of the corporation, from the funds to the credit of the Independent Sewer Pipe Company in the First National Bank. It is to be remembered that this note carried no personal obligation (as did the other two) of the two officers, Findley and Murphy, who, under a general authorization of the corporation, signed the check for its payment. It was in evidence that the payment of this smaller note, instead of anything on account of the note for $12,500, was approved by Mr. Lindsay and by the bank. Both E. M. Davids and Lycurgus Lindsay knew that part of the money collected on the contract for terra cotta was used in the ordinary business of the company. Indeed, the latter testified as follows:

"Q. You did know, as a matter of fact, that what application had been made of that money was in the general running of the company and the paying of expenses, did you not? A. Yes, sir."

It was not until after Mr. Lindsay had been compelled to pay the two notes for $70,000 and $12,500 that the prosecution was undertaken.

[1] From the foregoing it is quite evident that the jury was amply justified in believing, as did the magistrate before whom plaintiff (then defendant in the criminal case) was examined, that no criminal intent was proven on the part of Mr. Murphy, and that the application of the moneys received from the contract was with the knowledge and acquiescence of all the persons concerned. In this connection it is to be remembered that the assigned contract was in the bank's possession, and the bank had the right to collect and apply the moneys had it seen fit so to do.

We next will consider the position of defendants with reference to probable cause. Before the complaint in the criminal action was filed, both E. M. Davids and Lycurgus Lindsay were advised by Mr. Schenck and by certain prosecuting officers, yet the jury found, as we have indicated above, that full and free disclosure of all the facts was not made either to private or to public counsel and that neither the complaining witness nor his father-in-law honestly believed either Mr. Murphy or his associate guilty of embezzlement.

There are elaborate discussions in the briefs upon the matter of the support (or lack of it) in the testimony for the special findings. It will not be necessary, however, to review the record in which, as respondent asserts, the evidence concerning the special findings of the jury is sufficiently conflicting to warrant the court in refusing to interfere with said findings. If the defendants did not rely upon the advice of Mr. Schenck regarding the guilt of the president and secretary of the corporation of the crime of embezzlement, there was a want of probable cause which was sufficient to defeat the defense of "advice of counsel." The jury found that neither Mr. Davids nor Mr. Lindsay relied entirely on advice of counsel. That they did not rely upon the advice of counsel and did not believe in the guilt of Mr. Murphy and his associate were conclusions that the jury was justified in reaching. Although defendant Lindsay swore that he had nothing to do with swearing to the complaint, or suggesting that Davids swear to it, plaintiff showed that, upon cross-examination at the preliminary examination, he had made the admissions indicated by the following answers to the questions set forth below:

"Q. Didn't you suggest that it would be better for him to do it than you? A. I think I suggested—they were threatening about this case, if it was brought up they were going to sue me for damages. That is the only thing I talked about the matter. Q. And therefore that this prosecution should be commenced? A. I did not say anything about that. Q. Who did you say was threatening to sue you for damages? A. None of them threatened me, but that was the talk, and some of their friends came to me and said that if I took this up I would be laying myself liable for damages. Q. Did you tell that to Mr. Davids? A. I don't remember whether I told that to Mr. Davids. Q. It was a conversation with Mr. Davids I was asking you about. A. I think it was Mr. Davids spoke to me about it. Q. He reported it to you? A. Yes, sir."

[2, 3] At the trial of this case the same defendant, after stating that the prosecution had been commenced after the attorney employed by him had examined the books of the corporation, gave testimony as indicated below:

"Q. Did your attorney, after that examination, report to you that he had found any evidence that Mr. Findley or Mr. Murphy had converted any portion of that money to their own personal use? A. I do not remember whether—I couldn't say that they had. Q. Did your attorney report to you, after that examination, anything to the contrary, anything other than that they had deposited every cent of it in the First National Bank? A. They reported to me that they had not applied it on the note. Q. Simply that they had not applied it on the $12,500 note? He did not report to you that they had applied it to any purpose of their own? A. That I couldn't say; he did not report to me how they had applied it."

The evidence showed that defendant Davids had the same knowledge of the affairs of the corporation as did his father-in-law, and it follows that neither of them depended upon advice of counsel, knowing, as they did, that no crime had really been committed. Whether or not defendants acted bona fide upon counsel's advice is a question for the jury. Potter v. Seale, 8 Cal. 217. Advice of counsel is no defense if the person who pretends that he acted upon it did not believe the accused was guilty. Vann v. McCreary, 77 Cal. 434, 19 Pac. 826. We are convinced that the defense of "probable cause" in this case was properly held to be unavailing.

There was a showing of malice towards Messrs. Murphy and Findley. The arrest of plaintiff, Murphy, and Findley occurred after there had been litigation adverse to the interests of defendant Lindsay, which he believed to have been instigated by them. This and other circumstances connected with the case, notably the continuance of friendly business relations among all the parties long after these defendants knew all of the facts concerning the alleged "embezzlement," justify the reasonable deduction that a desire for

revenge, growing out of business differences, was the real motive for the prosecution.

[4] That defendant Lindsay was something more than a mere witness in the criminal case was also properly deducible from the evidence. Admittedly, he employed special counsel for the prosecution and conferred with counsel and with his son-in-law upon the various aspects of the case. True, he asserted that he believed that the prosecution, if any, would be by indictment, but the testimony was, we believe, sufficient to justify the conclusion that he was the real instigator of the prosecution by complaint.

[5] Certain alleged errors of law are specified by appellants. First of these was the offering and receiving of certain portions of defendant Lindsay's testimony taken at the preliminary examination in the case of People, etc., v. Findley and Murphy. The contention is that such testimony may not be used unless the witness be deceased or otherwise unavailable (citing 2 Wigmore on Evidence, § 1416). The parts of the transcript admitted in evidence were not offered as a deposition in lieu of the testimony of a witness, but as admissions of the defendant Lindsay regarding his connection with the institution of the prosecution. It was clearly admissible upon the issues joined by plaintiff's averment that he did take part therein and his own denial of that allegation. Section 1870, subd. 3, Code Civ. Proc.; Macomber v. Bigelow, 126 Cal. 9, 58 Pac. 312.

Testimony regarding plaintiff's good reputation in the community was admitted in advance of any attack by defendants upon such reputation. This is specified as error upon the authority of Davis v. Hearst, 160 Cal. 143–185, 116 Pac. 530, and 1 Wharton's Law of Evidence, § 50. Respondent's counsel contend that the rule in cases of malicious prosecution is different from that ordinarily applicable in other actions, and that it admits proof of his good character as a part of plaintiff's case. In this behalf they cite Thurkettle v. Frost, 137 Mich. 115, 100 N. W. 283, 4 Ann. Cas. 836, 839, 840, and Calhoun v. Bell, 136 La. 149, 66 South. 761, Ann. Cas. 1916D, at pages 1168, 1169.

[6] We are constrained to follow the rule declared in the opinions in those cases, supported as it is by the great weight of authority that in suits for damages because of malicious prosecution the good reputation of the plaintiff has a direct bearing on the question of probable cause, and may therefore be proven in chief, especially when such reputation is known to the defendant or defendants.

[7, 8] The court sustained respondent's objection to the question propounded by the attorneys for the defendants: "Did you honestly, in your conversations with them, state to them everything that you knew or had learned touching that matter [whether Murphy was guilty of embezzlement]?" The objection went to the word "honestly," as calling for a conclusion of the witness. It was for the jury to determine from the evidence whether or not defendants related their knowledge of plaintiff and his acts honestly. The objection was properly sustained. His belief on the subject of plaintiff's guilt would have been admissible (Runo v. Williams, 162 Cal. 444, 122 Pac. 1082), but the question, in the form in which it was propounded, was vulnerable to the particular objection leveled at it.

[9] It is next asserted by appellants that the question of probable cause was not determined by the court, but was erroneously left to the jury. In this behalf certain instructions are quoted and criticized. For example, the jurors were instructed as follows:

"In order to determine that the plaintiff was guilty of the crime of embezzlement, it must appear from a preponderance of the evidence in this case that the plaintiff had under his control the sum of $4,000 on or about the date charged, as a trustee, or one of the trustees or agents, * * * and for the use of, * * * and, having it so under his control, fraudulently and unlawfully appropriated it to some use or purpose not in the due and lawful execution of his trust."

This is declared by appellants to be leaving to the jury the question of the existence or nonexistence of "probable cause," and therefore erroneous; and Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174, is cited as holding that the question of "probable cause" is one of law for the court. The criticism is without merit. One of the pleaded assertions of the defendants was that plaintiff was in fact guilty of embezzlement. The instruction quoted above, and others of similar import, properly left to the jury the solution of this issue.

Other instructions contained the statement that for the plaintiff to prevail certain things must concur, among them being that the defendants acted in charging plaintiff with crime "without probable cause," but again and again, throughout the charge, the jurors were told that the question of probable cause was one of law with which they had nothing to do—that they were to determine questions of fact upon which the court must base its decision as to the probable cause or want of it.

[10] By another instruction upon the defense that advice of counsel had been followed, the jurors were told that defendants, "thus seeking to justify their acts in the premises," must not only show by a preponderance of evidence that they disclosed to counsel all material facts known to them, "but also, if they had reasonable ground to believe that other facts existed tending to exculpate the person accused, they should either themselves make inquiry as to such other facts or disclose their belief of such other

facts to said counsel that such counsel might have an opportunity to make such inquiry." This instruction was not opposed to the doctrine of Dunlap v. New Zealand Fire & Marine Insurance Co., 109 Cal. 365, 42 Pac. 29. In that case it was held that a defendant is not required, in addition to stating to his legal adviser all the material facts of the case of which he has knowledge, to go further and use diligence in the procurement of other facts. But if he have reason to believe that there are other facts bearing upon the guilt or innocence of the accused he must either disclose that belief or himself make inquiry to ascertain the facts in relation to the matter. This distinction is clearly defined in the opinion in Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463. Probably, the instruction which we are now considering was prepared with that opinion before the draughtsman.

We do not find it necessary to comment upon all of the instructions to which appellants present objections. We have examined the charge, which, as a whole, very fully, fairly, and correctly stated the rules of law properly to be observed by the jury.

[11] Mr. Findley, while on the witness stand, was asked about a conversation with Mr. Davis. Without objection he detailed a part of the conversation, involving a statement that "Mr. Lindsay was going to bring a criminal action." At this point the court asked if there was any objection, and, after some discussion, witness proceeded to testify, without objection, after the court had told the jury that the conversation could "only bind Mr. Davids and not Mr. Lindsay." The conversation as related, however, involved alleged statements by defendant Davids, regarding defendant Lindsay, among others, that the latter was not going to institute the action himself, but was going to make Davids do it. After these statements had been detailed by the witness, counsel moved that "the statement of what Davids said be stricken out so far as Mr. Lindsay is concerned, and that the jury be admonished to disregard it as to Mr. Lindsay." To this motion the court replied:

"It does not refer to anybody but Mr. Lindsay, and should not have been admitted at all, but you did not make an objection, and I am not going to strike it out now."

The ruling was proper under the circumstances. The jurors had been instructed that defendant Lindsay was not bound by the conversation. That was all that the court could well do if the conversation was admitted at all, and it had been admitted without legal objection.

No other alleged errors demand discussion. The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

181 Cal. 723

SPEAR et al. v. MONROE, Judge of Superior Court, et al. (L. A. 6381.)

(Supreme Court of California. Dec. 22, 1919.)

APPEAL AND ERROR ⟹607(1) — FILING OF NOTICE TO PREPARE RECORD JURISDICTIONAL AS TO RECORD.

Failure to file notice requesting preparation of a record under Code Civ. Proc. § 953a, within ten days as required by such section, went to the jurisdiction in so far as the preparation of the record was concerned, at least in the absence of an order of the trial court relieving the party from his default in the matter of filing such notice, and it was immaterial that a notice of appeal had been filed, and that there was an order of the judge made ex parte granting further time for the preparation of the record on account of the inability of the reporter to finish the same within the time specified in the section; such order being made by the judge in ignorance of the fact that no notice had been filed in time.

In Bank.

Petition by William C. Spear and others for writ of mandate prayed to be directed to Charles Monroe, as Judge of the Superior Court of Los Angeles County, and others. Writ denied.

Geo. M. Harker, of Los Angeles, for petitioners.

PER CURIAM. Proceeding in mandate looking to compelling the judge of the trial court to settle and certify a proposed record on appeal under section 953a, Code of Civil Procedure, and to requiring the clerk to certify and forward record of judgment roll, etc., prepared under said section. The petition shows that the notice requesting preparation of said record required by the section was not filed within ten days after notice of entry of the judgment. The failure to file such a notice within the time specified in the section goes to the jurisdiction in so far as the preparation of the record is concerned, at least in the absence of an order of the trial court relieving the party from his default in the matter of filing such notice. See Estate of Keating, 158 Cal. 109, 110 Pac. 109; Fiske v. Gosbey, 168 Cal. 334, 143 Pac. 611.

The fact that a notice of appeal has been filed is altogether immaterial in so far as the effect of a failure to file this notice for the preparation of a record is concerned.

The order of the judge, made ex parte, granting further time for the preparation of the record on account of the inability of the reporter to finish the same within the time specified in the section, is likewise immaterial here. It was not an order relieving the party from his default in the matter of filing the notice, and was made by the judge in ignorance of the fact that no notice had been

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

filed in time. The court was justified in vacating the same and in refusing to settle and certify the transcript, as was also the clerk in refusing to forward any record prepared under that section.

The application for a writ of mandate is denied.

All concur, except MELVIN, J., absent.

(181 Cal. 720)

COOK v. NOBLE, City Recorder.

(Supreme Court of California. Dec. 18, 1919.)

1. JUSTICES OF THE PEACE ⊂=13 — JUSTICE MAY NOT PRACTICE LAW BEFORE CITY RECORDER IN COUNTY OF JUSTICE'S RESIDENCE.

Under Code Civ. Proc. § 171, prohibiting justices of the peace from practicing law before any justice court in the county in which he resides, a justice may not practice before city recorder of city in the county in which the justice resides; the recorder's court being practically a justice's court.

2. MANDAMUS ⊂=12—WILL NOT LIE TO COMPEL PERFORMANCE OF ILLEGAL ACTS.

Mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose.

In Bank.

Mandamus by George M. Cook against C. G. Noble, City Recorder of the City of Taft, County of Kern, State of California. Writ denied.

Geo. M. Cook, of Taft, in pro. per.

PER CURIAM. [1, 2] Petitioner, a justice of the peace in Kern county, seeks a writ of mandamus to compel respondent, city recorder of the city of Taft, in Kern county, to allow him to practice law before him. Section 171, Code of Civil Procedure, provides: "Nor shall any justice of the peace practice law before any justice's court in the county in which he resides." In view of the nature and jurisdiction of a recorder's court in a city or town, it being practically a justice's court, we are satisfied it comes within the spirit and policy of the provision of section 171, Code of Civil Procedure, that we have quoted, and that petitioner has no lawful right to practice in respondent's court. Regardless of any other question presented, it is well settled that mandamus will not lie to compel the performance of acts which are illegal, contrary to public policy, or which tend to aid an unlawful purpose. See Godwin v. Carolina Telephone & Tel. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, and note.

The application for a writ of mandamus is denied.

ANGELLOTTI, C. J., and WILBUR, LAWLOR, OLNEY, and SHAW, JJ., concur.

(181 Cal. 734)

TUCKER v. SCOTT et al. (L. A. 5300.)

(Supreme Court of California. Dec. 23, 1919.)

1. APPEAL AND ERROR ⊂=757(2)—FAILURE TO PRINT ANSWER OR STATE ISSUES IN BRIEF PERMITS ASSUMPTION THAT ANSWER ADMITTED ISSUE.

In action for purchase price of stock, where defense was that the stock had not been delivered, court on defendant's appeal on typewritten transcript from judgment for plaintiff had the right, under Code Civ. Proc. § 953c, to assume, on defendant's failure to print answer or state the issue, that the answer admitted the delivery.

2. CORPORATIONS ⊂=116—DELIVERY OF STOCK BY DELIVERY OF CERTIFICATE TO AND APPROVAL BY BUYER'S ATTORNEY.

Where duly indorsed certificates of stock were produced and tendered by seller, were approved by buyer's attorney, and remained for some days in buyer's offices, there was a delivery of the stock under Civ. Code, § 1141, and notwithstanding section 1503, seller was entitled to recover purchase price.

3. APPEAL AND ERROR ⊂=1167—ADOPTION OF WRONG REMEDY HARMLESS WHERE PROPER RECOVERY HAD.

In action for purchase price of stock, where conceded facts showed plaintiff entitled thereto, court on appeal from judgment for plaintiff will not consider whether the appropriate remedy was an action for damages for breach of contract, there being no miscarriage of justice, under Const. art. 6, § 4½, since the measure of plaintiff's recovery in action for damages for breach of contract would have been the same as in action for recovery of purchase price under Civ. Code, § 3310.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by J. E. Tucker against W. C. Scott and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Arnold Praeger, of Los Angeles, for appellants.

Andrew M. Strong, of Los Angeles, for respondent.

WILBUR, J. Plaintiff recovered judgment for $2,287.50 for the purchase price of 61 shares of stock of the Greenwood Advertising Company (Western). Defendant appeals. The agreement of sale is in writing. The only question raised by the appellants is as to whether or not the stock was delivered. This

question becomes material only if the agreement of sale was executory. We will assume for the purpose of the decision that the contention of the appellants in that respect is correct. The plaintiff alleged and the court found that the stock was delivered to appellants on the 15th day of January, 1917. The appeal is presented upon a typewritten transcript, and the appellants print a copy of the complaint in their brief, but neither print the answer thereto nor state the issue raised thereby, contenting themselves in that respect with the following statement:

"Thereafter defendants answered, and in due course a trial was had, and the court, a jury having been waived, made findings in conformity with the complaint and gave judgment for plaintiff, and are as follows: [Then follows a copy of the findings of fact and conclusions of law and judgment, in part as follows:] From the evidence adduced and the facts admitted by the pleadings herein the court finds: * * * Third. That plaintiff has performed all the conditions in said agreement on his part to be performed, and said plaintiff did, on January 15, 1917, deliver to defendants and each and all of them the shares of stock described in said complaint," etc.

[1, 2] Because of the failure to state the issue or print the answer, we would be justified in assuming in favor of the judgment that the answer admitted the delivery. Code Civ. Proc. § 953c. However, an inspection of the typewritten transcript shows that the delivery was denied, and that this was the only issue in the case. The appellants admit the making of the contract and the refusal to pay the purchase price of the stock, and claim that plaintiff's remedy is an action for breach of contract, instead of an action for the purchase price of the stock. The difficulty between the parties arose at the time and place fixed for the transfer of the certificates of stock and the payment of the purchase price. At that time the appellants refused to pay the purchase price unless the respondent would sign a written agreement, then produced, that he would not engage in the advertising business within a certain district and certain time therein specified. The respondent was under no obligation to sign this agreement, and refused to do so, and appellants thereupon refused to pay the purchase price of the stock. There is no dispute that at the time and place specified the stock certificates were produced, duly indorsed, and tendered to the appellants, and that the certificates of stock remained in the office of the appellants for some days thereafter. One of the respondent's witnesses testified that the stock certificates were handed to the appellants' attorney, in their presence, and that he examined the indorsement "and said something about this being the number of shares, all right, and everything was all right, and then Mr. Praeger [appellants' attorney] pulled out of his coat pocket—inside coat pocket—a paper with a cover on it, * * * and he said, 'Everything is all right now, and we have no complaint.'" The document referred to was a draft of a proposed agreement by which respondent was to undertake not to engage in the advertising business. The evidence was clearly sufficient to establish the fact of delivery. Appellants contend, however, that an intention to accept is essential to a delivery, and that the facts and circumstances show that the defendants did not intend to accept the title to the stock unless they secured this additional agreement. The measure of plaintiff's recovery, however, would be the same whether the defendants intended to accept the stock or not. The title passes "when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto. * * *" Section 1141, Civ. Code. "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price." Section 3310, Civ. Code.

[3] Upon the conceded facts the plaintiff is entitled to recover the purchase price of the stock. Therefore on appeal we will not consider whether the appropriate remedy was for damages or for the purchase price, as the recovery would be the same in either case, and a judgment for the purchase price is not only no miscarriage of justice (Const. art. 6, § 4½) but is exact justice. Appellants contend that, treated as an offer of performance, the conduct of the respondent violates section 1503 of the Civil Code, which provides as follows:

"The person offering a thing, other than money, by way of performance, must, if he means to treat it as belonging to the creditor, retain it as a depositary for hire, until the creditor accepts it, or until he has given reasonable notice to the creditor that he will retain it no longer, and, if with reasonable diligence he can find a suitable depositary therefor, until he has deposited it with such person."

This section can have no application to a case where the purchaser actually receives and retains possession of the property, no matter how reluctant he may be to do so. The finding of the trial court that the stock was delivered is sustained by the evidence.

The judgment is affirmed.

We concur: LENNON, J.; KERRIGAN, Judge pro tem.

44 Cal. App. 267

In re KLING. (Cr. 686.)

(District Court of Appeal, Second District, Division 1, California. Nov. 12, 1919.)

1. ATTORNEY AND CLIENT ⟸54—SUSPENSION WITHOUT FINDINGS DISAPPROVED.

Practice of making no findings in connection with a judgment suspending an attorney from practice is not to be commended.

2. ATTORNEY AND CLIENT ⟸38 — ATTORNEY NOT SUSPENDABLE FOR ACTS OF OTHER ATTORNEY EMPLOYED BY HIM BEFORE HIS ADMISSION.

It is not ground for suspending an attorney that before his admission and when he was a collection agent, an attorney employed by him acted irregularly and without warrant of law.

3. ATTORNEY AND CLIENT ⟸53(2)—VIOLATION OF DUTIES NOT SHOWN BY EVIDENCE.

Evidence in proceedings for suspension of an attorney *held* not to disclose deception on his part, or that he acted through corrupt motives or otherwise violated Code Civ. Proc. § 282, as to duties of attorney.

4. ATTORNEY AND CLIENT ⟸38—MORAL TURPITUDE AS GROUND FOR SUSPENSION NOT PREDICABLE ON ERRORS OF JUDGMENT.

Moral turpitude as ground under Code Civ. Proc. § 287, subd. 5, for suspension of attorney cannot be predicated on errors of judgment as to law, or action had and taken in good faith, openly and with notice to the adversary under an honest assertion of legal right; deception not being practiced nor unfair advantage sought.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Proceeding for the disbarment of D. G. Kling, attorney and counselor at law. From a judgment of suspension, the attorney appeals. Reversed.

Winslow P. Hyatt, of Los Angeles, for appellant.

Percy V. Hammon and Paul Vallee, both of Los Angeles, for respondent.

SHAW, J. This is an appeal by D. G. Kling from a judgment of the superior court suspending him as an attorney and counselor at law from practicing his profession for a period of one year from March 10, 1919.

[1] The trial court made no findings of fact, and, conceding that findings in such cases are not essential to the validity of a judgment, nevertheless it is a practice not to be commended.

Want of such findings renders it necessary for us to state at length the facts which we deem established by the evidence. It appears therefrom that appellant and his sister, R. J. Kling, were the proprietors of a collection agency known as the Atlas Law & Adjustment Company; that among their clients was Dr. A. J. Berry, for whom, prior to these proceedings, they had acted in the collection and adjustment of some 2,000 different claims and aggregating in amount upwards of $30,000; that prior to appellant's admission to the bar, which was in July, 1915, they, when necessary to bring suits upon claims intrusted to them for collection, employed an attorney for such purpose; that on August 15, 1914, Dr. Berry assigned to R. J. Kling, appellant's sister, and one of the proprietors of the Atlas Law & Adjustment Company, a claim against T. L. Norris and wife, the amount thereof being $173.65, under an agreement that, where suit was brought upon claims assigned, the assignee should pay all cost and expense, including attorney's fees, incident to the bringing of such suit, and receive therefor as full compensation and reimbursement of expense made the sum of 50 per cent. of the amount collected in such cases. The attorney to whom the matter was intrusted, in bringing the suit, included as defendants therein with Norris and his wife two other persons, to wit, Clyde Briggs and Augustin Huizar, against whom like claims had been assigned to the plaintiff, R. J. Kling, the total of which claims included in said action was $248.50. Due service was had upon all the defendants, and judgment against them jointly taken for said sum. After this judgment was rendered a relative of the Norrises went to Dr. Berry, and, as to the Norrises, induced him to accept $60 in full settlement of the judgment and in full payment thereof. This was on March 21, 1916, after appellant had been admitted to the bar, and at which time, he, as attorney, represented the Atlas Law & Adjustment Company, and also the plaintiff in said action, R. J. Kling. In an effort to collect the judgment he called upon the Norrises, when for the first time he learned of the payment of this $60 to Dr. Berry and the fact of the giving of receipt. Thereupon he called upon the doctor and told him that, owing to the fact that the claim had been assigned and judgment obtained thereon by the assignee, which had an interest in the judgment, his act in settling the claim was unwarranted, and that, while the Norrises were entitled to recover the $60 from him, he would credit the judgment with the sum, which in effect would be equivalent to its return. Kling thereupon caused the judgment against the Norrises to be credited with the sum of $60, charged Dr. Berry with one-half thereof as commission, payment of which was retained out of collections made for and on behalf of Berry, and caused a transcript of the judgment rendered in the justice's court to be filed with the clerk of the superior court and an execution to be issued thereon and levied upon real estate owned by the Norrises. The amount for which the execution was

so issued, however, was not the full amount of the judgment so rendered against the Norrises and their codefendants, Briggs and Huizar, in said action, but for the amount of the claim of Dr. Berry against the Norrises alone, to wit, $173.65, less such amounts as had been theretofore paid upon said claim against them. In other words, notwithstanding the fact that the judgment had been rendered against the Norrises for amounts due by their joint defendants, he only sought to recover from them the amount for which they alone were in fact liable. Of this action in thus levying the execution upon their property and advertising the same for sale the Norrises had notice, and thereupon employed an attorney who unsuccessfully sought relief in the justice's court by motion to quash and set aside the execution, and the property was sold under execution. Thereafter the judgment debtors brought a suit in the superior court to quiet title, which action was tried, and, after being held under advisement by the court for some three months, a judgment as prayed for was rendered in favor of the Norrises, from which, pending an appeal therefrom by the defendant in said action, to wit, R. J. Kling, the judgment creditor, a compromise was effected.

[2] Conceding the action of the attorney in joining other defendants with the Norrises, and thus taking judgment against them for more than the amount of the claim, was irregular and without warrant of law, nevertheless, since it was had prior to appellant's admission to the bar and by an attorney other than himself, he should not be held responsible therefor. Moreover, since he did not, when he took charge of the matter, seek to collect by execution from the Norrises other than that part of the judgment for which they would have been liable had the suit been brought against them alone, they suffered no prejudice by reason thereof.

Furthermore, in enforcing the collection of the judgment by execution and sale of the property, he acted openly and without design to suppress from defendants in said action knowledge of the fact that he was about to sell their property under execution. According to his own uncontradicted testimony, he examined the law and consulted other attorneys as to the rights of his client under the circumstances, and concluded that, as his client was the legal owner of the judgment, due to assignment thereof coupled with an interest in the account, he, acting for such client, was justified in enforcing payment of the judgment, in support of which he cites Cobb v. Doggett, 142 Cal. 142, 75 Pac. 785, and other authorities, which appear to support him in his contention. The circumstances were such that, conceding the assignment was made for collection, the legal title thereto passed to the assignee, and after notice thereof the debtors dealt with Dr. Berry, the assignor, at their peril. 4 Cyc. 90; McCloskey v. San Francisco, 66 Cal. 104, 4 Pac. 1092. That the Norrises had notice of the assignment conclusively appears from the fact that service of summons in the action brought against them upon the assigned claim was had upon them, and hence, in adjusting the matter with Dr. Berry, they acted with a stranger having no authority in the premises.

That appellant, as attorney for the judgment creditor, could have repudiated the act of Dr. Berry in giving a receipt in full to the Norrises upon the payment to him of the $60, and thereafter proceeded to collect the full amount of the judgment, to our minds admits of no doubt. Respondent, however, insists that, in accepting one-half of said sum so collected by Berry, his client, with his knowledge, ratified the act, and hence his position was the same as though he, as attorney, had accepted said sum and given the receipt, by reason of which fact he was guilty of moral turpitude (subdivision 5, § 287, Code Civ. Proc.) in thereafter causing the levy of execution. Conceding that as a matter of law he was not entitled to enforce further payment, nevertheless, in the absence of deception or unfair advantage sought (and none is shown), his act was due to a mistake of judgment as to the law applicable to the case.

[3, 4] The record, as we read it, fails to disclose any deception on the part of appellant, or that he acted through corrupt motives or otherwise violated the provisions of section 282, Code of Civil Procedure. The oath required by section 278, Code of Civil Procedure, of an attorney is that he will "faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability." Moral turpitude cannot be predicated upon errors of judgment as to the law, or action had and taken in good faith by an attorney, openly and with notice to the adverse party under an honest assertion of legal right, where there is no deception practiced or unfair advantage sought.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 221

CHARVES v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (Civ. 2953.)

(District Court of Appeal, First District, Division 1, California. Nov. 8, 1919. Hearing Denied by Supreme Court Jan. 5, 1920.)

1. STREET RAILROADS ⊂⊃114(8) — NEGLIGENCE CAUSING INJURY TO CHILD ESTABLISHED BY EVIDENCE.

In an action for injuries to a child struck by a street car while crossing street, based on negligence in operating car at an excessive rate of speed, and in failing to stop after motorman had ample opportunity to have seen child, evidence *held* sufficient to sustain verdict for plaintiff.

2. STREET RAILROADS ⊂⊃117(7) — SPEED OF CAR QUESTION FOR JURY.

In an action for injuries to a child struck by a street car while crossing street, question of speed of the car and question of whether such speed was excessive *held* for jury.

3. NEGLIGENCE ⊂⊃136(29) — CONTRIBUTORY NEGLIGENCE OF MINOR JURY QUESTION.

Generally the question of whether in a given case minor has been guilty of contributory negligence so as to prevent recovery is a question of fact for the jury.

4. STREET RAILROADS ⊂⊃111(2)—LAST CLEAR CHANCE ISSUE RAISED BY GENERAL AVERMENT OF NEGLIGENCE.

In an action against a street railroad for injuries, the general averment as to railroad's negligence raises the issue of last clear chance, and under the averment negligence in failing to take advantage of the last clear chance may be proved.

5. APPEAL AND ERROR ⊂⊃882(12) — PARTY SUBMITTING INSTRUCTIONS ON ISSUE CANNOT COMPLAIN INSTRUCTIONS THEREON ARE BEYOND ISSUES.

A party who requests instructions on certain issues cannot complain of instructions given thereon on ground that issue is not raised by pleadings.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Lester Charves, a minor, by Frank Charves, as guardian ad litem, against the San Francisco-Oakland Terminal Railways. Judgment for plaintiff, and the defendant appeals. Affirmed.

W. H. Smith, of Oakland, and A. L. Whittle, of San Francisco (Chapman & Trefethern, of Oakland, of counsel), for appellant.

Stanley Moore and Geo. K. Ford, both of San Francisco, and Ostrander & Carey, of Oakland, for respondent.

RICHARDS, J. This is an appeal from a judgment rendered after the verdict of a jury in favor of the plaintiff for the sum of $10,000, damages for personal injuries alleged to have been sustained by said plaintiff as the result of an accident in which the plaintiff was struck by one of the cars of the defendant upon a public street of the city of Oakland on the 24th day of March, 1915.

Said plaintiff on said day, a child of the age of five years, was living with his parents near the place where the accident occurred, and had been sent by his parents on an errand which would take him across Adeline street, upon which the defendant was at the time operating a double-track electric railway, which ran in a general northerly and southerly direction. The child undertook to cross said street diagonally in a southwesterly direction, when a street car of the defendant, running in a southerly direction along the westerly track of its said railway, struck the plaintiff, cutting off his right hand.

In the complaint which was filed herein on behalf of said plaintiff for the recovery of damages for his said injuries it was alleged generally that while the plaintiff was crossing said street as aforesaid the defendant so negligently and carelessly ran and operated one of its electric cars in a southerly direction along said street that the car struck said plaintiff and caused the injuries complained of. To this complaint the defendant in due course filed its answer, denying negligence on its part, and setting up by way of special defense the negligence of the plaintiff.

Upon the trial of the cause upon the issues thus generally framed the verdict and judgment in plaintiff's favor were rendered, from which this appeal has been taken.

[1, 2] The first contention of the appellant upon the appeal is that the evidence is insufficient to sustain a verdict against the defendant, based upon any negligence on its part or on the part of its employés in connection with the plaintiff's injuries. We are satisfied from an examination of the record that this contention is without merit. The accident in question occurred about the hour of 5 o'clock in the afternoon, when there was ample daylight enabling the motorman in charge of the defendant's car to see clearly objects on said street for several hundred feet. There is ample evidence to show that said motorman either did see, or, with a vigilant lookout, could and should have seen, this child from the time it left the sidewalk on the easterly side of Adeline street to the moment of the collision, and that at the time when said child was or should have been within the range of his observation for the first time said car was several hundred feet away from the spot where it was finally struck and injured. With respect to the speed at which the car was running at the time the evidence is somewhat conflicting; but there were witnesses who testified that the car at the time when the child first started to cross the street was proceeding at the rate of about 30 miles an hour. What the actual rate of speed of the car was at the time was a ques-

tion of fact for the jury; and whether or not the rate of speed which the jury found said car to have been actually running at said time was an undue rate of speed for cars to be operated upon said Adeline street were also questions of fact for the jury. Burr v. United Railroads, 163 Cal. 663, 126 Pac. 873; Ellis v. Central Cal. Traction Co., 174 Pac. 407.

As to whether the motorman in charge of said car—with his opportunity to observe the child from the time it started to cross the street, and the direction in which it was going in attempting to cross, and its action in so doing, permitting him to judge whether or not the child was aware of the approach of the car—was or was not negligent is a matter upon which the evidence is conflicting. There was some testimony as to the ringing of the bell; but whether or not this form of warning was given sufficiently early for the child to have heard the same, and possibly to have thus avoided the collision, there is some dispute in the evidence, which it was the province of the jury to determine. There is also a conflict in the evidence as to when the motorman first applied his brakes, and first began to take such other steps as the mechanism of the car provided for its stoppage in time to avoid running down the child. These were also matters which it was the province of the jury to resolve. Upon this branch of the case we are therefore of the opinion that the evidence is sufficient to sustain the finding of the jury as to the defendant's negligence in the operation of its car, and that such negligence was the proximate cause of the plaintiff's injury.

[3] In this connection, however, the appellant makes the contention that the undisputed evidence shows that the plaintiff was guilty of such contributory negligence in the premises as should, as a matter of law, prevent his recovery in this action; and in support of this contention the appellant cites certain cases in which minors of various ages have been held to have been guilty of such contributory negligence as a matter of law as to preclude recovery for their injuries. The general rule, however, in this state is that whether or not a minor has in a given case been guilty of contributory negligence so as to prevent his recovery in an action to recover damages for his injury is a question of fact for the jury. Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094; Cahill v. Stone Co., 167 Cal. 126, 138 Pac. 712; Barrett v. Southern Pacific Co., 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; Foley v. Cal. Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87; Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 Pac. 700. In the recent case of Mayne v. San Diego Electric Ry. Co., 175 Pac. 690, the Supreme Court, after a full review of the foregoing authorities, declared that "as a rule courts upon appeal have not interfered with the discretion of trial courts in referring or in refusing to refer to juries the question as to whether the contributory negligence of children of the age of 14 years or under was such as to prevent their recovery for injuries sustained by them." We are therefore of the opinion that there is no merit in the appellant's contention in this regard.

The next contention of the appellant herein is that the trial court was in error in giving to the jury any instruction upon the subject of last clear chance, and the appellant further contends in this connection that the instructions which the court did actually give upon this subject were erroneous.

[4, 5] With respect to the first of these contentions, the appellant insists that the doctrine of last clear chance was neither made an issue in the case by the pleadings nor was it properly presentable to the jury in the state of the evidence before it at the time such instructions were given. In response to the first of these contentions it may be stated that the doctrine of last clear chance is one of the issues which the plaintiff tenders when he makes his general averment as to the defendant's negligence, and that under such general averment he is entitled to introduce evidence showing that the defendant has been guilty of negligence in failing to take advantage of its last clear chance to avoid the injury. And as to the evidence in the case we are of the opinion that sufficient was shown with respect to the position of the child upon the street at a time immediately preceding its injuries to have entitled the plaintiff to an instruction upon the subject of last clear chance. The appellant itself evidently considered that the question of last clear chance was among the issues involved in the case, since it submitted to the court a number of instructions upon this subject which the record shows to have been given. It is not, therefore, in a position to complain that the court gave instructions upon this subject, and its only remaining contention can be that the court was in error in the instructions thereon which it gave to the jury at the plaintiff's request. We have carefully examined the whole body of instructions which the court gave to the jury upon the doctrine of last clear chance, and from such examination we are of the opinion, without undertaking to quote such instructions in detail, that the jury on the whole was fully and fairly instructed upon this subject, and that, whether or not the particular instruction of which the appellant complains was ample enough in its phraseology to fully cover the subject, the instructions which were asked and given on behalf of the appellant upon the same subject were sufficient to eke out such deficiency, and that upon the whole said instructions embrace a correct exposition of the law.

As to the other instructions of the court of which the appellant complains, its objec-

tions are urged in the most general terms without the citation of any authority which would serve to indicate in what respect they are erroneous. We are unable to perceive that these instructions were in any respect erroneous, and are satisfied that the jury on the whole was fully and fairly instructed as to the law of the case.

This disposes of the defendant's various contentions, none of which we find to have sufficient merit to justify a reversal of the case.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 99

GARRETT v. JENSEN et al. (Civ. 2251.)

(District Court of Appeal, Second District, Division 2, California. Nov. 4, 1919.)

1. VENUE ⟸41 — CHANGING TO COUNTY OF NONRESIDENT DEFENDANTS PROPER, WHERE RESIDENT DEFENDANT NOT NECESSARY PARTY.

Where the only defendant residing within the county in which an action was brought was not a necessary party defendant, and the complaint stated no cause of action against him, the remaining nonresident defendants are entitled to a change of venue to the county where they reside.

2. APPEAL AND ERROR ⟸1180(1)—REVERSAL DOES NOT INVALIDATE PREVIOUS COLLECTION.

Where a claimant in an interpleader proceeding secured payment of a judgment in his favor after a stay had expired and before an appeal was taken, and paid a portion thereof to an attorney of the party paying the money into court, a subsequent reversal of the judgment did not relate back, so as to make the attorney's acceptance of the money an unlawful conversion.

3. APPEAL AND ERROR ⟸1180(1)—DUTY TO REPAY AMOUNT COLLECTED BEFORE REVERSAL.

A claimant in an interpleader proceeding has the right to collect a judgment in his favor after a stay thereon has expired, and before an appeal has been taken; but the subsequent reversal of the judgment creates a legal obligation to repay what the other claimant had lost by the erroneous judgment of the trial court.

4. TRUSTS ⟸356(2)—RIGHT TO FOLLOW FUND DOES NOT EXIST AGAINST ONE WHO RECEIVED MONEY UNDER DECREE BEFORE REVERSAL.

Where a claimant in an interpleader proceeding collected a judgment between the time the stay expired and an appeal was taken, paid part to a third party, who had assisted in the collection, and the judgment was subsequently reversed, *held*, that the third party did not hold his share as a trust fund, since, at the time he secured it from the claimant, the fund was not impressed with a trust, and plaintiff had a right to dispose of it.

5. JUDGMENT ⟸660—ERRONEOUS JUDGMENT JUSTIFYING COLLECTION BEFORE REVERSAL.

Until reversal of an erroneous judgment, the party receiving satisfaction under the judgment may justify under it, and under any execution issued thereon, for the erroneous judgment is the act of the court.

6. INJUNCTION ⟸118(3) — PLEADING HELD INSUFFICIENT TO WARRANT RESTRAINING ORDER AGAINST RECEIPT OF MONEY UNDER REVERSED DECREE.

Where a claimant in an interpleader proceeding collected a judgment between the time the stay expired and an appeal was taken, and paid part thereof to a third party before the judgment was reversed, *held*, that the third party will not be enjoined from receiving additional sums from the claimant, in absence of allegations that he has or is attempting to take money subsequent to the judgment's reversal.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Iva L. Garrett against Emma L. Jensen (guardian of William Edward Garrett, a minor), W. E. Lady, and others. From an order granting a motion for change of venue, plaintiff appeals. Affirmed.

Robert L. Hubbard, of Los Angeles, for appellant.

Charles S. Peery, of San Francisco, and V. J. Cobb and W. E. Lady, both of Los Angeles, for respondents.

FINLAYSON, P. J. Defendants, other than defendant Lady, moved in the court below to change the place of trial from Los Angeles county to San Francisco. Lady resides in Los Angeles county; the other defendants reside in San Francisco. From an order granting the motion, plaintiff appeals.

[1] If the complaint states a cause of action against Lady, the order granting defendants' motion for a change of venue should not have been made. If, on the other hand, Lady was not a necessary party defendant, or if the complaint does not state a cause of action against him, the right of the other defendants to have the place of trial changed to the city and county of their residence is undoubted. Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120; Donohoe v. Wooster, 163 Cal. 114, 124 Pac. 730; Buell v. Dodge, 57 Cal. 645.

The case alleged in the complaint is substantially as follows: Prior to the commencement of the present action, the plaintiff here had brought an action in the superior court of Los Angeles county against an insurance company to recover certain money due on insurance upon the life of Edward E. Garrett. William Edward Garrett, a minor, of whose person and estate the defendant Emma L. Jensen is guardian, appeared in that action by his guardian as a rival claimant of the insurance money. The insurance com-

pany appeared in the action, deposited with the clerk of the court the insurance money sued for, $4,074, asked to be discharged from all liability, and, having thus interpleaded the two rival claimants for the money, the company was duly discharged from further liability. On November 12, 1915, the court rendered a judgment in that action whereby it adjudged that the minor was entitled to the insurance money—the $4,074 that had been so deposited in court by the insurance company—and, on the same day, made an order staying execution of the judgment for 10 days. After the expiration of the 10 days' stay, namely, on December 15, 1915, the judgment was entered. On December 24, 1915, the plaintiff in that action, who likewise is the plaintiff in this, served and filed her notice of appeal from the judgment that on December 15, 1915, had been entered in favor of the minor; and on December 29, 1915, she perfected the appeal by filing the necessary undertaking. The judgment so appealed from was reversed by the District Court of Appeals, that court holding that plaintiff, as the widow of the insured, was entitled to the insurance money. See Garrett v. Garrett, 31 Cal. App. 173, 159 Pac. 1050, for a report of that case. Meanwhile, after the expiration of the 10 days' stay of execution that had been granted by the trial court at the time when it rendered judgment in favor of the minor but prior to plaintiff's appeal from that judgment, namely, on December 23, 1915, one of the defendants herein, Emma L. Jensen, as guardian of the minor's person and estate, came into possession of $3,975.10, a part of the $4,074 that had been so deposited by the insurance company with the clerk of the court. In securing possession of the money for her ward, defendant Jensen was assisted by the minor's attorney of record in that action, Charles S. Peery, whom plaintiff has made one of the defendants herein, and likewise by the defendant Lady, who, it seems, had appeared as attorney for the insurance company in the other action. The circumstances under which the minor's guardian, with the assistance of defendants Peery and Lady, came into possession of the money that the insurance company had deposited in court to be contended for by the two rival claimants thereto, were substantially as follows: The money, after its deposit with the clerk of the court by the insurance company, was transferred by the clerk to the county treasurer, with whom it remained on deposit to abide the final determination of the rights of the two claimants, the widow and the minor child; on December 23, 1915, Lady caused a certificate to be made by the county clerk certifying that, by judgment entered December 15, 1915, the minor, William Edward Garrett, was awarded the $4,074. On the same day Lady made demand on the county treasurer for the payment of the $4,074 to the minor, and made oath that the same was justly due to the minor from the clerk and the treasurer. On the same day Lady also requested the judge before whom the cause had been tried in the superior court to make an order directing the county auditor to allow, and the county treasurer to pay, to the minor the $4,074 to which that court had adjudged him entitled, less any moneys due the county for taxes. Thereupon the court did make such an order. Upon the making of this order Lady caused the auditor to issue his warrant for, and the treasurer to pay to one or more of the defendants here, but which one plaintiff is unable to say, the sum of $3,975.10. The auditor's warrant was made payable to the Humboldt Savings Bank of San Francisco, and was signed by the defendant Emma L. Jensen as guardian of the person and estate of the minor, William Edward Garrett. In his reply brief counsel for appellant admits that, from the record of the transaction as detailed in the complaint, "the money was paid to the guardian." Indeed, the complaint alleges that on February 15, 1916, plaintiff was informed that the money had been drawn from the county treasury, "and was at the time deposited in the account of said Emma L. Jensen in some bank in the city of San Francisco." It is alleged that, since the withdrawal of the money from the county treasury, "defendants have appropriated to their own use and disposed of and dissipated a large part of said money"; also that, unless enjoined by the court, they "will dispose of and dissipate the whole thereof." In her prayer for relief plaintiff asks that she have judgment against each defendant for $4,074, with interest and costs, that defendants be restrained from further disposition of the money, and that they be directed to pay back into the custody of the court so much of the money as may remain unexpended.

To support her contention that the complaint states a cause of action against Lady, or that he is a necessary party defendant, appellant, must be able successfully to maintain one, at least, of the three following propositions: (1) That the transaction whereby Lady and the other defendants caused the money to be paid by the county treasurer to the minor's guardian was an unlawful conversion of money to which plaintiff was entitled, and that therefore Lady, with the other defendants, is liable in damages by reason of such unlawful conversion; or (2) that, after the money was paid to the guardian and while it was in her hands or on deposit in bank to her credit, it was a trust fund held by her in trust for plaintiff's benefit, and while so held by her as a trust fund it, or some part of it, was received by Lady from the guardian and appropriated to his own use; or (3) that, in order to insure due protection to plaintiff's rights, it is necessary

that an injunction or restraining order issue against Lady, restraining him from making any disposition of the money.

[2, 3] We do not think that, on the facts alleged in the complaint, appellant can successfully maintain any one of these positions. And unless she can successfully maintain at least one of them, it must be held that the complaint does not state a cause of action against Lady, that he is not a necessary party defendant, and that the court properly granted the motion for change of venue to the place of residence of the other defendants.

If, on December 23, 1915—the day on which all the transactions were had that eventuated in the payment of the money by the county treasurer to the guardian of the minor—the latter was entitled to the possession of the money, then Lady's participation in those transactions was not wrongful or illegal. A judgment adjudging the minor to be entitled to the money had been entered; the stay of execution upon that judgment had expired. (Garrett v. Garrett, supra); and no appeal from the judgment had as yet been taken. There is no room, therefore, for the claim that, at the time when the money was received by the guardian, proceedings on the judgment had been suspended by any appeal therefrom, or that, at that time, supersedeas might issue to prevent an enforcement of the judgment in favor of the minor. The order of the court directing the county treasurer to pay the money to the guardian was, under the circumstances a proper proceeding for the enforcement of the judgment that had been given and made in the minor's favor. At the time when, on order of the court, the money was paid by the county treasurer to the guardian, there was a legal right in the minor to demand and receive it, or to enforce payment of it by some suitable method for enforcing the judgment that had been given and made in his favor. Doubtless the reversal of the judgment by the District Court of Appeal gave plaintiff a right or cause of action against the minor or his guardian. But that was a newly created right. It was a right created by the reversal of the judgment of the trial court and the entry of a new judgment—a judgment in favor of plaintiff, the widow of the insured, as directed by the District Court of Appeal. The reversal created a legal obligation on the part of the minor or his guardian to restore what the plaintiff here had lost by reason of the erroneous judgment of the trial court in that action. But the payment of the money to defendant Jensen, as the guardian of the minor, before plaintiff had taken any appeal from the judgment, was legal, and the reversal of that judgment did not have a retrospective operation so as to make void that which was lawful when done. The new right created by the reversal was, it is true, a right which, when created, was wholly antagonistic to the right that, before the reversal, was a right in the minor to obtain, by enforcement of the judgment in his favor, possession of the money that had been deposited in court. But this newly created antagonistic or inconsistent right did not make void, ab initio, the right created in the minor at the time when the judgment in his favor was given and made. The judgment in favor of the minor, though erroneous, was not void. By its enforcement—for that is practically what the order for the payment of the money to the minor amounted to—the minor received the money with a defeasible right thereto. But, until his right thereto was defeated by a subsequent reversal of the judgment, he, or his guardian for him, must be deemed to have received and held the money, clothed with all the attributes of rightful ownership. Bank of U. S. v. Bank of Washington, 6 Pet. 19, 8 L. Ed. 299.

If, at the time when the money was paid over to his guardian, the minor was entitled to an enforcement of the judgment that had been made in his favor, and he unquestionably was, then the fact that Lady had been the attorney for the insurance company and was not the attorney of record for the minor cannot lay him under any liability. If, as we hold, the guardian, at the time when the money was paid to her by the county treasurer, had the right to enforce the judgment that had been made in her ward's favor and compel payment to herself as guardian, the means and instrumentalities whereby she accomplished that result do not concern plaintiff.

[4, 5] The complaint alleges that, after the money was received by the guardian, the defendants—and that, of course, includes the defendant Lady—"appropriated" to their own use a large part of the money. Manifestly this can mean no more than that, after the money came into the possession or under the control of the guardian in the manner heretofore detailed, she paid or gave a part of it to Lady and the latter then used it as he saw fit. But that fact would not give plaintiff a cause of action against Lady for the part of the money that thus may have been paid to him by the guardian and then applied by him to his own use, unless, at the time when he received it from the guardian, it was then held by the latter as a trust fund. While it is true that, as claimed by appellant, equity will enforce a trust against all persons who, with notice of the trust, may come into the possession of the trust property, nevertheless, to entitle appellant to follow the money into the hands of Lady and recover it from him as part of a trust fund held in trust for her, she must first show that when Lady received it from the guardian the latter then held it as a trust fund in trust for appellant. This the complaint fails to do. It fails to show that, when Lady received any part of the $4,074 from the guardian, the latter did not then

have the right of disposition. As we have seen, on December 23, 1915, when the money was paid by the county treasurer to the guardian, or to some agent of the guardian, she, as the guardian of the minor in whose favor the judgment of the trial court had been entered, was entitled to an enforcement of the judgment—entitled to have the money paid to her for her ward. And not until the judgment of the district court of appeal reversing the judgment of the trial court became final did any obligation rest upon the guardian to return any part of the $4,074.

On the reversal of an erroneous judgment, but not before, the law raises an obligation on the part of any party to the action who may have received the benefit of the judgment to make restitution to the other party for what the latter has lost. Until the reversal, the party who may have received satisfaction under the erroneous judgment may justify under it and under any execution issued thereon, for the erroneous judgment is the act of the court. Bank of U. S. v. Bank of Washington, supra; Garrett v. Garrett, supra. Until the reversal of the judgment by the District Court of Appeal the money that had been received by the guardian from the county treasurer was not held by her as a trust fund; until then it was not stamped with the character of a trust.

The complaint does not allege when it was that Lady appropriated a part of the $4,074 to his own use. Non constat but that whatever part of the $4,074 he may have received and kept was received by him from the guardian before the judgment of the District Court of Appeal became final. In fact, if on this appeal, we may take judicial notice of the record on the appeal in Garrett v. Garrett, supra, we know that necessarily whatever sum or sums may have been "appropriated" by Lady as alleged in the complaint herein, i. e., sums received by him from the guardian after the latter had received the money from the county treasurer, must have been so appropriated by Lady before the judgment of the District Court of Appeal became final, and, therefore, before any part of the money that had been paid over to the guardian could be regarded as money held by her as a trust fund in trust for appellant. This is so because the present action was commenced August 8, 1916, and if we take judicial notice of the judgment of the District Court of Appeal we know that that judgment did not become final before September 28, 1916. If it can be maintained that any moneys which may have been paid to Lady by the guardian before the judgment of the District Court of Appeal in Garrett v. Garrett should be regarded, at all times after that judgment, as moneys held by him in trust for plaintiff, the answer is that the complaint does not allege facts showing that that judgment had become final prior to the commencement of the present action; and, if we may take judicial notice of the record on appeal in Garrett v. Garrett, we know that, at the time when this action was commenced, it could not truthfully be alleged that the judgment of reversal had become final prior to the filing of the complaint herein.

[6] Nor is the issuance of an injunction or restraining order against Lady necessary to the protection of any of plaintiff's rights. The transactions that resulted in the payment of the money to the guardian by the county treasurer show that the money, finally, was deposited in a San Francisco savings bank to the credit of the guardian. There is no allegation that all the money is not still so on deposit, save in so far as the continued deposit of the whole sum received by the guardian may be inconsistent with the general allegation that "defendants have appropriated to their own use and disposed of * * * a large part of said money." In other words, the only part of the $4,074 that can possibly be regarded as a trust fund now held in trust by any of the defendants for plaintiff is the amount that still remains in the custody or under the control of the guardian, the defendant Emma L. Jensen. This is so because there is nothing before us to show that the guardian ever parted with any portion of the $4,074 after the judgment of the District Court of Appeal became final. This being the situation, the issuance of an injunction or restraining order against the guardian would suffice to protect plaintiff's rights in the unexpended portion of the total sum that was received by her from the county treasurer. There is no apparent necessity for the issuance of a restraining order against Lady, who is not even alleged to have threatened to take or receive from the guardian any money since the judgment of the District Court of Appeal became final.

For these reasons we do not think the complaint alleges any cause of action against Lady or shows him to be an interested party defendant, and that therefore the remaining defendants were entitled to have the place of trial changed to the city and county of their residence.

Order affirmed.

We concur: SLOANE, J; THOMAS, J.

(44 Cal. App. 202)

STEWART v. SAN JOAQUIN LIGHT & POWER CO. (Civ. 2038.)

(District Court of Appeal, Third District, California. Nov. 7, 1919.)

1. NEGLIGENCE ⟸136(30) — NEGLIGENCE OF DRIVER OF AUTOMOBILE CARRYING PASSENGER INJURED QUESTION FOR JURY.

In an action against a power company for the death of an automobile passenger electrocuted in a collision with a power pole, whether it was negligence to drive an automobile without lights 18 miles per hour, over a road not traveled by the driver before, when it was dark and had been raining, *held* for the jury.

2. NEGLIGENCE ⟸93(1)—NEGLIGENCE OF AUTOMOBILE DRIVER NOT IMPUTED TO GUEST.

A passenger in an automobile is not responsible for the negligence of the driver, unless he has some control over him and his conduct.

3. NEGLIGENCE ⟸136(30) — CONTRIBUTORY NEGLIGENCE OF GUEST IN AUTOMOBILE FOR JURY.

Whether a passenger in an automobile was negligent in permitting the driver to drive at 18 to 20 miles an hour in the dark without lights, over a road which the driver had not traveled before, *held* for the jury.

4. ELECTRICITY ⟸16(7) — POWER COMPANY NOT LIABLE FOR ELECTROCUTION OF AUTOMOBILIST RUNNING INTO ROTTEN POLE NEAR HIGHWAY.

A power company maintaining a rotten pole was not liable for the death of a guest in an automobile, who was electrocuted when the automobile ran into and broke the pole, where it could not reasonably have been anticipated that a vehicle would leave the traveled portion of the highway and come in contact with the pole, and by reason thereof cause it to break and fall, not being called upon as a matter of law to take such precautions as would prevent injuries which might result from such contact.

5. ELECTRICITY ⟸16(7) — POWER COMPANY NOT LIABLE FOR ELECTROCUTION OF AUTOMOBILIST RUNNING INTO ROTTEN POLE NEAR HIGHWAY.

A power company maintaining a rotten pole was not liable for the death of a guest in an automobile, who was electrocuted when the automobile ran into and broke the pole, if the pole was in such condition as to withstand ordinary strain put upon it by the elements, and such strains as might be occasioned by the ordinary use of the highway by travelers, and was in such position as to be safe from the ordinary danger of collision from vehicles traveling on the highway, and if the breaking of the pole was caused by unusual circumstances over which the power company had no control and which it was not called upon to reasonably anticipate.

6. ELECTRICITY ⟸19(6) — NEGLIGENCE OF POWER COMPANY IN MAINTAINING ROTTEN POLE FOR JURY.

In an action for death of a passenger in an automobile, electrocuted when the automobile ran into a rotten pole on which was strung high-power cable, breaking the pole and causing the cable to fall, whether the power company was negligent in maintaining the rotten pole *held* for the jury.

Appeal from Superior Court, Tulare County; Henry C. Gesford, Judge.

Action by Laura Hilda Stewart against the San Joaquin Light & Power Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. S. Bell, of Napa, for appellant.

Short & Sutherland, of Fresno, for respondent.

ELLISON, Presiding Judge pro tem. The plaintiff is the widow of one Carl D. Stewart, and brings this action to recover damages for his death, alleged to have been caused by the negligence of the defendant.

It is set forth in the complaint that on the 9th day of May, 1915, the defendant was the owner of and maintaining, for the purpose of its business of selling electricity, a line of poles upon which was strung high-power wires or cables along and upon the side of a public road running from Woodlake, in the county of Tulare, to Seaville, in the same county; that at a point about 1 mile from the town of Seaville the defendant maintained a pole upon said highway forming a part of its power line and supporting a high-power electric cable carrying a heavy voltage of electricity; that said pole was in a rotten and dangerous condition and dangerous to people traveling said highway; that the defendant knew of its condition; that on May 9, 1915, Carl D. Stewart was a passenger in an automobile as the guest of one George Cole, who was driving the machine, and Stewart had no control or management of said automobile; that said automobile at said time, while being driven along said highway by said Cole, and through no negligence of said Carl D. Stewart, came in contact with said pole; that, by reason of the rotten condition of the pole it broke off at the top of the ground and also in two or three other places, and the cable dropped upon the automobile and upon Carl D. Stewart, and he was killed instantly by reason of his coming in contact with said cable carrying a heavy voltage of electricity.

The defendant, as one defense, alleges that the accident was caused by the negligence of said Cole, in driving an automobile while in an intoxicated condition, and in a reckless manner, off the traveled portion of the road and against said power pole, and that said Stewart knew the condition of said Cole, and that he was driving in a reckless manner, and with this knowledge had ample time to remove himself from the machine before the accident happened.

As another defense the defendant denies

that it was guilty of any negligence that was the proximate cause of the accident.

The case was tried by a jury, and a verdict rendered for the defendant, upon which judgment was entered, and from this judgment the plaintiff appeals.

The only ground relied upon for reversal is the claim that the verdict is not supported by the evidence.

If there is substantial evidence sustaining the defendant's plea of contributory negligence, or of its denial of any negligence on its part proximately causing the injury, the judgment must be affirmed, as a finding by the jury in favor of the defendant on either would necessarily result in a verdict for it.

While there was a conflict in the evidence on some points, there was sufficient, if accepted by the jury, to show the following facts: That the plaintiff and her husband left their home in Orange Cove, in Tulare county, at about 8 o'clock in the evening of May 8, 1915, at the invitation of George Cole to take an automobile ride, the Stewarts both sitting then on the front seat with Cole; that they went to Seaville, a small town in Tulare county, and took in two other young people, and then proceeded to Woodlake, another small town in the same county, about 12 miles distant, where they arrived between midnight and 1 o'clock, and in the meantime admittedly drank four pints of beer. The party left Woodlake at about 1:30 in the morning, occupying the same position in the car as above, and started home by another road with which they were unfamiliar. The distance from Woodlake to Seaville by the road traveled is about 12 miles. When the party left Woodlake, Cole, who was driving the car, had an ordinary lantern hanging on his radiator cap, which was originally placed there to supplement his oil dash lights; his electric lights being out of order and not lighted. None of these lights were burning at the time of the accident, the lantern having been extinguished at Woodlake, and the dash lights after the repair of a tire was finished, at a time when it was dark. The foot brakes of the car were out of commission, and the machine was being driven without lights on a wet and oil surfaced road. When the party had reached a point about a mile from Seaville the car swerved to the right and, after leaving the road, traveled in practically a straight line for about 125 feet, and struck defendant's pole, which was on the extreme northerly side of the highway, in line with a row of trees, and about 24 feet from the center of the main-traveled portion of the highway. At the moment the car left the traveled portion of the highway it was traveling at a speed of 18 to 20 miles per hour, and by the time it struck the pole was traveling not to exceed 6 miles per hour. There was evidence, although conflicting upon the point, to show it was dark when the accident occurred. The power pole, which was broken as a result of the collision, was 12 inches in diameter at the ground, the inside was rotten, but it had a shell about one-fourth of an inch thick which was very hard, and it and the other poles on the line had withstood the windstorms during the preceding winter. When the car struck the pole it broke in three pieces, and the weight of the cross-arms and the upper piece of the pole caused the wires to sag down across the machine, striking Stewart and causing his death instantaneously.

[1] From this evidence the jury might well have drawn the conclusion that the driver of the automobile, Mr. Cole, was driving in a very careless and reckless manner. They might justly have concluded that it was negligence for Cole to drive a car over a road that he had not traveled before, when it was dark, and had been raining to some extent, part of the time with insufficient lights and, at the time of the accident without any lights whatever.

[2, 3] It is true, as claimed by appellant's counsel, that the deceased, Stewart, cannot be held responsible for the negligence of Cole, who was driving the car, unless he had some control over him and his conduct. But it is equally true that he was responsible for his own negligence. He was bound to use due care to keep himself from injury. While he might not have known that the brakes were inefficient, he certainly did know that Cole was driving the car over an unknown road, in the dark, and without adequate, and at some points without any, lights, and at a time when from the evidence the jury might conclude it was dark, he was driving at a rate of speed of 18 to 20 miles per hour, and the jury might well have concluded that it was negligence for the deceased, under such circumstances, not to have taken some precautions for his own safety in requesting the driver to lessen his speed, or to stop and permit him to remove himself from the car. The evidence introduced before the jury would have justified such findings upon their part, and, so finding, they would have been justified in concluding that the accident was the result of negligence properly attributable to the deceased.

[4, 5] The foregoing recital of the salient facts of the case is taken mainly from the brief of respondent, but the court has verified it by an examination of the record, and finds it contains a fair statement of the same.

Upon the other defense set up in the answer, that the defendant was not guilty of any negligence approximately causing the accident, the court instructed the jury as follows:

"I instruct you that if you believe from the evidence in this case that the defendant could not reasonably have anticipated that a vehicle would leave the traveled portion of the highway and come in contact with its power pole, and by reason thereof cause the said pole to break

and fall, it was not called upon, as a matter of law, to take such precautions as would prevent injuries which might result from such contact, and that any accident or injury caused thereby cannot be said to have been caused proximately by the negligence of the defendant."

And, again:

"If you believe from the evidence that the particular pole in question here was in such condition as to withstand any ordinary strain put upon it by the elements and weather conditions, and such strains as might be occasioned by the ordinary use of the highway by travelers, and was in such position as to be safe from the ordinary danger of collision from vehicles traveling on the highway, and that the breaking of said pole was caused by any unusual circumstance over which the defendant had no control, and which it was not called upon to reasonably anticipate, then I instruct you that the defendant was not liable because of such breaking and consequent falling of the power wire which caused the power wire to come in contact with and cause the death of Carl D. Stewart, and your verdict should be for the defendant."

These instructions state the law correctly, and are not complained of by the appellant.

[6] The defendant, in building its power line along the edge of a public highway, owed a duty to the public to build it of such construction and in such manner that it would not be a menace to those who had occasion to travel the highway. It was, as stated in the instruction, its duty to anticipate such uses of the road as would probably occur, and to provide against accidents from its poles from such causes as might be reasonably anticipated.

In the instructions the court left it to the jury to say whether or not the defendant was bound to anticipate that persons driving upon the highway might, either through negligence or design, drive automobiles against the poles that it had set, and they were told that if the defendant, acting with reasonable prudence and with a proper regard for the safety of the public, was not called upon to anticipate that persons might drive against its poles with automobiles, then it was not in duty bound to set said poles or maintain them in a condition to prevent injury from such collision.

The jury might well have found from the evidence in the case, from the width of the road, the location of the pole, and the attending circumstances, that no duty rested upon the defendant to anticipate that any one, either by accident or design, lawfully traveling upon the highway, would come into collision with the poles which it had set and was maintaining, and therefore was not bound to keep a pole of such strength and soundness as would withstand such unexpected contact.

The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 138

MOORE et al. v. STRAYER et al. (Civ. 3027.)

(District Court of Appeal, Second District, Division 2. California. Nov. 5, 1919.)

MORTGAGES ⟸25(6)—EVIDENCE INSUFFICIENT TO PROVE WANT OF CONSIDERATION.

Evidence *held* sufficient to support findings refusing cancellation of note and mortgage for want of consideration.

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by Rebecca J. Moore and another against Henry Strayer and others, for the cancellation of note and mortgage. From a judgment for the named defendant, directing foreclosure of the mortgage, and orders denying motions for new trial and to retax costs, plaintiffs appeal. Affirmed.

See, also, 175 Cal. 171, 165 Pac. 530.

M. B. Butler, of Pasadena, and R. A. Moore, of Los Angeles, for appellants.

S. W. Odell and Tanner, Odell & Taft, all of Los Angeles, for respondent.

THOMAS, J. This is an action for the cancellation of a certain note and mortgage, alleged to have been made, executed, and delivered by plaintiffs to defendant Strayer, on the ground "that the said mortgage and note were made without any consideration and are void; no money or other property of value was ever paid to or delivered to these plaintiffs for the consideration of said mortgage."

Defendant's answer denied all the material allegations of plaintiffs' complaint, and alleged that $2,000 had been paid by defendants to plaintiffs through Jas. H. Gaut Company, of Pasadena, Cal., that plaintiffs had thereafter made three payments of interest on the note, and that the plaintiff R. A. Moore had himself indorsed two of said interest payments thereon. Defendant Strayer—being the only answering defendant—also filed a cross-complaint, setting up in the usual form the execution and delivery of said note and mortgage, and the default thereon made in the payment of interest, and that he had elected to declare the whole sum due, praying for a foreclosure of the mortgage. Plaintiffs thereafter filed their answer to the cross-complaint, setting forth substantially the same allegations as contained in their complaint, and alleging that—

"Subsequent to the 24th day of April, 1914, and on or about the 7th day of May, 1914, cross-defendants did place the note and mortgage in the custody of James H. Gaut Company, of Pasadena, on the condition, and not otherwise, that said note and mortgage become effective and of force as such instruments when $2,000 is paid on a certain $2,500 note, which was secured by a prior mortgage on said real property; that said $2,000, or any part thereof, was not paid on said $2,500 note."

Cross-defendants also denied that there was any interest overdue or unpaid, and alleged that the nine months' interest, referred to as having been paid by them, was paid by reason of the belief of cross-defendants that the $2,000 for which the said $2,000 note and mortgage were executed had been paid on the $2,500 note, and that they had no knowledge that said $2,000 had not been so paid, as alleged, at the time when the said interest payments were in fact made. The court found against the plaintiffs on all the issues, and decreed that defendant Strayer have judgment foreclosing said mortgage. Judgment was entered accordingly. There was a motion for new trial, and a motion to retax costs, both of which were denied. The appeals here are from the judgment and each of said orders.

Respondent contends that the appeal comes too late; but that question has been settled contrary to such contention. Moore v. Strayer, 175 Cal. 171, 165 Pac. 530.

As to the said orders, and each of them, we can see nothing in this case which would justify their disturbance.

As to the judgment, four specifications of error are urged, but they all go to the suffiency of the evidence to support the findings. We have read the entire record, and are satisfied that the findings are amply supported by the evidence.

The judgment and orders appealed from are, and each of them is, affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

44 Cal. App. 210

ENG-SKELL CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 3200.)

(District Court of Appeal, First District, Division 1, California. Nov. 7, 1919. Hearing Denied by Supreme Court Jan. 5, 1920.)

1. EVIDENCE ⟸442(4) — PAROL EVIDENCE ADMISSIBLE TO SHOW RELATIONSHIP BETWEEN CLAIMANT AND EMPLOYER UNDER WORKMEN'S COMPENSATION ACT.

In workmen's compensation proceedings involving issue of whether claimant, who by written contract had agreed to furnish employer with delivery truck, was an employé, oral testimony was admissible on such issue where the written contract did not purport to define any personal service between claimant and employer.

2. MASTER AND SERVANT ⟸367 — WORKMEN'S COMPENSATION; CLAIMANT "EMPLOYÉ" WHILE MAKING DELIVERIES WITH HIS TRUCK.

Where an automobile delivery truck owner agreed for six months' term to furnish truck and to devote his exclusive personal services from 8 a. m. to 6 p. m. in delivery of goods for a company, and during such time to be under its control and direction, he was its "employé" under Civ. Code, § 2009, and entitled to compensation for injury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Proceedings under Workmen's Compensation Act (St. 1917, p. 831) by George B. Rogers for compensation for injury opposed by the Eng-Skell Company, employer, and the Continental Casualty Company, insurer. Award by Industrial Accident Commission for claimant, and employer and insurer bring certiorari. Award confirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

RICHARDS, J. The facts of the case are these: The Eng-Skell Company, one of the petitioners herein, was, in the month of March, 1917, engaged in the business of supplying soda water fountains with the materials and compounds necessary to the conduct of such establishments. The said petitioner's business required regular and daily deliveries by means of delivery trucks or wagons operated by a driver and making a regular daily round of its customers. In March, 1917, the said petitioner, Eng-Skell Company, entered into an agreement in writing with one George B. Rogers, who was at that time the owner of a Ford delivery truck, by which the daily use of said truck, with its driver, was agreed to be supplied by said Rogers to said petitioner, for the purposes of its said business, between the hours of 8 a. m. and 6 p. m., Sundays and holidays excepted, for a period of six months thereafter, for the sum of $1,050 for the entire term, payable in equal semimonthly amounts of $87.50. This agreement was in the form of a written offer by said Rogers to supply said truck and driver during said term, and in connection with said offer and as a part thereof he was to deposit the sum of $50 to guarantee the faithful fulfillment of his offer, in case of its acceptance, in so far as the same provided for an uninterrupted delivery service during said term. To this written offer the Eng-Skell Company affixed its acceptance, also in writing, and thereupon said Rogers entered upon the duties provided for in the agreement thus made. Said agreement was, from time to time, renewed, and was in existence under one of such renewals on the 2d day of April, 1919, when said Rogers, while personally discharging the duties which devolved upon him by virtue of said agreement, sustained an injury to one of his eyes; he being at the time engaged in unloading or unpacking one of the boxes of

said petitioner in which its deliveries were wont to be made. Thereafter said Rogers applied to the Industrial Accident Commission for an award against said petitioner and its insurer, in due course of proceedings upon which the award in favor of Rogers was made, for the annulment of which the petitioners herein have instituted this proceeding.

The sole question presented for our determination is as to whether said Rogers was at the time of his injury an employé of the Eng-Skell Company or was an independent contractor.

If, in the consideration of this question, we are to be confined to the terms of the written contract entered into between said parties, it might well be concluded that said Rogers was not an employé of the Eng-Skell Company, but that he was an independent contractor. Upon the hearing before the commission, however, evidence was presented showing that, while by the terms of said contract Rogers was merely to furnish a Ford delivery truck during its term, with a driver thereof, the real arrangement between the parties was such that Rogers was himself to be such driver and was to give his personal services to the Eng-Skell Company during the term of said contract and during each day of its continuance, Sundays and holidays excepted, from 8 a. m. to 6 p. m., and that in the course of such personal service he was not only to be the driver of the truck, but was to attend to all of the details incident to the delivery of the goods and material which the Eng-Skell Company supplied daily to its customers. The evidence further sufficiently shows that this service on the part of Rogers was not only a personal service, but was such a service as precluded the pursuit of any independent calling by himself or the use of his delivery truck in any other business than that of the Eng-Skell Company, and that in the performance of such service and the use of said truck Rogers was at all times under the control and direction of the Eng-Skell Company.

[1, 2] It is the contention of the petitioners herein that the Industrial Accident Commission was in error in admitting such evidence, and that the relation between said Rogers and the Eng-Skell Company was to be determined solely from the terms of the written agreement. An examination of that agreement, however, discloses that it did not purport to relate to or define any personal service which Rogers was to furnish to the Eng-Skell Company; and, this being so, we are satisfied that the commission committed no error in going outside of the aforesaid written agreement and in seeking to ascertain, through oral testimony, what the actual relation was between Rogers and the Eng-Skell Company. And we are further satisfied that the evidence thus adduced established all of the elements necessary to the existence of the relation of employer and employé under the terms of section 2009 of the Civil Code.

The facts, as disclosed by such evidence, show that Rogers stood in no other or different relation to the Eng-Skell Company than that which is found in many trades and employments in which employés agree to furnish their own tools and appliances and to care for and replace them during the course and term of their employment; and it has been uniformly held that the fact that such persons were to supply such tools or appliances did not in any manner affect their relation or status as employés. The cases cited by the petitioners herein are sound in principle, but have no particular bearing upon the issues involved in this proceeding, and hence do not require review in detail. The case is clearly one in which the commission acted within its powers in determining the actual relation existing between said Rogers and the Eng-Skell Company, and it committed no error in arriving at the conclusion to which it came on the evidence which was properly presented before it.

It follows that the writ must be denied, and the award confirmed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 415

FORD v. FORD. (Civ. 3036.)

(District Court of Appeal, Second District, Division 2, California. Nov. 22, 1919.)

1. APPEAL AND ERROR ⟹1011(1)—FINDINGS ON CONFLICTING EVIDENCE NOT DISTURBED.

Finding of trial court based on conflicting evidence will not be disturbed on appeal.

2. APPEAL AND ERROR ⟹931(1)—PRESUMPTION THAT TRIAL COURT FOLLOWED PROPER RULE IN WEIGHING EVIDENCE.

Rule that evidence of fraud and undue influence to defeat conveyances must be clear and convincing is a rule of evidence directed to the trial court, and it must be assumed that in reaching conclusions the court was governed by the rule in weighing the evidence.

3. TRUSTS ⟹103(3)—CONVEYANCE TO HUSBAND ON FRAUDULENT REPRESENTATIONS CREATING TRUST IN FAVOR OF WIFE.

A trust estate is created in behalf of a wife where she without consideration deeds an interest in her separate property to her husband and permits him to take in his name an interest in other property purchased with her separate funds, on his representation that he only desires to hold an interest of record for the sake of his business and social credit and that he will convey to her at any time she desires;

she having parted with her title in reliance upon such representations made to her with bad faith and with intent to withhold the property from her.

4. PLEADING ⊂⊃249(1)—COMPLAINT TO QUIET TITLE MAY BE AMENDED TO ONE TO ESTABLISH TRUST.

Though action was begun under an ordinary complaint to quiet title, trial court did not err in permitting plaintiff pending trial to file an amended complaint setting up the facts relied upon to defeat defendant's claim of title and establishing the trust in plaintiff's behalf and praying that such trust be declared and a reconveyance of the premises decreed.

5. PLEADING ⊂⊃236(6) — TRIAL AMENDMENT WITHIN DISCRETION OF COURT.

So long as the action as set out in the amendment is not entirely foreign to the original form of the action, the amendment is within the discretion of the court; the relief sought arising out of the same general state of facts.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Josephine Ford against Louis M. Ford. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Levinsky, of Stockton, and Geo. E. Cryer and J. H. De La Monte, both of Los Angeles, for appellant.

Gordon A. Stewart, of Stockton, and H. H. Appel, of Los Angeles, for respondent.

SLOANE, J. Plaintiff, Josephine Ford brought this action against the defendant, Louis M. Ford, her husband, to establish her title to several parcels of land in the city of Los Angeles. She acquired title to one of the properties before her marriage, and, as the court finds, was at the time of her marriage also "the owner of and in the possession of a large sum of money." Shortly after her marriage with defendant, she conveyed by deed an undivided one-half interest in this real property to the defendant. The court also finds that after her marriage the other parcels of land were purchased with her separate funds, and the title taken in the names of herself and husband as tenants in common. These properties were subsequently handled by the parties jointly, mortgages and releases were made in their joint names, and moneys collected, handled, and deposited in bank to their joint account. The court further finds that the defendant acquired his apparent interest in this property as follows:

That as to the real property she owned before marriage, "after said marriage, and on or about the 6th day of July, 1904, and prior thereto, defendant desired to have it appear that he was the owner of an interest in said property, and importuned that plaintiff should make a conveyance to him of an undivided one-half in said lands and premises, and then and there promised plaintiff that defendant would, whenever plaintiff should demand, reconvey said lands and premises to plaintiff. Plaintiff believed said promises and representations of defendant, and relied upon said representations and promises, and induced solely by her reliance and belief in said representations and without other consideration moving to her from defendant, than said belief and said promises on the part of the defendant, and the confidence which she then had in said defendant, did on or about the 6th day of July, 1904, execute and deliver to defendant a conveyance in the form of a grant, bargain and sale deed, conveying to the defendant an undivided one-half of, in and to said lands and premises."

And as to the property acquired after marriage:

"That the defendant desiring to have it appear that he was the owner of an interest in said lands and premises, at the time of the purchase of each of said last-mentioned pieces and parcels of land, requested plaintiff to permit and to cause conveyances to be made, at the time of each of said purchases, by the predecessors and owners of said lands and from whom the plaintiff purchased said pieces of land, to the plaintiff and defendant as tenants in common, and for that purpose to permit the name of defendant to be mentioned in each of said conveyances as a grantee therein, together with the name of plaintiff, and then and there promised plaintiff that if plaintiff should permit said conveyances to be so executed, that he would at any time upon demand by plaintiff convey to her said lands and premises by a good and sufficient deed of conveyance, in such form and of such character so that the legal title to the whole of said lands should be and appear of record in her own name and as her own separate estate and property."

It is also found that there was no other consideration for these conveyances to defendant, that the plaintiff relied on the promises to reconvey, and that the promises were made in bad faith, with no intention to carry them out, but with intent to deceive and defraud the plaintiff.

[1] There is no serious controversy in the evidence as to the purchase of all these parcels of land with the separate funds of plaintiff, possessed by her before marriage, together with the rents and profits accruing therefrom after marriage. There is direct conflict in the evidence as to the conditions on which the defendant acquired his apparent interest as a cotenant with plaintiff. He claims that it was the result of voluntary and unsolicited action of the plaintiff to endow him with an interest in all her worldly goods. The court, however, found against this contention and in favor of the testimony given by the plaintiff, which, if accepted as true, fully supports the findings. It is useless, therefore, to review more minutely the testimony, as we would not under this state of the evidence be justified in disturbing the findings of the court.

[2] It may be conceded, as contended by appellant, that in order to establish fraud and undue influence to defeat these conveyances of title the evidence must be clear and convincing. But that is a rule of evidence directed to the trial court, and it must be presumed that in reaching the conclusion set out in the findings the court was governed by these considerations in weighing the evidence. Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020, 31 Am. St. Rep. 175; Sherman v. Sandell, 106 Cal. 373, 39 Pac. 797. Even in criminal actions, where the facts must be established beyond a reasonable doubt in order to justify a conviction, the appellate courts are not permitted to question the verdict if it is supported by any substantial showing. People v. Durrant, 116 Cal. 179, 201, 48 Pac. 75; People v. Freeman, 92 Cal. 359, 28 Pac. 261; People v. Ah Loy, 10 Cal. 301. Appellant cites Sheehan v. Sullivan, 126 Cal. 189, 58 Pac. 543, as holding that the sufficiency of the evidence in the light of this rule should be independently considered by the appellate court. It will be noticed in that case that the question was before the Supreme Court on undisputed evidence. Under such conditions the appellate tribunal may well go to greater lengths in estimating the conclusiveness of the evidence upon the point in issue; but, where the conclusion of the trial court is supported by testimony that is clear and convincing in itself, the fact that it is disputed by rebutting testimony does not entitle the appellate court to substitute its judgment for that of the trial court in determining the credibility of the conflicting witnesses. In fact, the Supreme Court, in Sheehan v. Sullivan, supra, says on this point:

"The question here is not really one of conflicting evidence; the evidence introduced by plaintiff, leaving out of view the fact that it was all contradicted, is not in itself sufficient to show the declaration and creation of the trust as averred in the complaint, or as found by the court."

In the matter before us, the testimony of the plaintiff supported to some extent by the undisputed circumstances surrounding the transaction, if accepted as true, is clear and conclusive as to the facts found.

[3] The only question, then, on the merits of this appeal is whether the findings support the judgment declaring a trust in this property against the defendant and in behalf of the plaintiff.

To restate briefly the issue presented: Is a trust estate created in behalf of a wife where she deeds an interest in her separate property to her husband and permits him to take in his name an interest in other property when it is purchased with her separate funds, and the transaction is had without consideration to the wife, at his solicitation, on his representation that he only desires to hold an interest of record for the sake of his business and social credit, and that he will reconvey to her at any time she desires; and where the consent of the wife was induced by these representations and she parted with her title in reliance upon them, and they were made to her in bad faith and with intent to withhold the property from her? Without reviewing and distinguishing the many authorities cited by appellant, we think that every point involved in this issue is determined against him in Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Id., 90 Cal. 323, 27 Pac. 186, supplemented by Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189; Cooney v. Glynn, 157 Cal. 583, 108 Pac. 506; Jones v. Jones, 140 Cal. 587, 74 Pac. 143; and Bradley v. Bradley, 165 Cal. 237, 131 Pac. 750.

[4, 5] This action was begun under an ordinary complaint to quiet title. Subsequently, and pending the trial, plaintiff, by leave of court, filed an amended complaint setting up the facts relied upon to defeat defendant's claim of title and establishing the trust in plaintiff's behalf, and praying that such trust be declared and a reconveyance of the premises to plaintiff decreed. Defendant moved to strike out the amended complaint, and contends that the court was in error in denying his motion and permitting the amended complaint, for the reason that it constitutes a new and distinct cause of action. Defendant's own citations of authority seem to be against him, where they refer at all to the question of amendment of the complaint. In Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518, no attempt was made to amend the complaint below, and the Supreme Court merely holds that under the complaint to quiet title the court cannot declare and enforce a trust, and that a new trial will not be granted to give appellant an opportunity to amend his complaint. In Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319, holding that under a complaint to quiet title judgment enforcing a trust could not be upheld, the court says:

"If the complaint had been amended at the trial so as to conform to the proofs and to correspond with the findings, we should have found no difficulty in affirming the judgment. * * * The judgment is reversed, and the cause remanded, with directions to the superior court to permit the parties to amend their pleadings."

So long as the action as set out in the amendment is not entirely foreign to the original form of the action, such amendment is within the discretion of the court. So long as the relief sought arises on the same general state of facts—as was obviously the condition here, although more fully stated in the amended complaint—such amendment is proper. Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Walsh v. McKeen 75

Cal. 519, 17 Pac. 673; Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; Doolittle v. McConnell, 174 Pac. 305; Porter v. Fillebrown, 119 Cal. 235, 51 Pac. 322. In the case last cited the amendment changed the cause of action from an action at law to recover on a creditor's claim to an equitable action for an accounting of a trust.

We do not find prejudicial error in the numerous rulings of the court excepted to by appellant.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

(44 Cal. App. 108)

HORTON-HOWARD v. PAYTON et al.

(Civ. 3006.)

(District Court of Appeal, Second District, Division 2, California. Nov. 4, 1919.)

1. LANDLORD AND TENANT ⊜291(1)—DEMAND FOR POSSESSION CONDITION PRECEDENT TO FORFEITURE OF LEASE.

In lessor's unlawful detainer action upon ground that lessee had breached condition of lease requiring the planting of certain crops, and was committing waste under Code Civ. Proc. § 1161, subds. 3, 4, lessor's failure to give notice of demand for possession under section 1162 *held* a good defense, notwithstanding that it was unnecessary to give lessee notice to perform condition because of impossibility thereof; such demand being a condition precedent to forfeiture of leasehold interest.

2. CONTRACTS ⊜318—FORFEITURES NOT FAVORED.

Forfeitures are not favored by the courts; every intendment and presumption being against person seeking to enforce the forfeiture.

3. STATUTES ⊜241(1)—STRICT CONSTRUCTION OF FORFEITURE LAW.

Statutes creating forfeiture must be strictly construed.

4. LANDLORD AND TENANT ⊜290(½)—REMEDY BY UNLAWFUL DETAINER STRICTLY LIMITED.

One who seeks the summary remedy of unlawful detainer allowed by the statute must bring himself clearly within its terms.

5. LANDLORD AND TENANT ⊜291(1)—SUFFICIENCY OF NOTICE TO QUIT.

Notice to quit or demand for possession need not be in any particular words or in any particular form, any written demand being sufficient if the person to whom it is given, as a person of common understanding, must understand from it that the landlord is absolutely and unconditionally demanding of him possession of the demised premises.

6. LANDLORD AND TENANT ⊜291(1)—DEMAND FOR POSSESSION NOT SUFFICIENTLY DEFINITE.

Letter written to lessees by lessor's attorney complaining of breach of conditions of lease, stating that lessor "demands possession," that lessee had sold water with no right to so do without accounting to lessor, asking lessee to "remit" to lessor and to "let me hear from you at once," *held* not sufficiently definite and unequivocal to constitute a demand for possession, being calculated to lead lessees to think that they could retain possession by adjusting their differences with lessor.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Minnie J. Horton-Howard against F. C. Payton and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Dixon L. Phillips, of Oakland, and Victor Ford Collins, of Los Angeles, for appellant.

G. P. Adams, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action of unlawful detainer. Plaintiff appeals from a judgment in favor of defendants. Defendants claim the right of possession under a written lease executed to them, as lessees, by plaintiff and one Helen A. Wright, as the lessors, whereby defendants leased from plaintiff and her colessor, for the term of five years, a 25-acre ranch near Norwalk, in Los Angeles county, agreeing to plant all the ranch to beets, farm it in a workmanlike manner, and, as rent, pay the lessors one-fourth of all the crops raised. Helen A. Wright, one of the colessors, has since conveyed all of her interest to plaintiff. Plaintiff alleges that defendants breacned their covenant to plant all the ranch to beets, in this, that in the year 1918 defendants planted a part of the land to corn; also that defendants committed waste in that they unlawfully diverted from the leased premises water developed thereon and used or sold it for use on other lands.

[1] At the outset we are met with respondents' objection that no demand for possession or notice to quit, as required by the statute, was ever served upon either of them. We think this objection is well taken, and that it is fatal to any recovery by appellant.

The only attempted demand for possession was that made by plaintiff's counsel in a letter written and mailed by him at Oakland, Cal., dated September 3, 1918, and addressed to defendants at Norwalk, in Los Angeles county. That letter was as follows:

"F. C. Payton and C. A. Payton, Norwalk, Los Angeles County, California—Gentlemen: Mrs. Minnie J. Horton, of 551 Crofton avenue, this city, has placed in my hands the 'lease' between you and her under date of the 10th day of August, 1916, to the land and premises known as the 'Helen Williams' ranch, in Los Angeles county, California, and which you are now in possession. She has also placed in my hands the correspondence relative to same. You have repeatedly violated the terms of this 'lease'

and she demands possession. You have sold water, which you had no right to do, and have made no accounting for same. You will please now make a full statement giving details of water sold from the premises, *and remit to her.* Again, the ranch, you know very well, was to be all put into beets, which you have not done. *Please let me hear from you at once.* Yours very truly, Dixon L. Phillips, Attorney for Mrs. Minnie J. Horton." (The italics are ours.)

It was stipulated that the writer of this letter, Mr. Phillips, was acting as plaintiff's agent.

It may be assumed that the letter was delivered to one of the defendants, F. C. Payton, doubtless by the letter carrier; for, on September 9, 1918, F. C. Payton wrote a letter to Mr. Phillips acknowledging receipt of his letter of the 3d instant, denying that the terms of the lease had been violated, and stating that he expected to hold the ranch until the expiration of the term of the lease.

The action is brought under subdivisions 3 and 4 of section 1161 of the Civil Code of Procedure. By subdivision 3 it is provided that a tenant is guilty of unlawful detainer when he continues in possession after a neglect or failure to perform other conditions or covenants than the one for the payment of rent, and three days' notice in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him; but "if the conditions and covenants of the lease violated by the lessee cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee * * * demanding the performance of the violated conditions or covenants of the lease." Subdivision 4 provides that any tenant committing waste upon the demised premises, contrary to the conditions or covenants of his lease, thereby terminates the lease, and the landlord, "upon service of three days' notice to quit upon the person or persons in possession," shall be entitled to restitution of the premises.

The covenant to plant beets, the breach of which is here complained of, was one that, so far as the crop year 1918 was concerned, could not be performed after any demand for possession that plaintiff might make at the time when the letter from Mr. Phillips, addressed to defendants at Norwalk, was mailed. Therefore it was not necessary that any demand or notice that might be served upon defendants should require the performance of the covenant to plant the beets for that year. It was necessary, however, that a demand or notice requiring possession be given, and that it be served as required by section 1162. Where the violated condition or covenant is one that can be performed, the statute provides for a written notice in the alternative, namely, a notice "requiring the performance of such conditions or covenants or the possession of the property"; but, where the condition or covenant cannot afterwards be performed, the statute says that no notice "demanding the performance of the violated conditions or covenants of the lease" need be given (subdivision 3, § 1161); that is, the notice in such case need not be in the alternative, but it will be sufficient simply to give three days' notice demanding "the possession of the property." Such demand for possession is a statutory prerequisite to any forfeiture of the lease, even though notice of the alternative requirement—performance of the condition or covenant—need not be given. As said by the court in Schnittger v. Rose, 139 Cal. 662, 73 Pac. 451:

"Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event."

So, also, where, as here, the plaintiff complains of "waste," contrary to the conditions or covenants of the lease, as, for example, the unlawful diversion of water contrary to the terms of the lease, the statute requires, as a condition precedent to the maintenance of the action, a "three days' notice to quit." Subdivision 4, § 1161.

[2-4] The right to recover possession in an action such as this is based upon the idea that the tenant has forfeited his leasehold. The service upon defendants of such a demand for possession, or a notice to quit, as is contemplated by the statute, was a condition precedent to the forfeiture of defendants' leasehold interest. Forfeitures are not favored by the courts; every intendment and presumption is against the person seeking to enforce the forfeiture; statutes creating forfeitures must be strictly construed; and one who seeks the summary remedy of unlawful detainer allowed by the statute must bring himself clearly within its terms. Savings & L. Soc. v. McKoon, 120 Cal. 179, 52 Pac. 305; Opera House Ass'n v. Bert, 52 Cal. 471; Lacrabere v. West, 141 Cal. 554, 75 Pac. 185.

[5] What is a sufficient notice to quit or demand for possession is stated in the several text-books on the law of landlord and tenant, and the authors do not seem to differ materially as to what the notice should contain. No particular words are prescribed, and no special form is indispensable. Doubtless any written demand is sufficient if the person to whom it is given, as a person of common understanding, must understand from it that the landlord is absolutely and unconditionally demanding of him possession of the demised premises. It must, however, clearly, positively, and unequivocally disclose the intention of the landlord to repossess the premises. It must be positive, decisive, and without ambiguity. In brief, the language must be such as to convey to the tenant notice that

it is the positive and unequivocal intention of the landlord that he shall quit and surrender possession, without any alternative choice whatever. The landlord must use language upon which the tenant can safely act. In the analogous case of notice from a tenant to his landlord of an intention to surrender the demised premises, Justice Bowen, in the English case of Gardner v. Ingram, 61 Law Times (N. S.) 729, holding the notice to be insufficient, discusses the essentials of a sufficient notice, saying:

"I think it is very necessary that in a notice to quit there should be plainness of speech; that is, it must be plain and unequivocal in its terms, leaving no doubt as to the intention of the party giving it. The effect of such a notice is to put an end to the relation of landlord and tenant. Therefore the landlord has a right to know whether the tenant is really going or not. If, instead of adopting that course, the tenant uses language which is ambiguous, makes use of expressions which leave matters at the conclusion of the term contingent on something to be done or some arrangement to be made, there is no sufficient notice to quit. We are asked to place a business construction upon this notice. In my opinion there was no business intended by it. The tenant used language on which the landlord could not safely act."

[6] Turning now to the letter addressed to defendants by plaintiff's attorney: Referring to the lease and to his client, the attorney says: "You have repeatedly violated the terms of this lease and she demands possession." He does not say that she "hereby" demands possession. Read in the light of what follows in the letter, its author leaves it in doubt whether his client, through him as her agent, is actually thereby unconditionally demanding possession, or whether he is simply, by way of recital, notifying defendants that his client desires possession, or, in lieu of that, satisfaction in some form for the alleged breaches of defendants' covenants. After telling defendants that they had wrongfully sold water and had made no accounting therefor, the attorney proceeds to say: "You will please now make a full statement, giving details of water sold from the premises, *and remit to her.*" And he concludes his letter with the words: "Please let me hear from you at once." Obviously plaintiff was not entitled, because of the "waste" complained of, to have the lease declared forfeited, regain possession and treble damages for the unlawful detention arising out of such waste, and, in addition thereto, the sum which Mr. Phillips' letter in effect demands, namely, compensation for the water claimed to have been wasted. The acceptance of such compensation, had any been made, would have been a waiver of any right to demand and regain possession based upon the alleged waste of water contrary to the conditions and covenants in the lease. The demand that defendants "remit" to plaintiff, coupled with the statement at the end of the letter, "Please let me hear from you at once," was calculated to engender in defendants' minds the thought that, by his letter to them, the attorney was not thereby unequivocally demanding, for and on behalf of his client, the unconditional surrender of possession, but that he was suggesting some alternative arrangement and inviting defendants to express themselves with regard thereto. The language of the notice was not a direct, positive, decisive, and unambiguous demand for possession or notice to quit. The attorney did not use language on which the tenants could safely act.

Moreover, the letter was written by an attorney. It must be assumed, therefore, that he understood the character of the notice necessary to effect a forfeiture of the lease, as well as the import of the language which he used. If it was his purpose to give notice to quit or to make an unconditional demand for possession, he well knew that such a notice or demand must be clear, certain, and unequivocal as to such intention. He knew that nothing less would satisfy the terms of the statute. With this knowledge he wrote the letter. It is neither certain, definite, nor unequivocal as an intention on plaintiff's part to demand unconditional surrender of the premises. It cannot therefore be presumed that Mr. Phillips intended that the letter should be a notice to quit. On the contrary, it is rather to be assumed that he left that matter, with the question of compensation to his client for the wasted water, for future arrangement, and, with that idea in view, he was throwing out a suggestion for negotiations that possibly might lead to some mutually satisfactory adjustment of their differences. This conclusion is further strengthened by the fact that when the action was commenced plaintiff's attorneys apparently were of the opinion that, because the broken conditions and covenants were incapable of performance at any time after the date of Mr. Phillips' letter, no demand for possession or notice to quit was necessary. Entertaining such belief, the complaint, as originally filed, omitted all reference to any demand. It was not until the day of the trial that plaintiff, with leave of court, amended her complaint by adding an allegation to the effect that more than three days prior to the commencement of the action she had made a demand for possession.

We think the letter to defendants was not sufficient as a demand for possession or notice to quit to effect a forfeiture of defendants' lease.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

(44 Cal. App. 239)

Ex parte DILLON et al. (Cr. 685.)

(District Court of Appeal, Second District, Division 1, California. Nov. 12, 1919.)

1. HEALTH ⊂=24—HABEAS CORPUS ⊂=13—PERSONS ARRESTED FOR VIOLATION OF ROOMING HOUSE ORDINANCE CANNOT BE HELD UNDER PRETENDED QUARANTINE.

Petitioners, arrested without warrant for violation of rooming house ordinance, could not be held by the chief of police without bail and under pretended quarantine, by reason of a general instruction given by the health department of the city, and without any knowledge being had on the part of the health department, or its inspectors, which would give rise to reasonable cause, or even suspicion, that petitioners were afflicted with contagious or infectious venereal disease.

2. ARREST ⊂=63(3) — WITHOUT WARRANT IN MISDEMEANOR CASES, NOT IN OFFICER'S PRESENCE, ILLEGAL.

Police officer had no authority to make arrest for violation of rooming house ordinance without a warrant, unless all of the acts essential to make out the crime were committed in his actual presence and view.

3. ARREST ⊂=63(4)—FALSE IMPRISONMENT ⊂=43—WITHOUT WARRANT FOR MISDEMEANOR, HIGH-GRADE MISDEMEANOR, OR FELONY.

The arrest of a person without warrant, upon suspicion or upon information of others that a misdemeanor has been committed, is wholly unauthorized, and makes the person who accomplishes the arrest guilty of false imprisonment, which is either a high-grade misdemeanor or a felony, depending upon the use or nonuse of violence in affecting the arrest. Pen. Code, §§ 236, 840.

4. HABEAS CORPUS ⊂=85(1) — PRESUMPTION THAT ARRESTING OFFICER DOES NOT VIOLATE LAW.

In habeas corpus the court may be justified in presuming that peace officers, in endeavoring to apprehend persons violating municipal regulations, will not commit a criminal offense of a more serious character than that which they accuse the persons arrested of having committed.

5. HABEAS CORPUS ⊂=85(1) — PRESUMPTION THAT PERSONS AFFLICTED WITH CONTAGIOUS OR INFECTIOUS DISEASES MAY BE QUARANTINED.

It may be assumed that under the laws relating to public health, inspection and quarantine may be made of persons upon reasonable ground that the persons so subjected to inspection or quarantine are afflicted with contagious or infectious diseases, such as are enumerated in Pol. Code, § 2979a.

6. HEALTH ⊂=24 — NO QUARANTINE UNLESS REASONABLY NECESSARY TO PROTECT HEALTH.

Where sufficient reasonable cause exists to believe that a person is afflicted with a quarantinable disease, the health authorities may examine into the case, and in a proper way determine the fact; but preliminary investigation must be made without delay, and, if quarantining is found justifiable, only such quarantine measures as are reasonably necessary to protect the public health may be resorted to.

Application by Frank Dillon and Ethel Adams for a writ of habeas corpus, prayed to be directed to the chief of police of the city of Los Angeles. Writ granted.

David D. Sallee and Gesner Williams, both of Los Angeles, for petitioners.

Erwin W. Widney, City Prosecutor, and J. D. Taggart, Deputy City Prosecutor, both of Los Angeles, for respondent.

PER CURIAM. Habeas corpus. Petitioners herein prosecute this writ for the purpose of being relieved from imprisonment in the city jail of Los Angeles city, the petition setting forth that they were therein held without process or warrant of law. It was alleged in the petition that at 1 o'clock a. m. on a certain Sunday morning of August, petitioners were arrested by police officers in Los Angeles city, that such officers held no warrant of arrest against petitioners, and that upon being arrested petitioners were held in the city jail until the hour of 8 o'clock p. m. of the same day, without having been taken before a magistrate or being permitted to give bail. At the last-named hour a writ of habeas corpus was secured from a judge of the superior court, and hearing thereafter had thereon. It was alleged, further, that the arrest was made by the officers under the claim that petitioners were violating an ordinance of the city of Los Angeles, commonly called the "Rooming House Ordinance"; that, in fact, petitioners had not violated the provisions of said ordinance. The return made by the chief of police admits that the arrest was made as charged, except that it is set forth that petitioners were at the time of the arrest violating the provisions of the ordinance mentioned, the main provisions of which ordinance, as set forth in the return, being as follows:

"Sec. 2. It shall be unlawful for any person to resort to any rooming house, lodging house, hotel, or other place in the city of Los Angeles, for the purpose of having therein sexual intercourse with a person to whom he or she is not married."

A further statement in the return declares that for two years or more last past it has been the practice of the health department of the city to examine all persons brought to the city jail "charged with the violation of said Ordinance 25640, or charged with any other offense involving sexual immoralities or lewdness, to determine the freedom of such persons from contagious and infectious quarantinable venereal disease." The return further states that "about" 1,000 persons have been examined within the time mention-

ed, and "that it has been the experience of such examining and investigating officers of said health department that about 90 per cent. of the women so arrested and charged are found to be afflicted with contagious and infectious venereal disease in some form; that for the past two years or thereabouts a part of said city jail has been set aside for the detention and quarantine of women so arrested and charged, pending a positive determination by the officers of said health department of their freedom from such disease." It is then stated that the woman petitioner was, upon her being arrested, detained in quarantine pending investigation as to her condition, and that petitioner Dillon was likewise detained in another portion of the jail, pending like determination as to his condition. It is shown also by the return that up to the time that the superior court issued its writ of habeas corpus no examination had been made of the parties.

[1, 2] Digesting the admitted facts shown on the part of respondent, it appears that whenever persons arrested for violating said rooming house ordinance are brought to the city jail they are, by the chief of police, held without bail and under pretended quarantine by reason of a general instruction given by the health department of Los Angeles city, and without any knowledge being had on the part of the health department or its inspectors which would give rise to reasonable cause, or even suspicion, that the persons so detained are afflicted with contagious or infectious venereal disease. The ordinance in question is not an ordinance designed particularly to cover cases of prostitution; in fact, it would seem to exclude persons committing illicit sexual acts at their established place of abode, regardless of the character of such persons. The return, as already appears, shows that the practice of the health department is to cause persons to be examined who may be "charged" with the misdemeanor under the ordinance. As the facts show in this case, quarantine is pretended to be made in advance of the ascertainment, in a legal way, of the fact as to whether the ordinance has been violated by the persons charged. As to how long this preliminary quarantine continues, we can only conjecture that the time is regulated wholly by the will of the health department. Meanwhile, the persons subjected to this restraint, while they were arrested under the authority of the criminal law, must remain in custody without being allowed bail, and, we may assume from some quarantine rules set forth in the brief of respondent, without the privilege of conferring with any person, except such as the health department may permit to visit them. In the event that the individuals detained are not willing to submit their persons for examinations of a highly private nature, we can also conjecture that their detention may be prolonged until, by the force of that coercion and to escape confinement behind jail doors, they may submit to the demands of the health officers. The respondent chief of police seems to occupy two positions here; one as custodian of the criminally charged inmates of the city prison, and the other as quarantine keeper, using the same jail as a quarantine hospital. The right of the health authorities to subject the person of an individual afflicted with contagious disease to quarantine restraint is an extreme measure, recognized as being necessary in cases of epidemics and instances where such detention is necessary to properly protect the public health. Sick persons who are subjected to such quarantine are not deemed to be criminals, and are to be treated with every consideration and afforded conveniences reasonably procurable under the circumstances. In cases such as this persons are not arrested under any direction of the health department, but are arrested solely and only because it is claimed they have violated the provisions of an ordinance of the city. In the first place, the offense being a misdemeanor, no authority resides in a police officer to make the arrest without a warrant, unless all of the acts essential to make out the crime are committed in the actual presence and view of such officer.

[3] The arrest of a person upon suspicion, or upon information of others, that a misdemeanor has been committed is wholly unauthorized, and the arrest in such a case, being without process, makes the person who accomplishes the same guilty of false imprisonment, which is either a high-grade misdemeanor or a felony, depending upon the use or nonuse of violence in effecting the arrest. Section 236, Pen. Code. See, also, on the right to make arrests, section 840, Pen. Code et seq. We have referred to this question here because it appears from the petition that this arrest for misdemeanor was made late in the night (at 1 o'clock a. m.), and the verified petition declares that the petitioners had, at the time of their arrest, committed no offense against the law. The return of the chief of police does declare (necessarily, however, upon information and belief) that petitioners, at the time of their arrest, had committed a misdemeanor. No facts are set forth showing that the misdemeanor was committed in the presence of police officers, which condition must have existed to make the arrest lawful at all.

[4] However, we may be justified in presuming that peace officers, in endeavoring to apprehend persons violating the municipal regulation, would not commit a criminal offense of a much more serious character than that which they accuse the persons arrested of having committed. Hence, for the purposes of this case, we will assume that the arrest was legally made.

[5] It may be assumed, too, that under the laws relating to the public health, inspection and quarantine may be made of persons, ani-

mals, and property by the duly constituted health authorities, where it is known, or appears upon reasonable ground, that the person so subjected to inspection or quarantine is afflicted with contagious or infectious diseases, such as are enumerated in section 2979a, Political Code.

[6] The question that we finally reach here is as to whether the health department may reasonably assume, without any previous knowledge, information or report as to the individual concerned, that every person arrested by officers and booked at the city jail as having violated the "Rooming House Ordinance" is reasonably likely to be afflicted with a quarantinable venereal disease. If it could be assumed that every person who had sexual intercourse with another to whom he or she was not married, at a hotel or lodging house at which they might meet for the purpose, was a person given to promiscuous acts of sexual intercourse, then we might agree that, in part, the practice of the chief of police and health department in such cases as has been herein outlined finds some justification in the law. But we do not agree that any such general deduction should be made, in view of the great concern of the law as to the liberty of individuals. We think that, for such detention to be legally justified, the return of the officer should show some further reason why the persons so detained are suspected of being afflicted with disease. We have before noted that this ordinance appears not to be aimed at the common prostitute who may engage in illicit intercourse at a fixed place of abode. We have called attention, further, to that feature of the practice which denies to the person accused the right first of establishing his or her innocence in the court where the charge is triable. Virtually the health officers, through their orders to the chief of police, say to the individual:

"We don't know whether you are guilty of this offense or not; if you were guilty we think it would furnish reason to suspect that you are afflicted with a venereal disease; but, whether guilty or innocent, you have been arrested, and you must remain confined without bail and without being permitted communication with the outside world, except with our consent, until you have submitted to a private examination and convinced us that you are free from the taint of disease."

The bare statement of this proposition, considered in view of all the safeguards which have been thrown around the liberty of the individual, is shocking to our sense of justice. Where sufficient reasonable cause exists to believe that a person is afflicted with a quarantinable disease, there is no doubt of the right of the health authorities to examine into the case and, in a proper way, determine the fact. Such preliminary investigation must be made without delay, and, if quarantining is found to be justifiable, such quarantine measures may be resorted to only as are reasonably necessary to protect the public health, remembering that the persons so affected are to be treated as patients, and not as criminals.

Our conclusion is that the return in this case does not show that the health department of the city of Los Angeles had reasonable cause to believe that the petitioners were afflicted with a contagious or infectious disease which warranted their being placed in quarantine. What was said by this court in the case of the Application of Grace Johnston, 180 Pac. 644, was intended to be read only in view of the facts of that particular case. That was a case where it was shown that the petitioner was in fact afflicted with an infectious or contagious disease, and that she was then confined in a hospital especially designed for the care and treatment of such patients.

It is ordered that petitioners be discharged from the custody of the chief of police.

44 Cal. App. 233

GOWER v. BERTRAND et al. (Civ. 2680.)

(District Court of Appeal, First District, Division 1, California. Nov. 10, 1919. Hearing Denied by Supreme Court Jan. 8, 1920.)

1. CHATTEL MORTGAGES ⟸229(3)—EVIDENCE SHOWING MORTGAGOR SOLD MORTGAGED CROPS FOR MORTGAGEE'S ACCOUNT.

In mortgagee's action for purchase price of mortgaged crop sold by the mortgagor to defendant, evidence *held* to support finding that sale was made by mortgagor for mortgagee's account.

2. APPEAL AND ERROR ⟸173(6)—DEFENSE OF STATUTE OF FRAUDS MUST BE MADE BELOW.

Where the statute of frauds was not pleaded nor the question raised in the trial court, such matter cannot be considered on appeal.

3. FRAUDS, STATUTE OF ⟸90(1)—INAPPLICABLE TO ORAL RATIFICATION OF SALE AFTER DELIVERY.

Where mortgagor entered into a written contract with a third person to sell his crop, and upon delivery of the crop notified such third person that the crop belonged to the mortgagee, and that the money due therefor should be paid to him, the statute of frauds did not apply as to the mortgagee's oral ratification of such sale, where the ratification of the sale was effective as of the date of the filing of the complaint in an action by the mortgagee for the purchase price, at which time the crop had been delivered.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Ray Gower against A. A. Bertrand and John Costello, copartners doing

business under the copartnership name of Bertrand Seed Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Hugh K. McKevitt, of San Francisco (W. H. Hyatt, of San Francisco, of counsel), for appellants.

Cooley & Lachmund and David L. Levy, all of San Francisco, for respondent.

RICHARDS, J. One Yagi, a Japanese, entered into a contract with the defendants by which he agreed to grow a quantity of seeds, and to sell them to the defendants at a given price. This contract was in writing. Shortly thereafter Yagi, who had a lease of certain land of the plaintiff, upon which he contemplated growing said seeds and other crops, mortgaged to plaintiff the crop of seeds, etc., to be produced, as security for the payment of an indebtedness. By said mortgage Yagi undertook to harvest said crop and deliver it to the plaintiff, the mortgagee, in default of which the latter was empowered to take possession of it, dispose of it, and apply the proceeds in settlement of Yagi's indebtedness to him. This mortgage was recorded in the county in which the land was situated. In due time Yagi produced the crop and harvested it. The indebtedness to the plaintiff was not paid, and having been apprised by Yagi of the contract between him and the defendants for the sale of the seeds, the plaintiff consented to their shipment by Yagi to the defendants in fulfillment of the contract. This being done, the plaintiff demanded of defendants payment for the seeds, which, not being forthcoming, he brought this action.

At the conclusion of the introduction of evidence the plaintiff was permitted to file an amended complaint to conform to the proofs introduced, which complaint declared upon a sale of the seeds by plaintiff to the defendants through Yagi as plaintiff's agent. The trial court found in favor of plaintiff, allowing defendants, however, to set off against the price of the seeds all amounts due them from Yagi up to the time of the filing of the complaint, the court regarding such filing as notice to the defendants that the sale was by the plaintiff and not by Yagi on his own account. This left due from Yagi to the defendants certain advances made by them after such notice and which they would be entitled to deduct from the price of the seeds if Yagi was in fact the owner thereof, and the sale is to be regarded as one made by him on his own account.

[1] The main question in the case is whether the evidence supports the conclusion of the trial court that the sale must be regarded as one made by Yagi for the account of the plaintiff, the appellant contending that the evidence is insufficient to support this conclusion.

A careful consideration of the evidence convinces us that this finding of the trial court should stand. Certain facts are shown in the evidence, fully warranting the court's conclusion. They may be briefly referred to. In the first place, plaintiff's mortgage imposed upon Yagi the obligation to deliver to him the crop. Whether it was actually so delivered prior to its shipment to the defendants or not, it is certain that the plaintiff testified that it was in his possession, and that he authorized Yagi to ship it to the defendants in fulfillment of the contract previously entered into by Yagi with them. The crop being shipped to the defendants under this authorization Yagi in writing notified them that the seeds were the property of the plaintiff, and that the money due therefor should be paid to him. Up to the time of this notification the defendants might well have supposed that the seeds were shipped to them by Yagi on his own account and in fulfillment of their contract with him, and in calculating the amount due to the plaintiff the court allowed the defendant to deduct all sums due from Yagi to them up to the time of such notification, such sums consisting of advances made by them upon the strength of their contract for the purchase of the seeds. The amount for which the court awarded judgment to the plaintiff was the balance left after these deductions were made, and against which the defendants vainly sought to offset advances made to Yagi, after they were notified, both orally and in writing, of the interest of the plaintiff in the property affected. If, thereafter, they made further advances to Yagi, they cannot equitably demand that they be permitted to reimburse themselves from the proceeds of property which, according to the evidence above narrated, belonged to the plaintiff.

The appellants also contend that, even accepting the trial court's conclusion that the evidence sustains a sale by the plaintiff to the defendants through Yagi as an undisclosed agent, nevertheless it erred in not allowing to them a further sum of $300. Among the items claimed by defendants was a note for the sum of $500, executed prior to the time of the sale of the seeds, and upon which, according to their contention, nothing had been paid. Upon this item the court allowed only $200, basing its finding in this regard upon admissions of the defendants that only that amount was due. We think there was sufficient evidence to warrant this conclusion, and we cannot therefore interfere with it.

[2, 3] The appellants in their closing brief raise for the first time the question of the effect of the statute of frauds on the verbal ratification by plaintiff of a contract required to be in writing—referring to the contract for the sale of the seeds, the value of which considerably exceeded $50.

We think there are two answers to this last point, viz.: That the statute was not pleaded nor the question raised in the trial court, nor, indeed, until the closing brief of the appellants; and, second, the ratification of the sale is by the judgment only given effect as of the date of the filing of the complaint, at which time the seeds had been delivered, thus we think eliminating the statute both as to the sale and the verbal ratification thereof.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

(43 Cal. App. 677)

HAYASHI v. PACIFIC FRUIT EXCHANGE. (Civ. 2018. Sac. 3017.)

(District Court of Appeal, Third District, California. Oct. 20, 1919. Opinion of Supreme Court in Bank, Denying Hearing, Dec. 18, 1919.)

1. CHATTEL MORTGAGES ⟸112—AFTER PAYMENT NOT SECURITY FOR PERFORMANCE OF CONTRACT THAT MORTGAGEE SHOULD MARKET MORTGAGED CROPS.

Provisions that mortgagee should have right to market mortgaged crops and receive therefor commissions, and that the mortgagor should purchase supplies from the mortgagee, etc., *held* incorporated into the instrument only for the purpose of protecting and preserving the security for payment of the note, and separable from the mortgage contract proper, so that, upon payment of the note which the mortgage was given to secure, the mortgage was discharged, and would not continue in existence as security for the performance of the marketing contract.

2. CHATTEL MORTGAGES ⟸23—MAY NOT BE GIVEN TO SECURE PERFORMANCE OF CONTRACT.

A chattel mortgage may not be given to secure damages that may arise from a breach of contract.

3. CHATTEL MORTGAGES ⟸22—MAY BE GIVEN TO SECURE FUTURE ADVANCES.

A chattel mortgage may be given to secure future advances, the amount of which may not be ascertainable until proceedings in foreclosure are ripe, or to secure indorsements made and to be made, or to secure payment for merchandise not exceeding a specified amount, to be delivered at different intervals of time in the future.

4. CHATTEL MORTGAGES ⟸21—MAY BE GIVEN TO SECURE "UNLIQUIDATED DEBT."

A chattel mortgage may be given to secure an unliquidated debt, but an "unliquidated debt" in such case is a debt which, while not actually existing when the contract of hypothecation is made, is from the nature of the contract and the whole subject-matter thereof inherently capable of coming into existence, or a debt the exact amount of which cannot be known at the time the mortgage is given.

[Ed. Note.—For other definitions, see Words and Phrases, Unliquidated debt.]

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Ben Hayashi against the Pacific Fruit Exchange. From judgment for plaintiff, defendant appeals. Affirmed.

Dunn & Brand, of Sacramento, for appellant.

Charles A. Bliss, of Sacramento, for respondent.

HART, J. Plaintiff brought the action to compel defendant to satisfy and discharge of record a certain crop mortgage given by plaintiff to secure the payment of a loan of $200 made to him by the defendant and for $100 damages as provided in section 2941 of the Civil Code. Judgment was in favor of plaintiff as prayed, from which judgment defendant prosecutes this appeal.

The principal question to be determined is as to what construction should be given the crop mortgage, plaintiff's claim being that it was given merely as security for the repayment of the $200 borrowed by him from defendant, while the contention of the defendant is that the mortgage was given to secure the performance of the marketing provisions of the mortgage, as well as the payment of the note.

Plaintiff was in the possession of 120 acres of land near Florin, in Sacramento county. On the 16th day of October, 1918, he borrowed from the defendant the sum of $200 and executed the crop mortgage in question. The instrument contained the following provisions, among others:

That the mortgagor, for and in consideration of the sum of $200 to him in hand paid, "does sell and convey unto the said party of the second part (defendant) * * * the following growing crops, viz.: The crop of grapes of every description, now growing and to be grown during the seasons of 1919–20–21 upon the trees and vines now being, standing and growing and to be grown, and also all other agricultural and horticultural products," etc., upon the lands described; "* * * provided, nevertheless, and these presents are upon the express condition that if the said party of the first part * * * shall well and truly pay" said promissory note, "and also all other indebtedness that may hereafter be due, owing or existing from said" mortgagor, "* * * and well and truly perform all other covenants herein provided to be performed by the party of the first part, * * * then these presents shall be null and void. Also in consideration of the sum hereinbefore mentioned, the party of the first part hereby places his entire crops of grapes" for said seasons "in the hands of the party of the second part, to market for his account. The party of the second part to receive for its serv-

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ices in marketing said crops, its usual rates of commission established by it in the district. The party of the first part shall also pay to the party of the second part a loading charge of three cents per package. The party of the first part shall purchase from the party of the second part the necessary shook, paper, nails and other supplies needed in preparing the above-mentioned crops for market." The mortgagor agreed to protect said crops while growing, and to "prepare the same for market and deliver the same immediately into the possession of said party of the second part."

The court, on motion of the plaintiff, struck from the answer certain allegations, setting forth facts in support of defendant's theory of the scope of the mortgage herein involved. Notwithstanding the granting of this motion, the defendant at the trial offered to prove the allegations stricken out, but, on objection of plaintiff, such proof was excluded.

The action was tried before the court sitting without a jury. The court found: "That defendant has never advanced, paid out, or expended, for or on plaintiff's account, any sum" other than the $200 evidenced by said promissory note; that "on the 11th day of January, 1919, plaintiff repaid to defendant said sum of $200, together with the interest due thereon to said date, and said defendant thereupon canceled said promissory note," and that plaintiff demanded satisfaction of said mortgage, which was refused; that the provisions of the mortgage that defendant should market the crops and receive commission, that plaintiff should purchase supplies from defendant, etc., were included in said mortgage "for the purpose of protecting and preserving the security * * * given to secure said promissory note, and for no other purpose," that since the making of the note and mortgage no crops of any kind have been harvested by plaintiff or marketed by defendant for plaintiff, and plaintiff has not bought any supplies from defendant.

Section 2941 of the Civil Code provides that when any mortgage has been satisfied, if the mortgagee does not cause the same to be satisfied of record he shall be liable to the mortgagor for damages, "and shall also forfeit to him the sum of one hundred dollars."

The instrument, while upon its face a defeasible or conditional sale of the grape crop, is in legal effect a chattel or crop mortgage, and bears a close resemblance to a deed of trust, whereby the legal title to realty is conveyed to trustees to secure money loaned to the trustor by the cestui que trust, such title being defeasible by payment of the money loaned. The instrument provides, however, that the mortgagee shall be entitled to the immediate possession of the grapes when they are harvested, and thus are in tangible and removable form, and this, it may be added, is also additional security for the payment of the note. But there is no question here raised as to the legal nature of the instrument. It designates itself as a mortgage, makes provision for certain matters in case of its foreclosure, and the parties treat it in their presentation of the points on this appeal as a mortgage.

[1] We agree with the conclusion arrived at by the trial court, in the construction of the writing, that the provisions in the mortgage that defendant should have the right to market the crops and receive therefor the prevailing rates or commissions for that service, and that plaintiff should purchase the mentioned supplies from defendant, etc., were incorporated into the instrument for the purpose of protecting and preserving the security for the payment of the note. It is probable also that said provisions contemplated another purpose, to wit: To give to the defendant the profits accruing from its services in the marketing of the fruit and from furnishing to the plaintiff the supplies required in the proper preparation of the fruit, when harvested, for marketing.

It will be noted that the language or sentence introducing the provisions referred to into the instrument commences with the word "also," and that the provision requiring the plaintiff to place "his entire crop of grapes" for the three seasons named in the hands of the defendant "to market for his account" expressly states that it shall constitute a part of the consideration for the loan of the money evidenced by the note to secure which the mortgage was given. The salient part of the language or sentence is:

"Also, in consideration of the sum hereinbefore mentioned, the party of the first part hereby places his entire crop of grapes for the seasons of 1919–20–21 * * * in the hands of the second party to market for his account."

It will be observed that it is not by language expressly provided, nor is it reasonably susceptible to that construction when it is considered in connection with the other provisions of the instrument, that "the mortgage is intended to secure and does secure the right of the defendant to the possession of the fruit when harvested." It merely says and plainly means that by it the defendant, as part of the consideration for the loan of the money, and also as further security for its repayment, shall be entitled to the possession of the fruit for the years named, and to market the same for and on account of the plaintiff. The same is true as to the provision whereby the plaintiff agreed to purchase the supplies necessary for preparing the grapes for shipment or marketing from the defendant—that is, the same is true of that provision in so far as the matter of the consideration for the note was concerned.

The result of the foregoing views is that the mortgage was intended to secure the payment of the note, and not to secure to the

defendant the right to the possession of and to market the fruit when harvested, or the right to furnish supplies to the plaintiff. These latter rights, as stated, were intended only as additional consideration for the note and as security, other than the mere mortgage itself, for the payment of the note. The plaintiff testified that, when negotiating for the loan and before he obtained it, he was told by defendant's agents that he would have to sign a marketing contract to market the crops for three years. The transaction was then reduced to writing, which writing embraced, not only the mortgage to secure the payment of the note, but a shipping contract to which, as we conclude, the mortgage has no more relation than if the two agreements were in separate or different writings.

[2] It may further be observed that the provisions of the mortgage could not be held to operate as a lien to secure the performance by the plaintiff of the agreement to place the grapes with defendant for marketing and to purchase supplies from the latter in any event unless, in case of default by plaintiff to perform these agreements, the defendant suffered some detriment or damage. In other words, it would hardly be in consonance with the principles of justice, or, indeed, with common sense, to hold that, although the defendant suffered no injury or loss from the default of the plaintiff in complying with the agreements referred to, it could, nevertheless, upon such default by plaintiff, proceed to foreclose the mortgage and cause the plaintiff's grape crops to be sold under the decree of foreclosure, for what purpose? If, however, the defendant should suffer loss or damage by the failure of the plaintiff to place the grapes with it to market or by his default in complying with his agreement to purchase supplies from the defendant, then it would have to be ascertained what that loss or damage was, and, if any be found, what damages, measured in money, would compensate the defendant for the loss so suffered by it. We have never heard of a mortgage being given to secure the payment of damages for the breach of a contract, and we do not think that any such a mortgage is to be found referred to in the books. Ordinarily, the security taken to insure the performance of such agreements as we are now considering is in the nature of a bond, and the remedy available to the party for whose benefit the bond is given, in case of a breach of the contract, is legal and not equitable, as is true in the case of the foreclosure of a lien.

[3] It is very true, as counsel for the defendant point out, a mortgage may be given to secure future advances, the amount of which may not be ascertainable until proceedings in foreclosure are ripe (Tapia v. De Martini et al., 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288); or to secure indorsements made and to be made (Braner v. Bowmar et al., 16 La. 370; Kramer v. F. & M. Bank, 15 Ohio St. 253); or to secure payment for merchandise, not exceeding a specified amount, to be delivered at different intervals of time in the future (Marvin, Assignee in Bankruptcy, etc., v. Chambers, 12 Blatchf. 495, Fed. Cas. No. 9,179).

In Stoughton v. Pasco, 5 Conn. 442, 13 Am. Dec. 72, cited in 1 Jones on Mortgages (6th Ed.) as authority for the statement therein "that a mortgage to secure the fidelity of an agent or factor is good," it is held, using the language of the syllabus:

"Where one of two joint trustees of the property of a deceased person for the benefit of legatees executed a mortgage to the other to render a true account and pay over and deliver to the mortgagee all moneys, notes and securities of the estate in the mortgagor's hands, such mortgage was held a valid incumbrance to the amount due, which was found to be $3,137, as against a subsequent mortgage with actual notice of an adjustment between the mortgagor and first mortgagee, and that there was more than $2,800 due."

[4] But it is manifest that the case here does not come within the principles of the above cases. There never has been any doubt that a mortgage given to secure an unliquidated debt may be upheld. An "unliquidated debt," however, within the meaning of that expression as it is used in the sense that its payment is capable of being secured by a mortgage, is a debt which, while not actually existing when the contract of hypothecation is made, is, from the nature of the contract and the whole subject-matter thereof, inherently capable of coming into existence. It simply means a debt the exact amount of which cannot be known at the time that the mortgage is given. In the present case, as has been stated, whether there will be any debt at all, is problematical and remote, for it must depend first upon whether there is a breach of the agreement, and, if so, upon the very uncertain result of the trial in court of a disputed question of fact, or of law, or both. The result would have to be reduced to a judgment to make it amount to a debt. In view of all these considerations, of which the parties may be assumed to have taken cognizance when entering into the contract, we think it is clear that the mortgage was intended to cover the grape crops for the years named as security only for the note, and that the provisions relating to the marketing of the grapes and the furnishing the plaintiff with supplies were, as the trial court concluded, solely intended to preserve the security or operate as additional security for the payment of the note, and also, perhaps, to give to defendant the benefit of such commissions as accrued from its services in marketing the grapes and of the profits re-

sulting from the sale to plaintiff of the supplies.

In the transcript the defendant sets out certain specifications of error in the rulings of the court upon the evidence and also on the motion to strike out certain portions of the answer. The rulings, the correctness of which is so challenged, bear directly upon and involve the question of the construction of the language of the instrument which we have considered, and thus practically the assignments themselves have been herein considered and disposed of.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal of the Third Appellate District, we desire to say that, in so far as the opinion of the District Court of Appeal may be construed as holding that a mortgage may not be given to secure damages that may arise from a breach of contract, we express or intimate no opinion as to the correctness thereof. This matter is not essential to the decision.

The application for a hearing in this court is denied.

44 Cal. App. 219

WOOD v. DAILEY. (Civ. 2344.)

(District Court of Appeal, Second District, Division 1, California. Nov. 7, 1919.)

1. APPEAL AND ERROR ⟸907(3)—THAT THERE WAS NO EVIDENCE ON ISSUE OMITTED FROM FINDINGS PRESUMED.

In determining appeal presented on judgment roll alone, the court must assume, in the absence of any showing to the contrary, that no evidence was presented on an issue omitted from the findings.

2. TRIAL ⟸397(4)—NO FINDING NECESSARY ON ISSUE NOT SUPPORTED BY EVIDENCE.

If there was no evidence on issue of reasonable value and amount of damages, the court was under no obligation to make a finding on such issue.

3. APPEAL AND ERROR ⟸1071(6)—FAILURE TO MAKE FINDING HARMLESS; THERE BEING NO EVIDENCE TO SUSTAIN FAVORABLE FINDING.

Failure to find on an issue is not ground for reversal, where the record discloses no evidence on which a finding favorable to the complaining party could properly have been made.

Appeal from Superior Court, Los Angeles County; Leslie M. Hewitt, Judge.

Action by F. G. Wood against Bertha M. Dailey, in which defendant filed a cross-complaint. From the judgment rendered, and from an order refusing to vacate and set aside the judgment and enter a judgment in favor of defendant, defendant appeals. Affirmed.

Slosson & Mitchell, of Los Angeles, for appellant.

Hyman Schwartz, of Los Angeles, for respondent.

CONREY, P. J. The defendant appeals from the judgment and from an order refusing to vacate and set aside the judgment and enter a judgment in favor of the defendant.

By her cross-complaint defendant sought to recover damages for the unlawful detention by the plaintiff of an automobile of the defendant from the 1st day of March to the 18th day of October, 1915. It was alleged that the reasonable value of the use of the automobile was the sum of $10 per day, and that defendant was damaged on account of the unlawful detention in the sum of $2,320. All of the allegations of the cross-complaint were denied by the answer thereto. The findings of fact were in favor of cross-complainant, except that the findings are silent on the issue as to reasonable value and amount of damages.

[1-3] Let it be assumed, as contended by appellant, that the findings of fact, if supplemented by a finding establishing the reasonable value of the use of the automobile and the amount of damages, would have entitled cross-complainant to judgment for the amount so determined; nevertheless, the judgment must be sustained. The appeal is presented on the judgment roll alone. This being so, this court, in determining the appeal, must assume, in the absence of any showing to the contrary, that no evidence was produced on the issue omitted from the findings. If there was no such evidence, the court was not under obligation to make a finding upon that issue. The failure to find on an issue is not ground for reversal, where the record discloses no evidence on which a finding favorable to the complaining party could properly have been made. Maloof v. Maloof, 175 Cal. 571, 166 Pac. 330; Mohr v. North Rawhide Mining etc. Co., 177 Cal. 264, 170 Pac. 600.

The judgment and order are affirmed.

We concur: SHAW, J.; JAMES, J.

43 Cal. App. 763

STANDARD AUTO SALES CO., Inc., v. LEHMAN. (Civ. 1959.)

(District Court of Appeal, Third District, California. Oct. 24, 1919. Hearing Denied by Supreme Court Dec. 22, 1919.)

1. ATTACHMENT ⊂=11—RETENTION OF TITLE BY SELLER AS "MORTGAGE" PRECLUDING ATTACHMENT.

An automobile sales contract under which the seller retained title and right to retake possession upon default in payment, etc., does not create a mortgage within Code Civ. Proc. § 537, prohibiting attachments upon contracts secured by mortgages, etc., since Civ. Code, § 2920, defines a mortgage as a contract by which property is hypothecated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mortgage.]

2. ATTACHMENT ⊂=11—RETENTION OF TITLE BY SELLER AS "LIEN" PRECLUDING ATTACHMENT.

Such contract is not, in view of Civ. Code, § 3049, making a seller's lien dependent on possession, and section 2874, defining liens as charges existing against the owner, a "lien" within Code Civ. Proc. § 537, prohibiting attachments where the obligation is secured by a lien, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lien.]

3. ATTACHMENT ⊂=11—DEMAND SECURED BY "PLEDGE."

Such contract is not a "pledge" in view of Civ. Code, § 2988, making the lien of a pledge dependent on possession, and hence Code Civ. Proc. § 537, prohibiting attachments to enforce obligations secured by pledge, does not apply.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pledge.]

4. ATTACHMENT ⊂=11—RETENTION OF TITLE BY SELLER AS PLEDGE PRECLUDING ATTACHMENT.

Code Civ. Proc. § 537, prohibiting attachments to enforce obligations secured by a mortgage, lien, or pledge unless such security has become valueless, etc., contemplates only the forms of security therein named, and does not preclude attachment by the seller of an automobile under a contract by which he retained title and right to retake possession upon default in payment.

5. ATTACHMENT ⊂=1 — STRICT CONSTRUCTION OF STATUTE.

Statutes permitting and providing for attachments must be strictly construed and followed.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by the Standard Auto Sales Company, Incorporated, against Charles Lehman. From an order dissolving an attachment, plaintiff appeals. Reversed.

Brittain & Kuhl, of San Francisco, and Wachhorst & Wachhorst, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondent.

BURNETT, J. The action was brought on a written contract for the sale and purchase of an automobile for the sum of $950, $150 to be paid by the defendant at the time of signing the contract, and the balance in certain definite monthly installments. Possession of the machine was delivered to the defendant, but it was provided in the contract that the title was to remain in the plaintiff until all the installments were paid. Paragraph 6 of said contract, which constitutes the basis of this action, reads as follows:

"Should the buyer make default in the payment of the said purchase price, or any part thereof, or in the event of the buyer's failure to perform any of the conditions and covenants herein contained, or to pay the cost of said insurance on demand, the seller or assigns may, without notice, declare any and all payments provided for herein to be due and payable at once, and may immediately take possession of said property, whenever found, without process of law, using all necessary force to do so, and retain the same, and all payments previously made by the buyer shall be construed to be and applied as compensation for depreciation in value, and for the use of said property, and the buyer hereby waives and relinquishes all rights to the moneys so paid and to the said property."

To the complaint, and made a part thereof, was attached said contract. It was alleged that the defendant failed to pay certain of the installments as they fell due, and that $650 of the purchase price remained due and unpaid from the defendant to the plaintiff, and that the plaintiff had complied with all the terms of the contract as it had agreed. The action was brought for the balance of the purchase price, and not for the return of the automobile. An attachment was issued in behalf of plaintiff and levied upon the bank account of the defendant. All the proceedings in reference to the issuance and levying of the attachment were in regular form and in accordance with the requirements of sections 537 and 538 of the Code of Civil Procedure. The defendant made a motion to dissolve the attachment upon the ground that it was shown by the complaint and contract on file in said action that the debt was secured by a mortgage or lien or pledge of personal property, and that such security had not become valueless, and that no proceedings had been taken to exhaust said security. Affidavits were filed in support thereof, and thereupon the motion was granted, and from the order dissolving the attachment the plaintiff has appealed. The only question in the case is whether it falls within subdivision 1 of said sec-

tion 537, providing that attachment may issue "in an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless." And the only doubt as to the application of said section is whether plaintiff's contract was secured by "any mortgage or lien upon real or personal property or any pledge of personal property." It is admitted that the action is brought upon a contract made payable in this state for the direct payment of money, but it is claimed by respondent that the plaintiff, by reason of the fact that it retained title to the property and had the right to retake it in case of default on the part of defendant in the payment of any of the installments, had security within the contemplation of said section of the Code, and therefore attachment was not a proper remedy.

[1] In the determination of the question it is important to notice carefully the precise terms used in the statute. The law does not provide that no attachment shall issue where the plaintiff has other security for the claim, but it designates the specific kinds of security that will bar the remedy, namely, a mortgage, a lien, or a pledge of the property. As to the mortgage, it is quite apparent from the definition of that term in the Code that plaintiff had no such security. By the terms of the contract the plaintiff remained the owner of the property, and this necessarily precludes the condition that it could be a mortgagee. A party cannot hold a mortgage on and the legal title to the same property at the same time. A mortgage is defined by Civil Code, § 2920, as follows:

"Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession."

In other words, for plaintiff to be the mortgagee of the property, it must have been hypothecated to it by the defendant, but this could not be, since defendant was not the owner. A person cannot hypothecate property where the title is in another.

[2] The question then arises whether the plaintiff, under the terms of the contract, had a lien to secure the payment of the obligation. As to this it seems to be plain under the law that a vendor's lien does not exist as to personal property independent of possession. There is no controversy that the defendant at the time of the action had and ever since the execution of the contract has had possession of the machine. Therefore, since by the law a lien does not exist independent of possession, it would follow, necessarily, that plaintiff did not have that kind of security. Section 3049 of the Civil Code provides as follows:

"One who sells personal property has a special lien thereon, dependent on possession, for its price, if it is in his possession when the price becomes payable, and may enforce his lien in like manner as if the property was pledged to him for the price."

If his lien depends upon his possession, manifestly the lien would not exist if the possession were in another. Besides, the existence of a lien and ownership as to the same property in the same party at the same time is not in accordance with the legal conception of these terms. A person cannot have a lien upon personal property of which he is the owner. A lien is a charge upon specific property which the holder thereof is entitled to enforce as a security for the performance of an obligation, which exists in his favor against the owner of the property. Section 2874, Civ. Code. It would seem plain, therefore, that plaintiff did not have a lien, as that term is understood in the law, upon said automobile.

[3] It seems equally plain that plaintiff was not secured by a pledge of said property. In order to have such security he must have been the pledgee and in possession of the property. Section 2988 of the Civil Code provides:

"The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee, or to a pledgeholder, as hereafter prescribed."

[4, 5] If we are therefore to be guided by the plain meaning of the statute, it would follow that plaintiff was entitled to the writ of attachment. The only ground upon which this conclusion could be avoided would be that the said statute contemplates other security as well as those which are specifically mentioned. This position would, however, be in contravention of a familiar principle for the interpretation of statutes, which from the enumerated specification of certain particular ones requires the exclusion of the consideration of other classes. In other words, the statute having specified the three particular kinds of securities, to wit, mortgage, lien, and pledge, by implication there would be excluded any other species. Indeed, we think that the lower court, in holding that this was not a proper case for attachment, has gone outside the plain and simple meaning of the statute. In doing so it had apparently the support of certain decisions of the courts to which specific reference will hereafter be made. But it seems to be well settled that the statutes permitting and providing for the levying of attachments must be strictly construed and followed. Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 Pac. 36, 113 Am. St. Rep. 253.

When the law, therefore, designates and specifies in what instances an attachment may issue and in what cases it is not a legal remedy, the express will of the Legislature must control.

As to the cases cited we think Eads v. Kessler, 121 Cal. 244, 53 Pac. 656, is most nearly in point. In that case the plaintiff agreed to sell defendant an interest in certain patent rights, the purchase price to be paid in installments, the plaintiff to give the defendant a conveyance of the patent right when the purchase price was paid in full. The defendant did not pay one installment when it fell due, and the plaintiff sued and levied an attachment. The defendant contended that the writ of attachment was improperly issued and should be discharged because the plaintiff had a vendor's lien upon the patent to secure the payment of the money sued for. In holding that the attachment was proper, the court said:

"It should be observed that the existence of a vendor's lien always presupposes that the title to the goods has passed to the vendee, since it would be an incongruous conception that the vendor might have a lien upon his own goods."

The court therein quotes section 119 of Tiedeman on Sales, as follows:

"In order that a vendor of goods may claim a lien on the goods, they must have already become the property of the vendee, for one cannot have a lien on goods belonging to himself. * * * The only cases in which the vendor can have a lien on goods are those on which the title to the goods passes to the vendee without delivery of possession."

It is true that the immediate question decided in that case was to whether or not the plaintiff had a vendor's lien on personal property to which he had not passed title; still the facts of the case were very similar to those herein, and it would seem that the decision would have been different if the court had believed that the plaintiff had any security, as provided by said section of the Code. It may not be amiss to specify the points of agreement between that case and this. In both cases the plaintiff sold personal property to the defendant. In both cases title remained in the plaintiff until the purchase price should be paid. In both cases the purchase money was not paid and an action was brought to enforce payment and an attachment levied on the property of defendant. In both cases the defendant objected to the ground that plaintiff had security for the payment of his obligation. In the Eads Case the particular contention was that the plaintiff had a vendor's lien; whereas in this case the defendant has not specified the nature of the security, although from his argument it is a reasonable inference that he claims that plaintiff had a security in the nature of a mortgage. It would, indeed, appear that it could with greater reason in that case than in this be concluded that plaintiff had security for his claim, since he retained possession of the property which was the subject of the executory sale.

The particular decision in this state upon which respondent relies is Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318. In that case the court stated that—

"The only question in this case is whether a negotiable promissory note not yet due, and bona fide taken as collateral security for pre-existing debt, is subject, in the hands of the indorsee, to any defense existing at the date of the assignment, between the original parties."

But in the determination of this question was involved the consideration for said assignment, and plaintiff, in support of his contention that there was a new consideration for said assignment of the note of Bensley as collateral security for the pre-existing debt, contended that before the assignment he had a remedy by attachment against his debtor, but by taking the collateral security he lost that remedy, and that the loss of this remedy constituted a new consideration, moving from Payne to his debtor, the assignee of the note. This case was decided in the year 1857, and the statute governing attachment at that time (section 120 of the Practice Act [St. 1851, p. 68]) provided that the remedy of attachment did not exist where the contract was secured by a mortgage on real or personal property. The statute did not then make any provision in reference to a pledge, but the reasoning of the court is to the effect that, since a mortgage is a mere security for a debt, the term was broad enough to include a pledge, which is "essentially the same, and intended to accomplish the same end." The conclusion was based upon the assumption that the "intention of the Legislature was to use the word 'mortgage' as applicable to personal property in its widest instance." In that case it is to be observed that there was actually a pledge of personal property. Hence the assignment had the effect of giving the plaintiff security. It is true that the statute in force at that time did not specifically mention such security, but a short time after the decision said section 120 of the Practice Act was amended so as to include a pledge. Applying the law that exists now to the facts of that case, we would have to reach the same conclusion, although we think the law was very liberally construed by the distinguished jurist who wrote the opinion in the Payne Case, and his associates, in order to affirm a judgment that was manifestly just and equitable. But in the present instance it cannot be said, as we have already seen, that there was a pledge of said personal property. The decision, therefore, that the term "mortgage" in the statute was broad enough to include the term "pledge" would not justify a

decision in favor of defendant in this case, since there was neither a mortgage nor a pledge. Respondent has also called attention to two decisions by the Supreme Court of Idaho which seem to support his contention. The first is Markmeans Transfer Co. v. MacKinzie, 9 Idaho, 165, 73 Pac. 135, and the second Barton v. Groseclose, 11 Idaho, 227, 81 Pac. 623. They are both to the effect that—

"One who makes a conditional sale of personal property, delivering possession to the vendee, and retaining the title thereto himself until the purchase price shall be fully paid, cannot, upon failure of the purchaser to make the payments, have an attachment against the property of the purchaser to secure the payment of the purchase price until the property itself has been exhausted."

It was held in those cases that the security was neither a mortgage, lien, or pledge, but that it was a higher class of security than either, and that the statutes of Idaho (Rev. St. 1887, § 4303, subd. 1) contemplated such security as grew out of the condition wherein the vendor retained title in the property until the entire purchase price was paid. It is to be observed, however, that the language of the Idaho statute is somewhat different from ours in that it makes it necessary to show, referring to the contract sued upon, "that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or if originally secured, that such security has, without any act of the plaintiff, * * * becomes valueless," while our statute is identical with that except the corresponding phrase is "originally so secured." The expression used in the Idaho statute might very properly be construed as enlarging the instances previously enumerated, so as to include any kind of security, whereas the corresponding phrase in the California statute clearly refers and limits the application of the law to the three kinds of securities specifically mentioned. Respondent also argues that the rule must be the same in an executory contract for the sale of real property and for the sale of personal property, and, since it has been held that in the former instance an attachment will not issue, that therefore the same rule must apply in the latter instance. But we think there is a clear distinction between the two; for instance, where a vendor sells real property and conveys the title and gives up possession, he has a vendor's lien upon the property for the payment of the purchase price. But in a similar situation as to personal property there is no vendor's lien, since the vendor has surrendered possession. It is true also that in an executory contract for the sale of real property where the title has not passed it has been held that the vendor has security in the nature of an equitable mortgage for the payment of the balance of the purchase price, and therefore that he is not entitled to the remedy by attachment. Richvale Land Co. v. Johnson, 28 Cal. App. 296, 152 Pac. 312. The ground upon which that decision is based, and also Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187, cited therein, is that the "transaction shows upon its face that the vendor held the legal title as security," and that the vendee cannot prejudice that title or in any way divest it except by performance of the act for which the vendor holds it. The difference, however, between the two kinds of property is the reason for the difference in the rule applicable to each. Real property is fixed and cannot be destroyed, lost, stolen, or taken away. And the vendor therefore always has his security for the payment of the balance of the purchase price. While personal property, as the automobile in the present case, may be taken away or stolen or destroyed with the consequent loss of his security and without the knowledge of the vendor. Of course, if the seller had retained possession of the automobile and passed title, there would have been a lien upon the property. But, retaining the title under the executory contract of sale and passing possession, plaintiff has neither a lien nor a mortgage as security, but only the bare legal title and the buyer's promise to pay.

We do not see how it can be held, without judicial legislation, by introducing something into the statute which is not contained therein, that the decision can be sustained.

The order is therefore reversed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

(44 Cal. App. 140)

WHITAKER v. DUNLAP-MORGAN CO.

(Civ. 2394.)

(District Court of Appeal, Second District, Division 1, California. Nov. 5, 1919.)

1. PRINCIPAL AND AGENT ⇐103(2) — INCIDENTAL TERMS OF SALE MAY BE MADE BY AGENT UNDER GENERAL AUTHORITY.

Where the general authority of an agent to purchase merchandise exists, the right to make all incidental terms of the purchase must be implied.

2. PRINCIPAL AND AGENT ⇐103(2)—NO LIMITATION OF AGENT'S AUTHORITY TO PURCHASE UNDER LETTER OF BUYER.

Where distant purchaser of hay expressly advised seller that his agent in the field was there for the purpose of buying hay, there was no limitation on agent's authority so as to call for confirmation by purchaser before closing deal.

3. EVIDENCE ⊂=16—MEANING OF F. O. B. WILL BE JUDICIALLY NOTICED.

Courts will take judicial notice of the meaning of the term "f. o. b." relative to sale of goods.

4. SALES ⊂=83—MEANING OF TERM "F. O. B."

The term "f. o. b." means that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time they are on board.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

5. SALES ⊂=218½—TITLE PRESUMED TO PASS ON DELIVERY F. O. B.

Where contract of sale provides that goods are to be delivered f. o. b. at point of shipment, the presumption that the property is to pass then is applicable.

6. SALES ⊂=168(2)—AFTER ACCEPTANCE AT SHIPPING POINT NO RIGHT TO INSPECT GOODS AT PLACE OF DELIVERY.

Where experienced agent of buyer had full opportunity for inspecting at point of shipment hay delivered there under a contract for f. o. b. delivery, and he made out bills of lading and superintended shipments, seller had no right of inspection at place of delivery under doctrine of implied warranty; the hay having been accepted as well as delivered at the point of shipment.

7. SALES ⊂=355(1)—EVIDENCE OF CONDITION OF GOODS PRIOR TO SALE INADMISSIBLE IN ABSENCE OF PLEADING.

Where property in hay sold passed at place of sale, buyer, having been given full right of inspection at that place, can base no rights on condition of goods prior thereto; the answer in action for price having presented no issue of limitation of inspection by reason of misleading assurance of buyer before sale was completed.

8. EVIDENCE ⊂=442(6)—COMPLETED CONTRACT OF SALE MAY NOT BE VARIED BY SUBSEQUENT LETTER OF BUYER.

Where contract of sale of hay is complete at place of shipment with no right of inspection at place of delivery, letters from buyer to seller, sent thereafter, could not ingraft right of inspection at place of delivery.

9. APPEAL AND ERROR ⊂=1051(2) — OPINION OF WITNESS AS TO MEANING OF F. O. B. HARMLESS.

Admission of opinion of witness as to meaning of term "f. o. b." is not prejudicial error, where meaning was not extended beyond that accepted by the courts as the true meaning.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. M. Whitaker against the Dunlap-Morgan Company. Judgment for plaintiff, and defendant appeals. Affirmed.

James W. Bell, of Los Angeles, for appellant.

J. R. Dorsey, T. M. McNamara, and Rowen Irwin, all of Bakersfield, for respondent.

JAMES, J. Plaintiff, after verdict of a jury, had judgment for an unpaid balance alleged to be due from defendant on account of the sale of certain hay in the year 1915. An appeal was taken from the judgment.

The hay consisted in part of alfalfa and in part of barley. It was shipped from the central part of the state to the defendant at Los Angeles, and the defendant contended that, as to the barley hay, when it was received at the latter point it was "hot" and unmerchantable. The evidence offered on the part of the defendant was sufficient to establish the fact as to the condition of the hay being, upon its arrival in Los Angeles, as alleged by the defendant. The main question presented on the appeal is as to whether, under the circumstances of the case, the right to inspect the hay and reject it remained in the defendant up to the time that opportunity was had to examine the same after its arrival in the city of Los Angeles. The purchase as made covered a quantity of hay then in existence at the date of the contract in the fields of the plaintiff. A portion of the hay had been already baled at the time it was bargained for, and some of the alfalfa hay had already been loaded on cars at McFarland preparatory to being shipped away to market by the plaintiff. Plaintiff had, previous to this time—May of 1915—written a letter to the defendant corporation, offering to sell hay, and in response had received a letter from defendant, reading as follows:

"Yours of the 15th received and will say that the writer has been out of the city is the reason same has not been answered. Regarding your barley hay, will say that Mr. Harmeling is buying for us in McFarland and we have notified him to call and give you a price for your hay. Of course, the quality counts more than anything else. Trusting Mr. Harmeling may be able to do some business with you, we remain, Yours very truly, Dunlap-Morgan Co."

The Mr. Harmeling referred to in the letter approached the plaintiff in his field, where he was at work hauling the hay, and made an offer to him for both the alfalfa and barley hay, the price offered being $7.50 per ton for the barley and $6.75 for the alfalfa, "on board cars, McFarland." This offer the plaintiff testified he refused, saying, "I want $8 for the barley and $7 for the alfalfa." His testimony continued:

"I then had a car of alfalfa loaded, and was loading another, and he says, 'Will you give me until 2 o'clock?' and I said, 'Well, you let me know in time so we can bill the hay out before freight time; that is all that is necessary.' When I was loading the second car he came to me with a telegram and handed it to me, and, as I remember, the telegram was from Dunlap-Morgan and said, 'Buy Whitaker's hay seven and eight dollars per ton, prompt delivery. [Signed] Dunlap-Morgan.'"

A copy of the telegram was later introduced, which showed that it was of the same substance as testified to by the plaintiff. The deal was closed, the condition of the agreement being that the price agreed upon was for the hay "f. o. b." McFarland. The alfalfa hay already loaded on cars was forthwith shipped to defendant, and the shipment of the barley hay was proceeded with as fast as the same was baled, the time occupied, as we gather from the testimony, being about seven or eight days. Before all of the hay had been shipped, the defendant dispatched to the plaintiff two letters, one assuming to confirm the purchase of the alfalfa hay and the other confirming the sale of the barley hay. In these letters conditions were stated which, if given the effect of modifying the terms of purchase, would clearly have given the right to defendant to inspect the hay at Los Angeles before being bound to pay the purchase price. It will be remembered, however, that before these confirmatory letters had been dispatched, not only had the negotiations been all completed between the plaintiff and the defendant's agent, Harmeling, but the shipment of the hay had been commenced and a portion of it had been received by the defendant.

[1-5] One of the questions suggested here is as to whether there was any limitation upon the authority of Harmeling which would entitle the defendant to consider and confirm the deal before it became operative. No such limitation of authority, we think, can be assumed under the circumstances. The defendant plainly and expressly advised the plaintiff that its agent in the field was there for the purpose of buying hay, and where the general authority of an agent to purchase merchandise exists, certainly the right to make all incidental terms of the purchase must be implied; otherwise the authority would not be authority to purchase at all, but merely an authorization to procure offers. Hence we must assume that Harmeling acted within the reasonable limits of his authority in all that he did concerning the making of the purchase of the hay. The agent purchased the hay for delivery "f. o. b." McFarland. This term is one that has such a common commercial signification that the courts take notice of its meaning, generally without proof. "In many mercantile contracts it is stipulated that the vendor shall deliver the goods 'f. o. b.', i. e., 'free on board.' The meaning of these words is that the seller is to put the goods on board at his own expense on account of the person for whom they are shipped, and the goods are at the risk of the buyer from the time when they are put on board." Benjamin on Sales (7th Ed.) § 682. "If, therefore, the contract provides that goods are to be delivered f. o. b. at point of shipment, the presumption that the property is to pass then is applicable." Williston on Sales, § 280. Notwithstanding that title to the hay passed at the time the loading on cars at McFarland was completed, the transaction might still have been subject to rescission by a showing that after inspection at Los Angeles the hay was determined not to have been in a marketable condition at the time of shipment.

[6-8] This matter is referable to the proposition of there being an implied warranty, but is not applicable here, because not only was the delivery complete at McFarland and the passing of title also, but full opportunity was given for inspection at that point by the defendant or its agent. The fact was shown that the agent of the defendant was very familiar with the particular hay sold by the plaintiff; that he had observed it while growing and after it was cut; had known that at some time previous to the date of the transaction a shower had wet the hay in the windrows and shocks. Furthermore, this agent had charge of the shipment of the hay, and caused the bills of lading to be made out, and was at different times at the railway station while the hay was being loaded. The evidence further tended to show that he was quite experienced in the matter of handling hay. By his own testimony it appears that he knew that if the hay was not properly dried before baling, it might be damaged. We are not unmindful of the fact that it was testified to by the agent that he, in a conversation with Whitaker, had been assured by Whitaker that the hay would be shipped in proper condition and dry. Whitaker disclaimed any recollection of such conversation; he stated that his recollection as to the occurrences was good. However, we do not find any issue presented by the answer as to defendant having been caused to limit its inspection of the hay at the point of delivery because of any misleading assurances received from the plaintiff. The undisputed evidence, we think, shows both delivery and acceptance of the hay at McFarland. This legal situation having resulted, then those things thereafter occurring by which defendant sought to limit its liability are of no moment.

[9] We do not think the court committed prejudicial error in allowing Harmeling to testify as to his understanding of the meaning of the initialed phrase "f. o. b." We do not understand that by his answer he extended that meaning beyond what is commonly understood and accepted in the commercial world and by the courts as the true signification. In our opinion, there was no implied warranty of the hay surviving the time of the delivery and acceptance at the railway station; this because the agent of the defendant had fully examined the hay, knew its particular character, was at the railway station when it was shipped, and was given every opportunity to complete any desired inspection. Under the undisputed testimony we have already concluded that

Harmeling had full power to negotiate the purchase of the hay and to fix the terms thereof. We think the court might have instructed the jury directly as to the extent of that authority. We have carefully examined the instructions as given and refused, and think that the case on the whole was fairly presented to the jury.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 256

FILES v. DERDERIAN et al. (Civ. 3023.)

(District Court of Appeal, First District, Division 2, California. Nov. 12, 1919.)

1. PRINCIPAL AND AGENT ⊂=123(5, 6)—AUTHORITY ESTABLISHED, NOT BY AGENT'S STATEMENTS AND REPRESENTATIONS, BUT BY PRINCIPAL'S.

Under Civ. Code, § 2317, ostensible authority is not established by the statements and representations of the agent, but only by the statements and representations of the principal.

2. PRINCIPAL AND AGENT ⊂=23(1) — OSTENSIBLE AGENCY NOT SHOWN.

Evidence *held* insufficient to show an ostensible agency.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. W. Files, doing business under the firm name and style of the Files Fruit Company, against H. M. Derderian and another. The action proceeded against the name defendant only, and from a judgment in his favor, plaintiff appeals. Affirmed.

N. Lindsay South, of Fresno, for appellant.

Astor Elmassian and G. L. Aynesworth, both of Fresno, for respondents.

LANGDON, P. J. This action was brought to recover damages for failure to deliver a crop of grapes, alleged to have been purchased by the plaintiff from the defendants. The court found that the grapes were the property of the defendant H. M. Derderian, and that the defendant J. Hov. Derderian had no right, title or interest in the same. J. Hov. Derderian was the son of the other defendant, and the evidence shows that he signed the contract for the sale of the grapes and received the several sums of money paid on account of such purchase by the plaintiff. At the time of the trial J. Hov. Derderian was in the United States army and could not be served. The action proceeded only against the other defendant, H. M. Derderian, who is the respondent here.

A copy of the contract for the purchase of the grapes was introduced in evidence. It was signed by J. Hov. Derderian as the "seller." It purported to sell the crop of grapes produced on the "Derderian ranch" at a stipulated price, and guaranteed that the same was the sole and absolute property of seller free from all incumbrances. There was also introduced in evidence a copy of a complaint in the justice's court of Fresno, sworn to by the plaintiff, charging J. Hov. Derderian with obtaining money under false pretenses. This complaint related to the same transaction sued upon here, and alleged that the said J. Hov. Derderian falsely and fraudulently represented to the plaintiff that he was the sole and absolute owner of the crop of grapes, and had the right to sell the same, and that by reason of said representations he obtained certain sums of money from the plaintiff as advance payments. The evidence is uncontradicted that the plaintiff did not deal with H. M. Derderian in the transaction sued upon, and did not speak with him at all with reference to the same.

Appellant, however, seeks in this action to charge the respondent with the contract upon the theory of ostensible agency. In support of this theory, he urges upon our attention the testimony of the plaintiff to the effect that in 1917, the year previous to this transaction, the plaintiff made a contract for the purchase of the grapes upon the Derderian ranch. It is argued that because this contract of 1917 was signed by J. Hov. Derderian, and delivery was made and the money paid thereunder to J. Hov. Derderian, the plaintiff, when he entered into the contract the succeeding year, had a right to rely upon the impression given in 1917 that J. Hov. Derderian had authority to sell the crop grown on the ranch. It is contended that H. M. Derderian is estopped from denying the relationship of principal and agent, in view of these previous transactions and business dealings with the appellant. But the testimony in regard to this particular transaction in 1917 is conflicting. The defendant H. M. Derderian and his son, M. H. Derderian, both testified that when the 1917 contract was entered into the plaintiff talked with the father about it, and negotiated the terms with him through J. Hov. Derderian acting as interpreter; that the father and his two sons were present when the contract was signed. The defendant H. M. Derderian also testified that he told his son in the presence of the appellant to sign the contract. The court was justified in accepting this evidence, and certainly such a course of dealing should not cause the appellant to believe that J. Hov. Derderian had authority to contract for the father. The evidence introduced to show that J. Hov. Derderian had

once had authority at the bank to sign checks for his father cannot aid the plaintiff here in establishing ostensible authority, because in the testimony of J. W. Files he admits that at the time he signed the contract he did not have any information about this matter, and did not know that the son signed such checks. He could not then have relied upon such evidence of authority.

[1] Appellant also relies upon the statements alleged to have been made by J. Hov. Derderian, at the time of the making of the contract, "that the conditions were the same as in 1917." Appellant asserts that this statement misled him, and he was justified in relying thereon. Ostensible authority is not established by the statements and representations of the agent, but only by the statements and representations of the principal. Section 2317, Civ. Code; People v. Dye, 75 Cal. 113, 16 Pac. 537.

[2] The entire record clearly indicates that the findings of the trial court are correct. There is neither actual nor ostensible agency established between the defendants H. M. Derderian and J. Hov. Derderian.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

44 Cal. App. 134

BAHEN v. FURLEY et al. (Civ. 3034.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1919.)

1. PRINCIPAL AND AGENT ⟸48—AGENT MUST ACT IN GOOD FAITH.

Since certain defendants were agents of plaintiff and he relied upon them as such, they were obligated to act in good faith with plaintiff.

2. FRAUD ⟸30—DEFENDANT WHO PARTICIPATED IN ILL-GOTTEN GAINS IS LIABLE FOR DECEIT.

Defendant, who knew of some, if not all, of false representations, and was jointly interested in trade of plaintiff's realty cannot participate in ill-gotten gains and avoid liability for damages for deceit.

3. FRAUD ⟸30—ONE WHO MERELY TAKES TITLE FOR PURCHASER NOT LIABLE FOR HIS DECEIT.

Defendant, who authorized his codefendants to have a piece of property deeded to him under agreement that he would deed it whenever his codefendants told him to, and who accepted title to property traded by plaintiff to codefendants, would not be liable for deceit, where he did not participate in proceeds, made no false representations, and did not conspire or authorize others to practice deceit.

4. FRAUD ⟸50—BURDEN ON PLAINTIFF TO SHOW DEFENDANT'S KNOWLEDGE ON TAKING TITLE TO LAND OF FRAUD AGAINST GRANTOR.

Plaintiff had the burden of showing that defendant who authorized his codefendants to have property deeded to him under agreement that he would deed it whenever the codefendants told him to, and who accepted title to property traded by plaintiff, had knowledge of the fraud of his codefendants.

Appeal from Superior Court, Los Angeles County, Paul J. McCormick, Judge.

Action by A. M. Bahen against Guy L. Furley and others. Judgment for plaintiff, and defendants appeal. Judgment reversed as to defendant R. Jebb Brown, but otherwise affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

William J. O'Brien, of Los Angeles, for respondent.

THOMAS, J. Plaintiff brings this action against defendants to recover judgment for the total sum of $5,950, because of deceit practiced against him. The material allegations of the complaint, with the exception of certain formal points, were denied.

Without a word of explanation the record before us might be confusing. The explanation is that much of the testimony in the record refers to another case, tried in the superior court, but which cause is not the subject of this appeal—a suit brought by this same plaintiff against certain of the defendants here, and others who are not joined as defendants in this action. The trial of the present action followed immediately after the trial of that case. It was therefore stipulated that the evidence given in the first action, so far as applicable, should be considered as having been given in this matter. Both cases, it is stated, were fraud cases. The testimony introduced in the first case, to a great extent, it is urged, bears directly on this dispute. Judgment went for plaintiff in both cases, but appeal is taken in this action alone.

In support of the appeal appellants contend: (1) That the complaint is insufficient; (2) that there is no evidence in the record to support the finding against defendants Brown and Koontz; and (3) that there is no evidence to support the finding that the defendants Furley and Plumer were plaintiff's agents.

[1] We have read the entire record, and are satisfied with the conclusion of the learned trial court on the point last urged. We think, beyond doubt, that defendants Furley and Plumer were the agents of plaintiff, and that he relied upon them as such; hence there need be no discussion of their obligation to act in good faith with plaintiff. That they did not do so is amply shown by the evidence.

Calmon v. Sarraille, 142 Cal. 638, 76 Pac. 486.

[2] It is urged by appellants that their motion for nonsuit should have been granted as to both Brown and Koontz, for the reason that:

"There had not been any evidence introduced showing that Brown or Koontz had any guilty knowledge, or knowledge whatever, of any representations made by Furley and Plumer, if any were made."

It is conceded that Koontz participated in the receipts from the sale of the property involved. The record shows, too, that he knew of some, if not all, of the false representations at the time they were made; that he went with Plumer to Corcoran, near which place the property in question is located, and returned "with an option on the Miller land"; that when the deal was closed Koontz (who was the notary public that took plaintiff's acknowledgment to the deed) told Bahen the deed was blank, and that the name of the grantee was not in it; that Bahen's note for $800 "was delivered to the bank by Koontz, and the proceeds thereof placed to the credit of Furley and Koontz"; and that all the proceeds of the sale, after paying commissions, etc., were paid to Furley and Koontz. Indeed, if entirely ignorant of any false representations having been made, enough transpired to put any prudent person on inquiry. The record does not show that Koontz made any such inquiry, while it does show some participation in, and the proceeds resulting from, this very unfair treatment of plaintiff. Can it be successfully maintained, under the record here, that because he may not have been present when Furley or Plumer, or both, made all the false statements to plaintiff (notwithstanding the fact that the three were jointly interested in the transaction with plaintiff—Corson v. Berson, 86 Cal. 433, 25 Pac. 7), that he can participate in their ill-gotten gains and evade responsibility? We think not.

[3] There remains, then, the sole question as to Brown, whom the court found "authorized the defendant Furley and Plumer to use his name in negotiating with the plaintiff, and that he agreed to allow them to prepare the said deed from plaintiff to himself, the said Brown, and the said note for $800 in his favor, with knowledge that plaintiff was being deceived in the transaction." It is urged by appellants that "there is no evidence that Brown knew anything about any deception or representations or misrepresentations." As to the fraud practiced by the defendants Furley and Plumer against the plaintiff there is no doubt. They misrepresented the facts to him to such an extent as to qualify them for a place among the members of the Ananias Club. Unless the law imposes some duty on the defendant Brown to inquire as to the real purpose of the nefarious arrangement in the consummation of which he was instrumental in assisting the defendants Furley and Plumer, then, in the light of this record, he is innocent of any wrongdoing with respect to the transaction in question. The record contains nothing whatever to support that part of the finding which says that what he (Brown) did was done "with knowledge that plaintiff was deceived in the transaction." The defendant Brown testified as follows:

"I am a resident of Santa Monica, and one of the defendants in this case. Mr. Plumer came to me in the spring of 1913, and said that he and Furley and Koontz wanted me to let them have a piece of property deeded to me. I agreed to do so, and that I would deed it whenever they all told me to. I did so. I never received anything for it."

The record discloses nothing further. The transaction was in itself not illegal. It was, perhaps, out of the ordinary, as honest men deal with one another. It would seem that a prudent man, by the very suggestion of such an arrangement, would have asked some questions as to why they wanted this done. Does the law impose some duty upon one in this position? Does the failure to so exercise that duty subject him to the same liability as though he knew? Does the law impute to him knowledge of facts which might have been his had he made inquiry? Defendant Brown did not participate in any of the proceeds; he made no false representations; he practiced no deceit; he did not conspire or authorize others to practice deceit. Unless the answer to the questions just submitted be in the affirmative, it would seem that because of the part which he took in this transaction he cannot be subjected to liability for damages.

[4] Appellants concede that, in accepting title to the property traded by plaintiff to Furley, Plumer, and Koontz, Brown became a trustee without any agreement of compensation for acting as such; that as to them his trust was a voluntary one; that his holding of the property was their holding; that if they—the first three mentioned—had obtained the property from plaintiff by fraud, an involuntary or resulting trust would have arisen in them to hold the property and return it to plaintiff upon demand; and that had plaintiff served any notice on Brown that he (plaintiff) had any claim to said property, prior to his disposing of the same, in that event he (Brown) would have become an involuntary trustee for plaintiff's benefit. No notice having been given, and Brown having no knowledge of the fraud, it is urged that he is and cannot be liable under such condition. With this contention we are in full accord. The burden of proof to show Brown's knowledge of the fraud was on plaintiff, and has not been met. It was not incumbent upon this defendant to prove his innocence. In the absence of showing of fraud, undue influence, accident or mistake,

wrongful act or fiduciary relation on the part of defendant Brown, we know of no law, and none has been called to our attention, which authorizes or supports a theory which would hold one liable under such circumstances as disclosed here. We have examined every case cited by respondent on this phase of the controversy, and we think none of them in point. In every case cited the person taking the deed, or found by the court to be an involuntary trustee, took with knowledge of the fraudulent transaction.

The judgment is reversed as to the defendant Brown, but otherwise affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

(44 Cal. App. 208)

FRIEND & TERRY LUMBER CO. v. DEVINE et al. (Civ. 2063.)

(District Court of Appeal, Third District, California. Nov. 7, 1919.)

APPEAL AND ERROR ⟸628(1)—FAILURE TO FILE TRANSCRIPT IN TIME EXCUSED BY BELIEF OF COUNSEL THAT APPEAL WAS ABANDONED.

Where appellant did not file transcript on appeal with clerk of appellate court within the 40 days allowed, but filed it after motion to dismiss, the motion to dismiss will be denied, where failure to file was due solely to erroneous belief of attorney that appeal was to be carried no further; no adverse rights having been seriously affected by the delay.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the Friend & Terry Lumber Company against James H. Devine and another. Judgment for plaintiff, and defendants appeal. On motion to dismiss appeal. Motion denied.

Irving D. Gibson, of Sacramento, and Stanley Pedder, of San Francisco, for appellants.

C. E. McLaughlin and S. R. Hart, both of Sacramento, for respondent.

PREWETT, Judge pro tem. The respondent moves the court to dismiss the appeal taken herein, upon the ground that appellants did not cause the transcript on appeal to be filed with the clerk of this court within the 40 days allowed by rule for that purpose.

Judgment was rendered against the appellants on April 14, 1919, and the appellants in due course filed their notice of appeal, caused the transcript to be prepared, and paid all lawful fees therefor. The court below properly settled and certified the transcript. The time for filing it in this court expired on the 10th day of September. It was not filed until the 18th day of October.

It is shown that appellant Devine, who appears to have managed the matter on behalf of himself and his coappellant, is quite aged and in poor health; that he was absent from Sacramento City, the place of residence of himself and his attorneys, by reason of his ill health, during the greater portion of the summer. A few days after the settlement of the transcript he held a conference with his attorneys concerning the appeal, and they erroneously understood him to say that the appellants intended to abandon the appeal. The transcript was not on file when the notice of motion was served, although it was filed prior to the hearing on the motion.

"If the transcript is on file when notice of motion is given to dismiss the appeal, it defeats the motion. If filed after the notice is given, the motion is not defeated; but circumstances to excuse the default may be shown by affidavit." Carter v. Page, 77 Cal. 64, 19 Pac. 2.

It is clear that the appellants did not intend to abandon their appeal. It is also clear that their failure to file the transcript within the proper period was due solely to the erroneous belief of their attorneys that the appeal was to be carried no further. It appears that no adverse rights have been seriously affected by the delay. This showing is sufficient to entitle appellants to an order denying the motion.

The motion to dismiss is denied.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

(44 Cal. App. 230)

BEGGS v. RIORDAN et al. (Civ. 3082.)

(District Court of Appeal, Second District, Division 1, California. Nov. 8, 1919.)

RECORDS ⟸9(11)—AFFIDAVIT OF MERITS SUFFICIENT TO OPEN JUDGMENT ON SERVICE BY PUBLICATION FOR REGISTRATION OF TITLE.

In proceedings to register title to land, affidavits of merits under Code Civ. Proc. § 473, to open judgment rendered on service by publication by defendant that she stated all facts to attorney and was advised of a complete defense, and by attorney that he had examined proceedings leading up to plaintiff's tax title, and found irregularities in them, some of which were pointed out, and had advised client of a complete defense, *held* sufficient.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Proceedings to register title to land by Henry Jackson Beggs against Mabel B. Riordan and others. From an order denying motion of named defendant to set aside judgment against her, she appeals. Reversed.

John F. Poole, of Los Angeles, for appellant.

Walter Eden, of Los Angeles, for respondent.

CONREY, P. J. Defendant Riordan appeals from an order denying her motion to set aside the judgment rendered against her and permit her to defend. The proceeding was commenced by petitioner, Beggs, under the provisions of the land title law adopted by the initiative method at the general election of November 3, 1914. Petitioner set forth in his petition that his title to the two lots described in the petition was acquired by virtue of two certain tax deeds of date September 25, 1915. The judgment purporting to establish petitioner's title and to authorize registration thereof is based upon findings which recite that defendant Riordan could not with reasonable diligence be found and served in this state, and that service was made by publication of the statutory notice and by mailing of a copy thereof to appellant's last known place of residence.

Under the circumstances shown by the record there is no doubt that appellant's motion, which was made within one year after the rendition of the judgment, should have been granted, if the affidavits of merits upon which the motion was made were sufficient. Code Civ. Proc. § 473. In her affidavit appellant stated "that affiant has fully and completely stated all the facts of the case to her counsel herein, and that she has been informed that she has a full and complete defense to said action." The affidavit of her attorney contains the following:

"That affiant has examined the tax deeds and record of the proceedings leading up to the issuing of the tax deeds upon which plaintiff's action is based, and finds that there are numerous irregularities in the proceedings, making said deeds and the proceedings therein void from the beginning. That he has advised defendant herein, Mabel B. Riordan, that she has a good and complete defense to the action of plaintiff herein upon the merits thereof. The defendant herein, Mabel B. Riordan, is the owner in fee and record owner of said property, subject only to the alleged claims of said tax deeds, which are void. That some of said irregularities are duly set out in the affidavit of defendant herein."

The affidavit of defendant pointed out some of the alleged defects in petitioner's tax deeds, stating, among other things, "that the taxes on said property were extended for a greater sum than was due, and the property was sold to the state for a sum greater than was due for said year." Appellant, in connection with her motion (although that part of said section 473 requiring the presentation of such answer, does not apply to a motion for relief upon the grounds specified in the motion), tendered a verified answer, denying the plaintiff's alleged ownership of the land, and alleging that appellant was the owner in fee and entitled to possession thereof.

We think that the affidavits of merits were sufficient, and that the court erred in denying the motion. Gray v. Lawlor, 151 Cal. 352, 356, 90 Pac. 691, 12 Ann. Cas. 990; Osmont v. All Persons, etc., 165 Cal. 587, 590, 133 Pac. 480.

The order is reversed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 259

DOYLE v. DOYLE. (Civ. 3128.)

(District Court of Appeal, First District, Division 2. California. Nov. 12, 1919.)

1. APPEAL AND ERROR ⟸1002—VERDICT ON CONFLICTING EVIDENCE CONCLUSIVE.

Verdict on conflicting evidence cannot be disturbed on appeal.

2. BILLS AND NOTES ⟸493(3) — NOTE IMPORTS CONSIDERATION.

A promissory note imports consideration, and the maker has the burden of showing there was none.

3. BILLS AND NOTES ⟸493(1)—BURDEN OF PROOF OF CONSIDERATION ON PLAINTIFF ON POSITIVE EVIDENCE TO CONTRARY.

The presumption of consideration of a promissory note sued on having been met by the maker by clear and positive evidence, the burden of proof then shifts to plaintiff.

4. HUSBAND AND WIFE ⟸249—SICK BENEFITS "COMMUNITY PROPERTY."

Sick benefits received by a married man, being in lieu of wages, are "community property."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Community Property.]

5. HUSBAND AND WIFE ⟸260 — DAMAGES FOR HUSBAND'S INJURY "COMMUNITY PROPERTY."

Damages recovered by married man for personal injuries, not being within the definition in Civ. Code, § 163, of separate property, is, under section 164, "community property."

6. BILLS AND NOTES ⟸537(3)—EVIDENCE OF LEGAL, NOT IMAGINARY, CONSIDERATION NECESSARY.

Though the question of consideration of a promissory note is for the jury, to support its verdict for the holder of the note the facts must show a legal consideration, not an imaginary one.

7. HUSBAND AND WIFE ⟸232(3)—EVIDENCE OF LEGAL CONSIDERATION OF WIFE'S NOTE INSUFFICIENT.

Evidence in action on note of wife to husband *held* to show no legal consideration.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by M. J. Doyle against Alla Doyle. Judgment for plaintiff, new trial denied, and defendant appeals. Reversed.

W. H. Spencer and C. P. Kaetzel, both of San Luis Obispo, for appellant.

Lamy & Putnam, of San Luis Obispo, for respondent.

NOURSE, J. [1] This is an appeal from a judgment following a verdict in favor of plaintiff upon a promissory note for $2,200. Plaintiff and defendant were husband and wife. The note was executed by the wife on March 28, 1914. She defends on the ground of want of consideration, and that the execution of the note was secured by coercion and duress. Upon the latter defense the finding of the jury, as evidenced by its verdict, based as it is on conflicting evidence, cannot be disturbed. As to the first defense, appellant's case rests upon the question whether, as a matter of law, the facts proved show a failure of a legal consideration.

These facts are that plaintiff and defendant were intermarried in Texas October 8, 1907; that at that time they each owned property in El Paso, Tex., from which, at the time of marriage and continuing to the time of trial, plaintiff received $35 a month and defendant received $90 a month in rentals. These moneys, together with plaintiff's wages, he put in a joint account with his wife in banks in El Paso. They were used for the mutual expenses of the family. In January, 1912, plaintiff was injured in the course of his employment, and received no wages from that time until the time of the trial, during which time the family was supported by the rentals received from the El Paso properties and what money was saved by the parties prior to the date of the injury. Soon after the injury the parties moved to California, bringing $1,000, the balance of this joint bank account, $900 of which was deposited with a bank in San Luis Obispo. The rents from the El Paso properties were deposited in the same bank. Soon thereafter plaintiff received $910 in sick benefits on account of his injuries and $1,585 as the proceeds of a damage suit on the same account. These moneys were likewise deposited in the same bank in San Luis Obispo. With the moneys so deposited the parties purchased a lot in San Luis Obispo county for $550, upon which they erected improvements, making a total investment of $2,600. In July, 1912, defendant deeded her interest in this property to plaintiff. The deed was not recorded until April, 1914, soon after this note was obtained. It was the home property in which the parties lived, and in November of the same year defendant filed a declaration of homestead upon it. The property rights of the respective parties were put in issue in a divorce proceeding which, at the time of the trial of this action, was still pending in San Luis Obispo county. In that proceeding the plaintiff in this action claimed the home property in San Luis Obispo as his own.

Defendant's testimony was that there was no consideration whatever for the note, and that it was given merely to appease her husband, who was suffering from a nervous mental condition as a result of his injury. A few months after the execution of the note plaintiff was committed to a state institution for the insane, where he remained for nearly two years. This condition no doubt affected his memory of the events, and accounts for his conflicting and evasive testimony. In answer to defendant's positive testimony that no consideration passed he advanced several different claims in support of a consideration, based upon the theory that it was an adjustment of the community interests of the parties. For instance, he claimed a community interest in the defendant's separate property in El Paso until the record was produced showing a conveyance to defendant before the marriage relation existed. He claimed that he had paid some $1,200 for street work, assessed against his wife's separate property in El Paso, and $240 for painting and repairing the same, and, when this was disputed, admitted that the El Paso transactions were not taken into consideration when the note was executed. He claimed that the note was given him by his wife so he could have money to speculate with. Yet no money passed in the transaction, and he testified that when the note was signed he immediately handed it to his attorney, with instructions to hold it until his death and then to give it to his wife. Another claim was that he gave his wife $1,100 from their joint account in the bank in San Luis Obispo to purchase an automobile, and that this was a consideration for the note. Yet the automobile was purchased for his own benefit, and immediately after his commitment his wife sold it. These discrepancies are pointed out, not for the purpose of discrediting the witness, but to show the unstable ground upon which plaintiff's claim of a consideration stands.

[2-5] Of course, the note itself imports a consideration, and the burden was on defendant to show there was none. This she met by clear and positive evidence. The burden of proof was then shifted to plaintiff. Eliminating the El Paso transactions from the consideration, as, of course, they must be under any reasonable view of the evidence, and eliminating the claim that the note was given him so he could raise money for speculation, as this is negatived by his instructions to his attorney to keep the note until his death, the situation is that the parties came to California with about $1,000, which was the result in part of their community

savings and the rentals of their separate estates. To this was added the sick benefits received by plaintiff, which were in lieu of wages and hence community property, and also the proceeds of the damage suit. Was this money separate or community property? Section 163, Civil Code, defines the separate property of the husband as that owned by him before marriage and that acquired afterwards by gift, bequest, devise or descent. "All other property acquired after marriage by either husband or wife, or both, is community property." Section 164, Civ. Code. The proceeds of the judgment for damage for injury to the husband, sustained during the course of his employment, represent an award for the injury to the family relation, and, not being included within the definition of separate property in section 163 Civil Code, and being acquired after marriage, they become a part of the community estate. McFadden v. Santa Ana, etc., Ry. Co., 87 Cal. 464, 468, 25 Pac. 681, 11 L. R. A. 252; Moody v. Southern Pac. Co., 167 Cal. 786, 789, 141 Pac. 388. There was thus a community estate of $2,495, plus whatever part of the $1,000 brought from El Paso came from plaintiff's wages. With these funds the home in San Luis Obispo was purchased for $2,600, and plaintiff took full title as his separate property. In addition to this, he purchased from the same fund some country land, which he continued to hold and claim as his separate estate, and an automobile, which his wife sold for $700 while he was confined in the institution. Out of a community estate of less than $3,400 he had already received $2,600 and his wife subsequently received $700. At the time the note was executed the wife's interest in his community estate was a mere expectancy, but she was not required to convey that right without a consideration.

[6, 7] Though the question whether a consideration passed is one for the jury, the facts must show a legal consideration, not an imaginary one. There is no evidence of a legal consideration for the note, and the judgment and order denying a new trial are, therefore, reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 181

DOBBINS v. CITY OF ARCADIA et al.

(Civ. 2889.)

(District Court of Appeal, Second District, Division 1, California. Nov. 6, 1919.)

1. MUNICIPAL CORPORATIONS ⟨⟩744—TRUSTEES NOT LIABLE FOR NEGLIGENCE OF CITY ENGINEER.

Trustees, who directed city engineer to construct storm drain, necessitating digging of dangerous trench across drive, but who had no knowledge of negligence of engineer in failing to properly guard trench, are not liable for resulting injury, in view of St. 1911, p. 1115.

2. MUNICIPAL CORPORATIONS ⟨⟩733(1)—CITY NOT LIABLE FOR NEGLIGENCE OF CITY ENGINEER CONSTRUCTING STORM DRAIN.

For injuries to plaintiff and his automobile, due to failure of city engineer to properly guard trench dug in constructing storm drain across drive, pursuant to order of city trustees, the city was not liable.

3. STATUTES ⟨⟩120(3)—SUBJECT NOT WITHIN SCOPE OF ACT AS ENTITLED.

In so far as liability of city for injuries to plaintiff and his automobile, due to failure of city engineer to properly guard trench dug in constructing storm drain across drive, is concerned, St. 1911, p. 1115, cannot be invoked, since in so far as it purports to apply to municipal corporations the subject is not within the scope of the act as described in its title, as required by Const. art. 4, § 24.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Horace M. Dobbins against the City of Arcadia and others. From the part of the judgment adverse to him, plaintiff appeals. Affirmed.

Porter & Sutton, of Los Angeles, for appellant.

Walter Dunn and Ralph Woods Pontious, both of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought recovery of damages alleged to have been sustained as the result of the negligent acts of the city trustees and city engineer of the city of Arcadia. Upon findings made, it was adjudged that plaintiff recover as against defendant Ehle, who was the city engineer, and take nothing as to defendants Charles A. Billings, J. W. Barnes, A. L. Parker, H. M. Roth, and James A. Stoker, who were trustees of the city, from which part of the judgment adverse to plaintiff he appeals upon the judgment roll.

In substance, the findings upon which appellant claims the judgment should be reversed, and judgment thereon directed in his favor as to the defendants named as trustees, are: That the city of Arcadia is a city of the sixth class, and that the parties, other than defendant Ehle, at all times mentioned constitute its board of trustees; that on December 14, 1914, pursuant to an order made by the board of trustees on December 3d requiring him so to do, defendant Ehle caused a trench 5 feet deep and 8 feet wide to be dug across Huntington drive for the construction of a storm drain; that on said date, to wit, December 14th, said Ehle left said trench improperly guarded by any warning light or signal to indicate the existence of said trench, or other than a wooden barrier insufficient

for such purpose, until after 6 o'clock p. m. of said evening; that said trench "was constructed under the supervision and direction of said Ehle, and he, and he only, had the supervision and direction of, the said work of improvement"; that said trustees knew, at the time they ordered the construction of said storm drain, that it would necessitate the digging of a deep and dangerous trench across the drive, but made no provision for guarding the said trench or the placing of any warning lights or signals to indicate its existence, "but that said defendants did not, nor did any of them, have any actual notice that said trench was left unguarded and without any warning lights or signals, nor did any of them have anything to do with the work of constructing said trench, other than to instruct said Ehle, as aforesaid, to have the said drain constructed as aforesaid"; that about 5:45 o'clock p. m. of the day on which said trench was dug, and while so improperly guarded and without light or signal to indicate its existence, plaintiff was traveling along said street in an automobile, proceeding with due care for his safety, and, being unaware of the existence of said trench, was precipated into the same, as a result of which he suffered bodily injury in the sum of $500 and his automobile was damaged in the sum of $475, for which sums the court, as a conclusion of law, found that plaintiff was entitled to judgment against defendant Ehle, and as to the other defendants that he was entitled to take nothing.

[1] These findings present a case almost identical with the facts involved in Merritt v. McFarland, 4 Cal. App. 390, 88 Pac. 369, where it was said:

"As to the liability of the city trustees, they are only the agents of the city, and, as such, they appoint the superintendent of streets. They do not, however, stand in the relation of principal to the superintendent, and are not responsible for the faithful performance of the duties of his office."

To the same effect is Brown v. West, 75 N. H. 463, 76 Atl. 169, in which it was held that, where the selectmen of a town are in charge of the improvement of a highway, not as principals, but as the agents of the town, and have placed a superintendent in charge of the work, the selectmen are not liable for injuries to a traveler by reason of the superintendent's negligence and failure to put out warning lights at night, indicating a point of danger on the road being repaired, and that the doctrine of respondeat superior does not apply to such a case. The principle upon which a recovery is denied in such cases is that "an agent is not in general liable to third persons for the misfeasance or malfeasance of subagents employed by him in the service of his principal," unless he directs or authorizes the particular wrongful act of the subagent. 31 Cyc. 1563; 50 Am. St. Rep. 122; Story on Agency (9th Ed.) § 313. In directing the city engineer to construct the storm drain, the trustees were not guilty of any negligence; nor does it appear that in digging the trench he committed any wrong. The negligence consists in leaving the trench improperly guarded, an act on his part which was wholly unauthorized by the trustees; and, having no notice of such negligent act, they cannot be charged with damages resulting therefrom.

Appellant relies largely upon the case of Doeg v. Cook, 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171. Nothing said in that case, however, is opposed to the views here expressed. There it was made to appear that the trustees had actual knowledge of the dangerous condition of a highway, and because of this knowledge of its unsafe and dangerous condition it became their imperative duty to see that the same was repaired. The facts there involved differ from these, in that in the instant case the court finds that defendants, trustees, did not, nor did any of them, have any actual notice that said trench was left unguarded and without any warning lights or signals.

Not only is the conclusion of the trial court upon the findings made supported by authority, but under the facts found the trustees are protected from liability under an act of the Legislature approved April 26, 1911 (Stats. 1911, p. 1115), which provides that if, in consequence of the dangerous or defective condition of any street, any one shall suffer injury, no officer who has charge of or whose duty it is to care for or repair such street, shall be liable for such injury, unless such officer shall have had actual notice of the defective condition of the street, as Ehle, the engineer, had, and shall have failed for a reasonable time after notice to repair the same. Hence, under the provisions of this statute, since the court finds that the trustees had no actual notice of the dangerous condition in which the street had been left by the city engineer, they could not, in any event, be held liable for damage sustained.

[2, 3] As to the city of Arcadia, also made a party defendant, the court sustained a general demurrer to the complaint, and this ruling is assigned as error. That it was correct is supported by an unbroken line of authorities, from an early date in the judicial history of the state down to the present time. See Davoust v. City of Alameda, 149 Cal. 75, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847, and cases there cited. No doubt the Legislature, recognizing the rule that a municipality, in the absence of express statute providing therefor, is not liable for the negligent acts of its agents, intended to enact a law changing the rule, since in the act of 1911 above referred to, it, after providing in what cases an officer of a city might be held liable, provided that damages may be recovered against a county, city, or city and county, as in ordinary actions for

damages due to negligence. This statute, however, in so far as it concerns the point under discussion, cannot be invoked in aid of appellant's contention, for the reason that in so far as it purports to apply to municipal corporations, the subject was not within the scope of the act as described in its title, as required by section 24, article 4 of the Constitution. Brunson v. City of Santa Monica, 27 Cal. App. 89, 148 Pac. 950.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 214

PARKER v. MERCHANTS' & INSURERS' REPORTING CO. (Civ. 2635.)

(District Court of Appeal, Second District, Division 1, California. Nov. 7, 1919.)

ACCOUNT STATED ⊂=5—MINUTES OF CORPORATION NOT SHOWING AGREEMENT FOR AN ACCOUNT STATED.

Minutes of board of directors of corporation showing that on motion it was ordered that commissions due plaintiff to amount stated be paid does not show an account stated, there being no evidence of demand at that time by plaintiff for any sum of money, or that she assented to such order or knew of it.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by P. A. Parker against the Merchants' & Insurers' Reporting Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Henry W. Nisbet, of Los Angeles, for appellant.

Slosson & Mitchell, of Los Angeles, for respondent.

CONREY, P. J. Upon the trial of this action the plaintiff rested her case solely upon the second cause of action stated in the complaint, which was upon an account stated. Upon the conclusion of the plaintiff's evidence the defendant moved for a nonsuit, which motion was granted, and accordingly judgment was entered in favor of the defendant. From that judgment the plaintiff appealed.

Plaintiff introduced in evidence minutes of the board of directors of defendant corporation, showing that upon motion it was ordered "that commissions due P. A. Parker to the amount of $3,990.44 be paid." There is no evidence of any demand being made at that time by the plaintiff for the specified sum of money or any sum whatever. Neither is there any evidence that she ever assented to said order or to the amount therein specified, or even that she knew that such order had been made. It necessarily follows that no agreement was made between the parties whereby the amount of plaintiff's demand was limited or ascertained and determined. Gille v. Anderson, 34 Cal. App. 237, 167 Pac. 193; Gardner v. Watson, 170 Cal. 571, 150 Pac. 994.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 145

BANSE v. WELLS. (Civ. 2275.)

(District Court of Appeal, Second District, Division 2, California. Nov. 5, 1919.)

1. JUDGMENT ⊂=143(3)—NO ABUSE OF DISCRETION IN OPENING DEFAULT FOR EXCUSABLE NEGLECT.

Setting aside default judgment against defendant—a man of 70 years—in view of his age and inexperience and his apparent confusion as to time and manner of his appearance, arising from conversation with the process server, *held* not an abuse of discretion.

2. APPEAL AND ERROR ⊂=957(1)—AFFIRMANCE OF ORDERS OPENING DEFAULTS FAVORED.

The appellate court is more disposed to affirm an order opening a default, where the result is to compel a trial upon the merits, than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action to quiet title by Oscar Banse against A. C. Wells. Judgment for defendant, and plaintiff appeals. Affirmed.

E. T. Sherer, of Los Angeles, for appellant.

William Hazlett, of Los Angeles, for respondent.

THOMAS, J. This is an action to quiet title. Summons and complaint were duly and legally served on defendant, who did not appear. Default judgment was entered accordingly. Four days after the entry of judgment defendant gave notice of motion to vacate said default and set aside the judgment. This motion was presented to, considered and granted by, the court on October 30, 1916. This appeal is from the order granting said motion.

[1] Appellant insists that the court abused its discretion in granting the motion referred to. We do not think so.

In view of the fact that this case presents one of those points which has been up so frequently, and so much having been said bearing thereon, both by this court and the Supreme Court, that neither bar nor bench has the time or disposition to dwell further

on a long, or any, statement of the facts here, we desist from so doing. Suffice it to say that we have read the entire record, and are satisfied that the court had enough before it to support the order made, in view of the age and inexperience of defendant, and the apparent confusion as to time and manner of his appearance in the matter, arising from the conversation with the process server. As has been so frequently stated:

"The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary." Berri v. Rogero, 168 Cal. 736, 145 Pac. 95.

This language, we think, is especially fitting to the case at bar. It is conceded by appellant that there was negligence on the part of defendant—an old man of 70 years—but insists that such negligence is not so excusable and so important a matter, as disclosed by the record, as to warrant the court below, without abusing its discretion, to enter the order appealed from.

[2] Appellant also insists, for his own protection, upon mere technicality, rather than to submit to a trial on the merits. This court "is much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made." O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105.

There was no abuse of discretion practiced by the learned trial judge in entering the order appealed from.

The order appealed from is affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

44 Cal. App. 263

GARAU v. MARCHETTI. (Civ. 2458.)

(District Court of Appeal, Second District, Division 1, California. Nov. 12, 1919.)

1 APPEAL AND ERROR ⟸110 — NO APPEAL FROM ORDER DENYING NEW TRIAL.

Appeal does not lie from an order denying a motion for new trial.

2. PLEADING ⟸349—FAILURE TO DENY ALLEGATIONS OF COMPLAINT DOES NOT PRECLUDE PROOF OF AFFIRMATIVE DEFENSE.

Where plaintiff advanced money for production of grand opera, and defendant agreed to repay half the advancement, "in the event that the money from the sale of seats or other sources, after the payment of all necessary debts and obligations," should be insufficient to pay amount, failure to deny allegation in complaint that receipts were insufficient to make a repayment does not entitle plaintiff to judgment, the defendant being entitled to prove his special defense that the opera company had a cause of action then pending for a large sum of money, and that, until such litigation was concluded, the accounts of the opera company could not be considered closed.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by A. Garau against Carl Marchetti. Judgment for defendant, and plaintiff appeals. Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant.

Anderson & Anderson, of Los Angeles, for respondent.

CONREY, P. J. On the 28th day of November, 1914, the National Grand Opera Company, a corporation, was preparing to commence the production and presentation of operatic performances in various places on the Pacific Coast. On that day a contract was entered into between the corporation, as party of the first part, and A. Garau, as party of the second part, and Carlo Marchetti, as party of the third part, which provided for certain moneys to be advanced by Garau and Marchetti to cover the preliminary expenses of the presentation of such performances. Provision was made in the contract for the manner of repayment of such moneys to be advanced. On the 5th day of March, 1915, a supplemental contract was entered into between the same parties, referring to the fact that the party of the second part subsequent to November 28, 1914, had advanced to the party of the first part a certain sum of $2,000, and further provided as follows:

"Now therefore, in consideration of the assuming by said party of the third part of the repayment to the said party of the second part of one-half (½) of said sum of two thousand ($2,000) dollars with legal interest in the event that the money from the sale of seats. or other sources, after the payment of all necessary debts and obligations, shall be insufficient to pay to the said party of the second part the said sum of two thousand ($2,000) dollars as aforesaid, the said respective parties do mutually agree that the said contract so entered into as aforesaid shall be modified in the following respect, to wit."

The contract then set forth a modified arrangement for the division between Garau and Marchetti of the moneys to be received by them in repayment of their advances to the corporation.

In this action the plaintiff seeks to recover from the defendant the sum of $1,000, which the defendant agreed to pay to the plaintiff under the provisions of said sup-

plementary agreement, together with interest thereon. It is admitted that no part of said sum of $2,000 has been repaid to the plaintiff either by the National Grand Opera Company or by the defendant.

Responding to an affirmative defense contained in the answer and in accordance with the facts as shown by the evidence, the court found that as a part of the business of the opera company for the season covered by said agreements, the company planned to produce and present grand opera in the city of San Francisco, in the Cort Theater, and had a lease for the production and presentation of grand opera in that theater; that the lessor, one John Cort, prevented the company from presenting grand opera in said theater, and thereby caused a loss to the said opera company in the sum of $49,000. Subsequently the opera company commenced an action in the superior court of Los Angeles county against John Cort and others to recover from the defendants named therein the said sum of $49,000 as damages for the breach of the contract of lease. That action was pending and undetermined at the time of the trial of this present action. The court found in this action that on March 5, 1915, at the time of the making of said supplementary contract, it was understood and agreed by the parties thereto that the proceeds of said claim for damages in said action against Cort and others were understood to be a source of income to the opera company; and that by the words, "other sources of income," as used in said agreement of March 5, 1915, the parties intended to and did agree that the proceeds of said claim or action were to be considered as a source of income of the opera company. As conclusions of law from its findings, the court determined that plaintiff's right to recover of defendant the said sum of $1,000, or any part thereof, will not accrue until after the final determination of said action against Cort and others. Accordingly, judgment was entered herein in favor of the defendant and against the plaintiff; it being provided therein, however, that said judgment shall be without prejudice to the right of plaintiff to recover from the defendant the sum of $1,000, as provided in the agreement of March 5, 1915, after the final determination of said other pending action.

[1] The plaintiff appealed from the judgment, and also attempted to appeal from an order denying his motion for a new trial. The law recognizes no right of appeal from such order denying the motion for a new trial, and that appeal is dismissed.

The parties herein have stipulated to the existence of the Cort lease and the wrongful breach thereof, and that the said wrongful acts of John Cort caused the opera company a loss in the sum of $49,000. It seems clear that the pendency of the action to recover those damages leaves open and undetermined the conditions upon which the defendant's liability to the plaintiff herein depends. It is only when that action shall be determined and the practical results thereof reasonably established that it will be possible to know whether or not "the money from the sale of seats, or other sources, after the payment of all necessary debts and obligations," has been insufficient to pay to the plaintiff the said sum of $2,000 advanced by him to the opera company.

[2] We think there is no merit in appellant's claim that he is entitled to judgment because there is not in the answer a specific denial of allegation 4 of the amended complaint that "the money of said National Grand Opera Company from the sale of seats, or other sources, after the payment of necessary debts and obligations of said National Grand Opera Company, was insufficient to repay to plaintiff the said sum of $2,000, or any part thereof." That allegation only covered the fact concerning money received down to the time of the commencement of this action. Admitting the fact so alleged, it still was necessary under the affirmative defense to determine whether such conditions were in existence that the accounts of the opera company might be considered to be finally closed. When they are completely closed, so that the final balance can be struck, and if at that time the moneys which have been received are insufficient to repay the plaintiff the sum claimed by him, then the liability of defendant under said supplementary agreement will become fixed in accordance with the facts then existing.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 215

STARKEY v. PARKER. (Civ. 2405.)

(District Court of Appeal, Second District, Division 1, California. Nov. 7, 1919.)

1. APPEAL AND ERROR ⊂=870(3)—ORDER DENYING CHANGE OF VENUE NOT REVIEWABLE ON APPEAL FROM JUDGMENT.

Though appeal from judgment is under alternative method, appellant cannot have reviewed alleged error in denying his motion for change of place of trial, where no appeal is taken from order denying the motion, in view of Code Civ. Proc. §§ 956, 963.

2. APPEAL AND ERROR ⊂=1050(1)—ADMISSION OF ORAL EVIDENCE VARYING TERMS OF CONTRACT HARMLESS IN VIEW OF THE FACTS.

Where defendant took a reasonable time in attempting to supply water pursuant to contract, and, when the crops planted by plaintiff were drying up for want of water, informed plaintiff that because of bad luck the obligation to furnish water could not be fulfilled, any error in admitting oral testimony that pumping plant which defendant was to furnish was to be in condition to furnish water by February 1st was harmless.

3. LANDLORD AND TENANT ⊂=48(½)—LANDLORD'S CONTRACT TO FURNISH WATER FOR IRRIGATION IMPLIED THAT IT WOULD BE AVAILABLE WHEN NEEDED.

Where plaintiff agreed to farm defendant's land, and term of service commenced November 1st, it must be supposed, though contract did not specify when defendant should "install a pumping plant on said premises to furnish water for use on said land," that the parties intended that the water supply would be available when the crops in the ordinary course of farming would need it.

4. LANDLORD AND TENANT ⊂=48(½)—NO DEMAND FOR PERFORMANCE NECESSARY AFTER NOTICE BY LANDLORD THAT HE CANNOT PERFORM.

When defendant, who had agreed to install a pumping system on his farm, which plaintiff was to work, notified plaintiff, after unsuccessful attempts to install well, that for lack of money he would be unable to complete work on the well, he relieved plaintiff from making further demand, or allowing any further time to elapse before exercising right to make claim for damages due to failure to fulfill obligations.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by D. Starkey against George E. Parker. Judgment for plaintiff, and defendant appeals. Affirmed.

John Munro and Fay R. Robertson, both of Los Angeles, Edwards & Smith, of Dinuba, and D. M. Edwards, of Visalia, for appellant.

Calvin L. Russell and Calvin L. Russell, Jr., both of Tulare City, and Lamberson, Burke & Lamberson, of Visalia, for respondent.

JAMES, J. Appeal from a money judgment entered against defendant for damages alleged to have been suffered by the plaintiff because of the breach of a certain contract made between the parties.

In November, 1915, the plaintiff and defendant resided in Los Angeles county; defendant owned certain land in the county of Tulare; plaintiff was a farmer. The defendant desired to have his Tulare land worked, and entered into a contract with the plaintiff, whereby plaintiff was to remove to the land of defendant and farm the same for a period of five years. The terms of the agreement were reduced to writing. The defendant, among other obligations assumed, agreed to furnish brood sows and boars, and also agreed to install a pumping plant to furnish water to be used on the land; that term reading as follows:

"The said party of the first part also agrees to install a pumping plant on said premises to furnish water for use on said land."

The plaintiff assumed the obligation to farm the land in a diligent and husbandlike manner and to raise all food necessary for the live stock; he agreeing further to furnish all horses, farming implements, and equipment necessary. Pursuant to this agreement the plaintiff went upon the land of the defendant in Tulare county, and on his part proceeded to carry out the terms of the agreement. He planted certain crops, and by the middle of the year following there were growing 25 acres of barley, 3 acres of pumpkins, and 30 acres of corn. Plaintiff had also built a reservoir for the storage of water, and had leveled the land for the purpose of planting alfalfa, and had planted some fruit trees. Defendant had not furnished any hogs, although a number of months before the time last mentioned his attention had been called to that matter, and, while he had looked at certain hogs which were offered for sale, he stated that he considered the price too high, and neglected to purchase any. He made an attempt to carry out his contract regarding the furnishing of water, but the well and pumping plant which had been installed failed to produce water in any quantity reasonably sufficient for use upon the land. By June of 1916 the crops planted by the plaintiff were suffering for want of water, and defendant's attention was called to that fact. In a letter dated June 14, 1916, and addressed to the plaintiff, defendant expressed his regret to the plaintiff that the pumping plant and well had failed to be a success. In this letter he complained of "bad luck," and stated, in substance, that he would be unable then to do anything more toward fulfilling his obligation to procure water with which the plaintiff might irrigate the crops. Immediately after this situation

arose, the plaintiff harvested the barley crop, which was suitable for hay, stacked it available for defendant's use, and abandoned the contract, and within a few weeks thereafter brought this action for damages.

[1] Upon filing his demurrer to the complaint herein, the defendant also gave notice of a motion to have the place of trial changed from the county of Tulare to the county of Los Angeles, and filed an affidavit in support thereof. The motion came on for hearing and was denied. The first contention made by appellant is that the court erred in denying this motion. No counter affidavits were interposed to the affidavit of defendant, and some question is made as to whether the affidavit of appellant sufficiently showed that at the time of the commencement of the action he was a resident of Los Angeles county. As respondent correctly says, however, the question is immaterial here, because no appeal was taken from the order denying the motion for change of place of trial. Section 963, Code of Civil Procedure, makes such an order separately appealable. Section 956 of the same Code, which enumerates the matters which may be reviewed upon an appeal from a judgment, concludes with this provision:

"The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

As this appeal was from the judgment alone, considering the provisions we have cited, it is quite plain that the question now sought to be raised as to the alleged error of the court in ruling upon the motion cannot be considered. Appellant's counsel argue that, because the appeal is taken under what is known as the alternative method, his right to have a review of the question made is freed from the limitations imposed by sections 963 and 956, Code of Civil Procedure. We find nothing in the sections to which our attention is by appellant directed which extends at all the right of an appellate court to review questions on appeal from the judgment alone beyond the limit fixed by the statutes referred to. Under the alternative method a party may appeal from a judgment or an order, but the provisions of the sections do not dispense with the necessity for the notice of appeal to separately state whether the appeal is taken from the judgment, or some order, or both.

[2] The remaining question argued in the briefs is that raised by appellant when he contends that the court erred in admitting testimony of oral negotiations, the effect of which was to add to the terms expressed in the written contract. This oral testimony consisted of a showing made by respondent's witnesses that it was orally agreed that the pumping plant which appellant was to furnish was to be in condition to furnish water by the first of February. Appellant's contention is that this evidence was incompetent because, under the terms of the written contract, he would have a reasonable time after the occupation of the land by respondent within which to install the plant. Assuming that there was error in permitting this testimony of oral negotiations to be introduced, in the face of the facts shown by the record and sustained by the court in its findings, the error is wholly without prejudice. This because of two things: First, appellant did take a reasonable time (about six months) in exerting himself to procure a supply of water and failed in the attempt; second, in June, 1916, when the crops planted by respondent were drying up for the want of water, he advised respondent in direct terms that because of "bad luck" he would be unable to prosecute further work in that direction.

[3, 4] What would amount to a reasonable time for the procuring of a water supply would depend upon the circumstances. The condition of the obligation of respondent was to farm the land; his term of service commenced on the 1st of November, 1915; and it must be supposed that the parties intended, judging by the terms of the written contract alone, that the water supply should be ready and available whenever the crops, in the ordinary course of farming, would need it, and that time naturally would be at the approach of summer. The crops were found actually to be in need of water in June, and the water supply had not been made available for respondent's use. Furthermore, when appellant notified respondent that for lack of money he would not be able to complete work on the well, he relieved respondent from the necessity of making further demand upon him, or of allowing any further time to elapse before exercising his right to make claim for damages suffered.

The findings of the trial court are fully sustained by the evidence, and no error appears which would justify a reversal.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 85

COHN v. BESSEMER GAS ENGINE CO.

(Civ. 3025.)

(District Court of Appeal, Second District, Division 2, California. Nov. 3, 1919. On Petition for Rehearing, Dec. 3, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

1. EVIDENCE ⊂=457 — PAROL EVIDENCE ADMISSIBLE TO EXPLAIN TECHNICAL WORDS.

In buyer's action for breach of warranty that gasoline engine would develop certain horse power with certain number of revolutions per minute from use of "No. 3, or painter's distillate," oil fuel, buyer had the right to explain what he understood the words describing the oil to mean; the words having no exact or scientific meaning.

2. SALES ⊂=445(4)—ACTION FOR BREACH OF WARRANTY OF GAS ENGINE; INABILITY OF SELLER'S AGENTS TO MAKE ENGINE A SUCCESS MADE BREACH OF WARRANTY QUESTION FOR JURY.

In buyer's action for breach of warranty that gasoline engine would develop certain horse power, where defense was that buyer had failed to use the particular oil fuel designated in the contract, jury was justified in finding that the fault was in the mechanism, and not in the fuel, where seller's agents had experimented with the engine and failed to make it a success.

3. DAMAGES ⊂=142 — PLEADING SPECIAL DAMAGES FOR BREACH OF CONTRACT AS WITHIN CONTEMPLATION OF PARTIES.

Recovery may be had for damages not covered by the general liability for breach of contract where facts are specifically pleaded showing that the injury was one reasonably within the contemplation of the parties, and that the conditions likely to result in the special injury complained of were brought to defendant's attention at time contract was made.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. SALES ⊂437(2)—ACTION FOR BREACH OF WARRANTY; SUFFICIENCY OF COMPLAINT TO SUSTAIN RECOVERY OF SPECIAL DAMAGES.

In buyer's action for breach of warranty of efficiency of gasoline engine, complaint alleging that buyer told seller at time warranty was made of the condition of his growing crop and of contemplated planting of additional acreage of alfalfa and that he depended upon the gasoline engine to supply water to sustain crops, and further alleging facts sufficient to inform seller of disastrous consequences to crops upon failure of engine to meet guaranteed requirements, *held* sufficient to sustain verdict for special damages for loss of seed and damages, notwithstanding Civ. Code, §§ 3300, 3313, 3314.

5. SALES ⊂442(8) — DAMAGES FOR BREACH OF WARRANTY OF GAS ENGINE.

Under Civ. Code, § 3314, providing that upon breach of warranty of fitness of article for a particular purpose buyer shall be entitled to a fair compensation for the loss incurred by an effort in good faith to use it for such purpose, buyer of gasoline engine for irrigation purposes, upon breach of warranty of horse power, was entitled to loss of seeds and loss to crops caused by his unsuccessful effort to use engine; such loss being the natural and proximate result of the breach.

6. SALES ⊂442(5) — DAMAGES FOR BREACH OF WARRANTY OF GAS ENGINE; RENTAL VALUE OF LAND.

Buyer of gasoline engine for irrigation purposes in action for breach of warranty would be entitled to recover, under a proper state of pleadings and evidence, the fair rental value of such acreage of his land as he might be deprived of by the failure of an irrigation supply through the breach of the warranty.

7. SALES ⊂442(5) — DAMAGES FOR BREACH OF WARRANTY; INABILITY OF TENANTS TO PAY RENT.

Buyer of gasoline engine for irrigation purposes was not entitled, upon breach of warranty of efficiency of engine, to recover as damages the stipulated rent due buyer on tenant's failure to pay rents, on theory that by reason of failure of pump to supply water tenants were unable to raise crops, and therefore unable to pay rent, where breach of warranty did not relieve tenants under the lease of liability for rent, and did not deprive tenants entirely of irrigation, since tenant's inability to pay rent might have been due to other sources; such damages being too remote and uncertain.

8. SALES ⊂288(3)—RIGHT OF BUYER TO EXPERIMENT WITH GASOLINE ENGINE.

Buyer of gasoline engine for irrigation pump was justified in continuing his efforts to use engine over a very considerable period of experimenting with it under representations from sellers that they would remedy its defects and while all parties were working in good faith to accomplish that end.

On Petition for Rehearing.

9. DAMAGES ⊂62(4)—DUTY TO MINIMIZE ON BREACH OF WARRANTY.

Buyer of gasoline engine for irrigation pump could not extend his reliance upon the guaranteed sufficiency of the engine for a period of two years and recover damages for such period, but had duty of supplying other irrigating machinery to protect at least second year's crops.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action by C. Cohn against the Bessemer Gas Engine Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. F. Brittan and C. L. Claflin, both of Bakersfield, for appellant.

W. W. Kaye and Kaye & Siemon, all of Bakersfield, for respondent.

SLOANE, J. The appeal in this action is under the provisions of section 953a, b, and c of the Code of Civil Procedure, and both plaintiff and defendant have presented portions of the record in supplements accompanying their briefs. From these supplements, aided by reference to the voluminous typewritten transcript, we have attempted to get at the material facts of the case.

The plaintiff, and respondent, entered into a contract with the defendant corporation for the purchase from defendant of a gasoline engine at the agreed price of $1,850, to be installed for the purpose of pumping water for irrigation on plaintiff's land in the county of Tulare. The contract contained a guaranty by the defendant company that the engine would develop 55 horse power, with from 200 to 250 revolutions per minute, from the use of oil fuel described as "No. 3, or painter's distillate." Plaintiff brought suit to recover damages arising from defendant's failure to deliver the engine within the time agreed upon, and for failure of the engine, after it was installed, to meet the conditions of the guaranty. Claim of damages for delay was subsequently abandoned, by reason of a provision in the contract that acceptance of delivery should constitute a waiver of damages for any delay. The action was prosecuted for breach of the warranty, and plaintiff recovered a verdict for $7,500.

[1, 2] The only point made by defendant, as against the breach of the covenant of warranty, is that the evidence shows that plaintiff failed to use the designated "painter's distillate," or "No. 3," in his attempts to operate the engine. It seems to be conceded that the engine proved a failure as a going concern; its movements, when it did move, being very spasmodic and inadequate. A dispute exists, under the testimony, as to the precise grade and quality of distillate covered by the contract designation "No. 3, or painter's distillate." Dealers in gasoline and distillates testified that it was an oil fuel product of a gravity of 38 degrees or higher. Plaintiff's witnesses were permitted to testify, over the objection of defendant's counsel,

that prior to the execution of the contract the plaintiff was shown engines of the same make in successful operation which were using a fuel of 28 degrees gravity, described as "tops," that plaintiff was told by defendant's agent that this was the same as No. 3, or painter's distillate, and that these terms were used in the guaranty with that understanding. We think, in view of the fact that the terms used have no exact or scientific meaning, plaintiff was entitled to explain the sense in which he understood the words as used in the written instrument. However, this matter becomes unimportant in view of the fact that the plaintiff experimented with various grades of fuel, running from 28 to 52 degrees specific gravity, without success. The defendant was also called upon to make the engine go, and sent its agents at various times to discover the source of the trouble. It does not appear with what grade of fuel the defendant's agents experimented, but it was clearly their business to try the right kind; and, as they could not make the engine a success, the jury was justified in finding that the fault was in the mechanism, and not in the fuel.

The more serious questions arise on the elements of damage which, under the instructions of the court, the jury was permitted to consider in determining the amount of its verdict. It appears from the record that plaintiff was the owner of the land, comprising about 300 acres, on which the engine was installed; that he had an ample supply of water, but that it was necessary to pump it for purposes of irrigation; that there were 100 acres of the tract already planted to alfalfa; that plaintiff was preparing to immediately plant alfalfa on the remaining portion thereof; and that the installation of a new engine was necessary in pumping water to preserve the crop already planted and to germinate and sustain the planting under contemplation. The defendant was advised of these conditions at the time the contract sued on was entered into. Plaintiff claims that, relying upon the contract and guaranty, he expended $617.40 in alfalfa seed, which was sown on the land, and which failed to grow because of the inadequacy of the engine and consequent lack of irrigation, and that the growing alfalfa died out for the same cause, to his damage in the sum of $1,000; that he expended $692.45 for oils and distillates in unsuccessful attempts to operate the engine; and that the engine itself, for which he paid $1,850, was worthless. Plaintiff further claimed damages from loss of $3,200, rentals from his tenants, who were unable to raise crops, and hence unable to pay their rentals, and that he was also prevented from leasing the premises for a term of years by the failure to establish his alfalfa acreage, to his damage in the sum of $9,240.

The court, under its instructions, permitted the jury, in estimating damages, to allow for the difference between the actual value and the price paid for the engine, the amount expended for oil and distillate in attempting to operate the engine, the cost of alfalfa seed planted in anticipation of the successful operation of the engine, the loss, if any, from the dying out for want of irrigation of the growing alfalfa, and also for any loss in the value of the use and occupation or rental value of his land during the years 1913 and 1914 because of the breach of the warranty. Appellant takes the position that, under the provisions of sections 3313 and 3314 of the Civil Code, recovery for damages for breach of warranty of an article of personal property for a particular use is limited to the excess in value, if any, which the property would have had if it had been as represented over its actual value at the time, together with "a fair compensation for the loss incurred by an effort in good faith to use it for that purpose." Read in connection with section 3300 of the same chapter and article of the Code, there is room for this contention. Section 3300 provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." By sections 3313 and 3314, above referred to, there is "otherwise expressly provided" a measure of damages to whatever extent the provisions of those sections are open to a different interpretation from that to be given to section 3300.

[3] It may be conceded that the sections cited were intended to fix the limitations of recovery as a measure of general damages common to actions for such breaches of warranty. But it is a well-recognized rule of law that recovery may be had for damages not covered by the general liability for breach of contract, where facts are specifically pleaded showing that the injury was one reasonably within the contemplation of the parties. As defined by Chitty on Pleading, 410, 411:

"Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law, and are either superadded to general damages arising from an act injurious in itself * * * or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences. * * * And whenever the damages sustained have not necessarily accrued from the acts complained of, and consequently are not implied by law, then, in order to prevent the surprise of the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damages which he has sustained."

It may be further added, to cover the requirements in such a case as this, that there must also be pleaded facts which show that the conditions likely to result in the special injury complained of were brought to the attention of the defendant at the time the contract was made. The complaint in this action alleges with some particularity that at the time the contract of purchase and sale, with defendant's guaranty of the efficiency of this engine, was made, the defendant was informed of the condition of plaintiff's growing crop, and the contemplated planting of additional acreage of alfalfa, and of plaintiff's dependence and reliance upon this pump to supply the water essential to germinate and sustain the crops, and, further, that the facts as alleged were sufficient to inform defendant of the disastrous consequences to such crops as were growing or might be planted in the event of a failure of the pumping machinery to meet the guaranteed requirements.

[4] We think the facts pleaded and proved were sufficient to sustain a verdict for such special damages of this nature as are recoverable. Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 226, 162 Pac. 441. The case above cited not only sustains the sufficiency of the complaint as to special damages, but holds that damages for loss of crops by failure of irrigation machinery may be recovered under section 3314 of the Civil Code. Consequential or special damages are also upheld in an action for breach of warranty of quality in Snyder v. Holt Mfg. Co., 134 Cal. 324, 66 Pac. 311, but the statutory provision is not discussed.

Appellant places much stress on the statements of the Supreme Court of South Dakota in Hermon v. Silver, 15 S. D. 476, 90 N. W. 141, commenting upon a like Code provision fixing the measure of damages for breach of a warranty, and of the Court of Appeals, First Appellate District, of this state, in Tibbals Oakum Co. v. Meigs, 11 Cal. App. 298, 104 Pac. 844; but neither of these decisions involved any question of special damages. In the South Dakota case the trial court had attempted to lay down a rule different from that of the statute for determining the failure in value of the article warranted, and the Supreme Court very properly held that in this respect the measure of the statutory rule must be followed. In the California case the damages claimed by reason of a failure in the warranted quality of a quantity of oakum was the difference between the price which the purchaser paid and what he was able to sell the article for. The Court of Appeals upheld the rule of section 3313 of the Civil Code that the loss from this depreciation was the difference between the value of the goods as warranted and their actual value in the damaged condition. In stating this rule the court uses the language cited by appellant:

"This section lays down a simple plain rule which eliminates all imaginary claims to damages in such cases. It is intended to do justice to both the seller and the buyer"

—but proceeds with the further comment that—

"The Code only recites the rule as long established in England and since adopted in most of the United States"—citing Benjamin on Sales (5th Ed.) 1617, 3 Sutherland on Damages, § 670, and Hodgman v. State Line, etc., R. R. Co., 45 Ill. App. 395.

Each one of these authorities, while disclosing the general rule of the statute, recognizes the right of recovery in such actions under proper pleadings of such further proximate damages as were within the contemplation of the parties when entering into the contract.

"Direct damages are always recoverable and consequential losses must be compensated if it can be determined that the parties contracted with them in view." Sutherland on Damages, § 45; Sedgwick on Damages, §§ 759, 765, 766, 767.

[5] But, entirely aside from the considerations we have been discussing, we are inclined to think that such special damages as plaintiff suffered in the loss of seed and growing crops are covered by the express provisions of section 3314 of the Civil Code. It is so held in Lichtenthaler v. Samson Iron Works, supra, although the question was apparently not discussed. But the reason of the rule there laid down, considered in the light of the prevailing trend of judicial opinion in other jurisdictions as to the correct measure of damages for breach of warranty of fitness for a special purpose, tends to support the conclusion that it was intended to cover all the natural and proximate injuries arising from the breach of contract, or within the contemplation of the parties. The clause of section 3314 in question provides for "fair compensation for the loss incurred by an effort in good faith to use" the article in question for the purpose intended. As appellant interprets this provision, he would confine it to expenses directly incurred in an attempt to operate the engine, such as for fuel, labor, repairs, etc. There are other losses that might quite as naturally and proximately flow from such an effort to use the defective article, and be as clearly within the contemplation of the parties. It was understood that a small pump which had been previously installed was to be removed, and that the new pump was to be the sole reliance of the plaintiff for sustaining his growing crop of alfalfa and germinating the seed for further acreage; and it was just as certain, if the plaintiff went on with the farm work to maintain which this pump was to be

installed, and it failed in its purpose, that the crops and labor and seed would be a total loss, as it was that time and money and fuel would be expended in trying to get results from the pump. The loss of the growing crop and seed for the further planting were the direct result of a reliance upon and an attempt to utilize the machinery guaranteed by defendant's contract.

[6, 7] We are further of the opinion, under a proper state of the pleadings and evidence, that plaintiff, as declared by the trial court's instruction to the jury, would be entitled to recover the fair rental value of such acreage of his land as he might be deprived of by the failure of an irrigation supply through the breach of defendant's covenant of warranty. It was within the contemplation of the parties that this land was to be used under irrigation, and that the lack of irrigation would destroy its use for the time being. But this does not seem to be the theory of plaintiff's demand for rental values, either under the pleadings or under the evidence. He alleges and proves that the usufructuary interest during the period claimed for had been assigned to tenants to whom he had leased the premises for two years at an agreed rental of $1,600 per annum. The rental use of the land belonged to the tenants, and not to plaintiff. The allegation of the complaint is that by reason of the failure of this pump to supply irrigation the tenants were unable to raise crops on the land, that they were dependent on the proceeds from their crops to pay their rent, and that by this combination of circumstances plaintiff was unable to collect from them. The lease is set out in the record. It contains nothing to indicate that plaintiff was obligated to furnish the tenants a pumping plant. They were not, so far as appears, released from their obligation to pay rent by reason of the failure of either the plaintiff or the defendant to supply irrigation facilities. The plaintiff's loss in this respect was not of the value of the use of his land, for this belonged to his tenants. His loss arose from the tenants' inability to pay, which might or might not be from the fault of defendant, but in any event it is too remote and uncertain a liability to be the subject of damages in this action. The same is obviously true as to the claim of damages from alleged loss of opportunity to make a long term lease of the ranch to some other prospective tenants, by reason of failure to develop it into an alfalfa farm.

The plaintiff was entitled to recover the difference in the value of the pump as warranted and as it actually was delivered, together with the loss from destruction of his growing alfalfa, the value of the new seed planted, and the expense incident to attempts to operate the pump; but, as the amount of the verdict is greatly in excess of these items, it is obvious that the above-indicated improper items of damage entered into the jury's estimates, and a new trial will have to be granted along the lines of liability indicated in this opinion.

[8] It may be stated further that the plaintiff was justified in continuing his efforts to use the pump over the very considerable period of experimenting with it, under the representations of the defendant company that they would remedy its defects, and while all parties were working in good faith to accomplish that end.

Judgment reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

On Petition for Rehearing.

PER CURIAM. Conceding the point urged by respondent in his petition for a rehearing, that defendant in this case is liable for damages resulting from the failure of the Quimbys to pay the stipulated rentals under their lease, a new trial would still have to be granted under the present state of the pleadings and evidence.

[9] We have held that it was within the province of the jury to allow in its verdict the $692.45, the alleged cost of attempting to operate the defective engine, the sum of $617.40 for seed planted which did not germinate, $1,000 for the alfalfa dying out for lack of irrigation, and $1,813, the price paid for the engine—aggregating the sum of $4,122.85. The verdict and judgment was for $7,500, thus leaving $3,378 to be applied on this item of rentals. This would cover the full contract price under the lease for two years. We do not believe respondent could extend his reliance upon the guaranteed sufficiency of this engine over so long a period. It would devolve upon him to provide other irrigating machinery to protect at least the second year's crops of his tenants. But in any event the stipulated rentals under the lease with his tenants was not shown to be the measure of his damages. The tenants apparently did not cancel the lease because of the cutting off of their irrigation facilities. They were not entirely deprived of irrigation from other sources; there being a portion of the year when water was obtainable from the Tule river ditches. This land presumptively had still some rental value to the tenants, for which they were liable to respondent in the absence of an abandonment or rescission of their lease. But the pleadings or the evidence do not conform to this theory of recovery, but are predicated on the right to recover from defendant the entire sum of the rentals stipulated in the lease.

We think appellant is entitled to a new trial. Whether respondent can recover for loss of rents under amended pleadings is left an open question.

The petition for rehearing is denied.

43 Cal. App. 591

EXCELSIOR CEREAL MILLING CO. v. TAYLOR MILLING CO. (Civ. 2994; L. A. 5119.)

(District Court of Appeal, First District, Division 1, California. Oct. 15, 1919. Hearing Denied by Supreme Court Dec. 11, 1919.)

1. TRADE-MARKS AND TRADE-NAMES ⟸70(1)—UNFAIR COMPETITION BY USE OF SIMILAR NAME ENJOINED.

Where one who so duplicates the product of another, or imitates the name or content of its wares, or the place or places of sale, as to deceive the public into the notion that it is in fact entering such other person's store or buying such other person's goods, equity will enjoin the further pursuit of such fraudulent purpose and practice.

2. TRADE-MARKS AND TRADE-NAMES ⟸70(3)—UNFAIR COMPETITION NOT SHOWN BY USE OF SIMILAR NAME.

Where a dealer has no exclusive right by way of trade-mark in the use of a particular name, or term in the description of his business or product, he may not rely upon the mere similarity of names or terms employed by a competitor to establish fraud or justify an injunction, but in order to obtain such relief there must be such a condition of unfair trade dealing on the part of the competitor, in the way of duplication, imitation, and soliciting, as would amount to a showing of willful fraud, imposition, and deceit.

3. TRADE-MARKS AND TRADE-NAMES ⟸70(3)—UNFAIR COMPETITION NOT SHOWN BY USE OF SIMILAR NAME.

Plaintiff, selling an article of merchandise under the name "California Flapjack Flour," could not enjoin defendant from producing an article under the names "Los Angeles Best Self-Rising Flapjack Flour" and "Taylor's Improved Flapjack Flour," the mere using of the word "Flapjack" not showing an intent to deceive in the matter of names.

Shaw, J., dissenting.

Appeal from Superior Court, Los Angeles County; F. W. Houser, Judge.

Action by the Excelsior Cereal Milling Company against the Taylor Milling Company. Judgment for defendant, and plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in the Supreme Court.

Donald Barker, of Los Angeles (Arthur R. Smiley, of New York City, of counsel), for appellant.

Kenton A. Miller and Fred W. Smith, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant after an order sustaining its demurrer to the plaintiff's complaint, the latter having declined to amend.

The facts of the case as set forth in said complaint are briefly these: In the year 1907, and long prior thereto, the Del Monte Milling Company was engaged in the manufacture and sale of food products throughout California and adjacent states, in the course of which it had discovered a process for the blending of different kinds of flour so as to produce a compound to be used in the making of pancakes, waffles, etc., and which it had introduced to the trade and largely sold under the name of "California Flapjack Flour." In 1907 the Del Monte Milling Company sold to the plaintiff the exclusive right to use this process in the manufacture of said compound for sale in certain of the southern counties of California and in the states of Nevada and Arizona. The plaintiff thereupon began the manufacture and sale of the product under the name of "California Flapjack Flour," and has since continued so to do, and has expended large sums in advertising said product under said name, and has built up an extensive trade therein. It is also alleged that because of the long-continued use of said name the word "Flapjack" therein has come to be understood by consumers and by the public and the trade generally to mean and apply to the particular brand of self-raising flour which the plaintiff was making and selling under said name, and that in fact up to the year 1914 no other like article of food had been put upon the market or sold within said territory under the name of "Flapjack" or "Flapjack Flour." The complaint then proceeds to allege that in the year 1914 the defendant began the manufacture and sale of self-raising

flour to which at first it gave the name of "Pancake Flour," but a year later this name was changed, and the defendant began to put forth its said product under the names of "Flapjack Flour," "Los Angeles Best Self-Rising Flapjack Flour," and "Taylor's Improved Flapjack Flour," and to sell the same within said territory under said names, and that many persons have bought the defendant's said products under the belief that they were obtaining the plaintiff's product, and have thereby been deceived to the plaintiff's injury and loss. The complaint prays for an injunction against the defendant, restraining it from the use of the name "Flapjack" in connection with the product which the latter puts forth.

The defendant's demurrer was general, and the trial court sustained it upon the broad ground that said complaint did not set forth facts sufficient to constitute a cause of action. The correctness of this ruling is assailed upon this appeal.

We are of the opinion that the trial court was not in error in its said ruling. The appellant concedes that the word "Flapjack" and the phrase "Flapjack Flour" are generic terms which could not be made the subject of prior or exclusive appropriation as or by means of a trade-mark, and the plaintiff lays no claim to the possession of any exclusive right thereto or to the use thereof upon that ground. This phase of the case being disposed of by this admission, the only remaining basis upon which the plaintiff could predicate a claim of right to prevent the defendant's use of said terms in marketing its own product would be that by such appropriation and use of said terms the defendant was indulging in a fraudulent practice, to the plaintiff's injury, which it would be the duty of a court of equity to enjoin.

[1, 2] There can be no question but that upon proper averments and proof of fraudulent intent and conduct on the part of a defendant in so duplicating the plaintiff's product or imitating the name or content of its wares, or the place or places of sale, as to deceive the public into the notion that it was in fact entering the plaintiff's store or buying the plaintiff's goods, a court of equity will enjoin the further pursuit of such fraudulent purpose and practices. The leading case in this state upon that subject is the case of Weinstock-Lubin Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, in which the Supreme Court in a very full and well-reasoned opinion lays down the law of such a case. On the other hand, it is equally well settled by the case of Dunston v. Los Angeles Van & Storage Co., 165 Cal. 89, 131 Pac. 115, that where the plaintiff has no exclusive right by way of trade-mark in the use of a particular name or term in the description of his business or product, he may not rely upon the mere similarity of names or terms employed by a competitor to establish fraud or justify an injunction, but that in order to obtain such relief the plaintiff in such a case must aver and prove such a condition of unfair trade dealing on the part of the competitor in the way of duplication, imitation, advertising, and soliciting as would amount to a showing of willful fraud, imposition, and deceit. The case of Italian-Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, 110 Pac. 913, 32 L. R. A. (N. S.) 439, is also instructive upon this subject, the court therein holding that in the absence of a right in the plaintiff to the use of a particular name or term as a trade-mark the law will only afford him protection against the unfair competition of one who seeks by imitation of label or package or other artifice to induce persons to deal with him in the belief that they are dealing with the plaintiff or buying his wares. "If," as the court says, "the defendant can be shown to have put up his product with intent to palm it off as that of plaintiff, and if it does in fact tend to mislead the purchasing public, a case is made out, even though the plaintiff has shown no exclusive right in any trade-mark or trade-name."

[3] An examination of the plaintiff's complaint herein in the light of these cases will disclose how far short it comes of measuring up as to its facts with the case of Weinstock-Lubin Co. v. Marks, supra, and also how far it fails to bring the plaintiff's case within the law as laid down in the two later cases above cited. While it is true that the defendant does make use of the old and familiar word "Flapjack," already in use by the plaintiff in relation to its own product, it does not otherwise make any attempt to deceive the public by a duplication of names. The plaintiff's article of merchandise is put forth under the name of "California Flapjack Flour." The defendant's product is marked under the names "Los Angeles Best Self-Rising Flapjack Flour" and "Taylor's Improved Flapjack Flour." Not only is there thus displayed the very opposite of an intent to deceive in the matter of names, but in addition to this the plaintiff makes no pretense at any showing that the defendant, in placing its product upon the market under these distinctive names, has done anything in the way of duplicating the wrappings or imitating the packages containing the plaintiff's wares, or of doing anything whatever in the way of advertising or soliciting which would have a tendency to deceive or mislead the purchasing public into the impression that they were buying the plaintiff's wares. Clearly, in the absence of such essential averments, it fails to state a cause of action.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

Opinion of Supreme Court in bank denying hearing.

PER CURIAM. Hearing denied.

SHAW, J. I dissent from the order denying a rehearing and refusing a transfer of this case to the Supreme Court.

The case comes directly within the principle established by this court in Weinstock, Lubin & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57, and Banzhaf v. Chase, 150 Cal. 180, 88 Pac. 704. The principle is that one who, with intent to defraud the plaintiff, uses any artifice, device, or label on his own goods to deceive the plaintiff's customers into the belief that they are buying the plaintiff's goods and thereby induces them to buy the defendant's goods he is liable in damages for the injury thus caused to the trade of the plaintiff. The complaint in the present case sets forth facts which bring it within this principle. The device used was putting a label, including the word "Flapjack" on the defendant's flour whereby it led plaintiff's customers to believe they were purchasing flour sold by the plaintiff under that label. The error in the opinion is in assuming that this device could not, as a matter of law, have deceived the plaintiff's customers. The complaint alleges that it did and the court should not and could not properly hold that this allegation is on its face impossible. It might not deceive all persons, but the case is made out if it deceives a sufficient number to constitute a substantial injury to plaintiff's trade and the deceit was practiced with the intent to defraud plaintiff. The allegation is sufficient and the fact could only be determined by the evidence. The case involved nothing more than the sufficiency of the allegations.

44 Cal. App. 236

PEOPLE v. ROSENCRANTZ. (Cr. 679.)

(District Court of Appeal, Second District, Division 1, California. Nov. 10, 1919.)

1. CRIMINAL LAW ⊜1159(3) — APPELLATE COURT MAY NOT RECONCILE CONFLICTING TESTIMONY.

Where evidence was sufficient to justify conviction, appellate court has no concern with attempt to reconcile conflicting testimony.

2. CRIMINAL LAW ⊜371(3)—PASSING OTHER CHECKS WITHOUT FUNDS IN BANK ADMISSIBLE TO SHOW INTENT.

In a prosecution for passing a check drawn on a bank without having funds therein, evidence of similar transactions with other persons is admissible to show intent.

3. CRIMINAL LAW ⊜374—PASSING OTHER CHECKS WITHOUT FUNDS NOT ADMISSIBLE WITHOUT SHOWING OF REASON FOR RETURN OF CHECK.

In prosecution for passing a check drawn on a bank without having funds therein, evidence of passing other checks is inadmissible, where there is no showing why the bank returned the checks.

4. CRIMINAL LAW ⊜1169(11)—ERRONEOUS ADMISSION OF EVIDENCE OF OTHER FRAUDULENT TRANSACTIONS PREJUDICIAL ERROR.

Where, in prosecution for passing a check drawn on a bank without having funds therein, accused explained the transaction, erroneous admission of evidence of passing of other check, no explanation being given as to why bank returned them is prejudicial error, in view of instruction rejecting the checks themselves, but refusing to strike the oral testimony of the passing.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Evelyn Rosencrantz was convicted of passing a check on a bank without funds therein, and from the conviction and the order denying a new trial she appeals. Judgment and order reversed.

M. M. Gordon, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

JAMES, J. Appeal from a judgment of imprisonment and from an order denying to the defendant a new trial.

[1] The appellant was convicted of a felony, the specific offense charged in the information being that she feloniously and fraudulently made and passed a check drawn upon a San Diego bank for the sum of $45 without having money or credit at that bank with which to meet the demand. The evidence was sufficient to justify the conclusion that the check had been passed as charged in the information, although had the jury believed the statements made by the appellant in her testimony it might have reached a contrary verdict. However, this court has no concern with any attempt to here reconcile conflicting testimony, but such a condition of the case does become important in considering certain objections urged to the introduction of testimony, rulings as to which are assigned as errors of the court arising during the course of the trial.

[2, 3] The prosecution not only made proof of the passing of the particular check set out in the information, but showed transactions had at a prior time between the appellant and persons other than the original complainant herein. This testimony, if complete, was admissible under the well-known rule that like fraudulent acts may be shown against a defendant so accused in order to illustrate the intent with which the particular act was committed. Here the attempt was to show that other checks had been passed by appellant which were not paid because of insufficient funds or credit at the bank upon which they were drawn. The testimony as to three of such instances fell short of showing the reason why the check so issued and passed was not paid by the bank upon which it was drawn; in other words, there was no evi-

dence showing why the respective banks refused payment of the checks. The witnesses were allowed to testify that they paid appellant money and took her check, and that the check was sent to "the" bank and returned. In one case a witness testified that "she thought" that the check had been presented to a bank, but she had no actual knowledge as to the fact. For aught that appeared in testimony, in each of these instances involving prior claimed fraudulent acts of appellant many reasons may have existed other than that the appellant had not sufficient credit, which led the banks to return the checks. The checks themselves, when offered in evidence, were, upon objection, rejected by the court, but the court refused to strike out the oral testimony that had been given concerning the passing of them. There was therefore carried to the jury the suggestion that these transactions may have been fraudulent, and the effect may have been to influence the jury in passing upon the credibility of the defendant as a witness. We have before stated that she gave an explanation with reference to the particular transaction charged, which, if believed, would have resulted in a verdict of acquittal. The court directly invited to the attention of the jury the consideration of the evidence referring to the previous transactions by instructing the jury as to the purpose for which such evidence was received. We think that the testimony, not being completed with a showing as to why the checks were not paid by the banks, should have been withdrawn from the consideration of the jury and stricken from the record.

[4] We think it cannot be said that a miscarriage of justice has not resulted. After hearing the defendant's testimony the jury might have adopted her version of the transaction charged; with the evidence of previous transactions of alleged like kind, the jury would most likely have drawn the inference that in the prior transactions appellant had committed similar offenses, without understanding that that proof failed to establish that the acts so described were guilty ones.

The claim as to other alleged errors, as made by appellant, we think, is without merit.

The judgment and order are reversed.

We concur: CONREY, P. J.; SHAW, J.

181 Cal. 696

WESTERN SALT CO. v. CITY OF SAN DIEGO. (L. A. 5252.)

(Supreme Court of California. Dec. 16, 1919.)

1. MUNICIPAL CORPORATIONS ⟸741(1) — CLAIM FOR DAMAGES MUST BE PRESENTED TO COUNCIL WITHIN SIX MONTHS AFTER ACCRUAL.

In action against city for damages suffered by collapse of a dam constructed as part of city waterworks under San Diego City Charter, art. 2, c. 2, § 1, par. 29, plaintiff's failure to have presented claim to city council within six months after occurrence from which the damage arose *held* to bar recovery under article 2, chapter 2, § 10, presentation of such claim being necessary regardless of whether liability of city was incurred in the exercise of powers not governmental in character.

2. MUNICIPAL CORPORATIONS ⟸723½—CHARTER PROVISION REQUIRING PRESENTATION OF CLAIMS TO CITY COUNCIL VALID.

San Diego City Charter, art. 2, c. 2, § 10, requiring claims against city for damages to be presented to city council and filed with the clerk within six months after the accrual of damages, *held* valid as against contention that it was in conflict with the general law at time of amendment to Constitution of 1896, and was therefore not revived by such amendment, which made charter supreme in municipal affairs; such statute relating to the method of securing payment for claims against a municipality as an agency of the state.

In Bank.

Appeal from Superior Court, Orange County; Hugh H. Craig, Judge.

Action by the Western Salt Company against the City of San Diego. Judgment for defendant, and plaintiff appeals. Affirmed.

Leovy & Leovy, of San Diego, for appellant.

T. B. Cosgrove, of San Diego, for respondent.

WILBUR, J. This action was brought to recover damages suffered by the plaintiff by reason of the collapse of the "lower Otay dam" constructed by the defendant city and maintained by it as a part of its municipal waterworks. A general demurrer to the complaint was sustained, and a judgment rendered for the defendant.

[1] The defect in the complaint to which the demurrer was directed and to which our attention is called is the failure therein to allege the presentation of the claims for damages to the city council of the defendant city within six months after the accrual of the damages. The freeholders' charter of the city provides as follows:

"All claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose." Section 10, art. 2, ch. 2, San Diego Charter; Stats. 1889, p. 658.

This provision of the charter of San Diego was considered by this court in bank in Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712. It is there held that the failure to present a claim for damages to the city council within six months was fatal to the cause of action. It was there said:

"This charter expressly requires all claims for damages to be presented within six months, not to an auditor or auditing committee, but to the legislative body of the city. Coupled with the other provisions which expressly require the presentation of all claims and demands and authorize the auditing committee to take testimony, and upon that to reject or allow, there can be no doubt as to the policy adopted in this charter."

Damages therein sued for were damages for change of grade of the street. The only way in which the appellant in the instant case seeks to break the force of the decision in Bancroft v. City of San Diego, supra, is by the contention that the rule for the presentation of claims is different with reference to those claims incurred by the city in exercising its governmental powers and those incurred in the exercise of powers in private enterprises undertaken by the city. This dis-

tinction was drawn by the Supreme Court of the state of Nebraska in Henry v. Lincoln, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. (N. S.) 174, and seems also to be recognized by the Supreme Court of Massachusetts in D'Amico v. Boston, 176 Mass. 599, 58 N. E. 158. These decisions, however, turn upon the language of statutes there under consideration and the local legislative and judicial history involved in their interpretation. The claim for damages here presented by the plaintiff in his complaint comes within the language of the charter requiring "all claims for damages" to be presented to the common council. The same charter which provides for the presentation of claims for damages also authorizes the city to establish and maintain waterworks. Paragraph 29, § 1, c. 2, art. 2, Charter of San Diego; Stats. 1889, p. 653. Under these circumstances we see no opportunity for any construction of the language with reference to presentation of claims based upon the fact that some of the powers of the city enumerated in the charter are governmental in character and others authorize the establishment by the city of enterprises which partake of a private character. In either event the city is acting as such, and the damages which accrue against it, under the law, are chargeable against the city.

It is suggested by appellant that perhaps this court recognized the distinction now sought to be invoked in the case of Bloom v. City of San Francisco, 64 Cal. 503, 3 Pac. 129. But it appears from the records in that case and the decision of this court in Lehn v. San Francisco, 66 Cal. 76, 4 Pac. 965, and the later case of Spangler v. City of San Francisco, 84 Cal. 12, 20, 23 Pac. 1091, 18 Am. St. Rep. 158, that the basis of that decision was the conclusion that the consolidation act (sections 24, 82–85, Stats. 1856, pp. 169, 170; see, also, Stats. 1858, p. 235) did not require the presentation before judgment to the board of supervisors of the city and county of San Francisco of unliquidated claims for damages. See, also, Bank of California v. Shaber, 55 Cal. 322, 325. The reason for this type of legislation, requiring claims to be first presented to the legislative body of a city or county before suit is brought is thus stated in an early case in this state:

"We think the intention of the Legislature was to prevent the revenue of the county from being consumed in litigation, by providing that an opportunity of amicable adjustment should be first afforded to the county, before she could be charged with the costs of a suit." McCann v. Sierra County, 7 Cal. 121.

A similar reason was given for the rule requiring a presentation of claims to an executor or administrator. Ellissen v. Halleck, 6 Cal. 386. This reason applies with like force to all claims against a city, however originating.

[2] It is, however, claimed that this provision of the charter is invalid for the reason that the freeholders' charter conflicts with the general law, and is only supreme in "municipal affairs," and that where the provision of the charter was adopted, as here (in 1889), before the amendment of 1906, such provision thereof, if in conflict with the general law, was then invalid because of such conflict, and was not revived by the amendment of 1896 to the Constitution, which amendment makes the charter supreme in "municipal affairs." This contention is predicated upon the proposition that by the general law a complaint for damages is a sufficient presentation of a demand against an individual or private corporation. The question involved here, however, is an entirely different one, namely, the method of securing payment of claims against a municipality, an agency of the state. There is no general law upon that subject, but the charter of each municipality prescribes the method for such payment. The charter controls and, as the plaintiff has failed to present his claim for damages within the time provided by the charter, the demurrer was properly sustained.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; LENNON, J.

181 Cal. 749

CARTER v. CANTY. (S. F. 8379.)

(Supreme Court of California. Dec. 26, 1919.)

1. PLEADING ⟸48—COMMON COUNTS MAY BE USED TO STATE INDEBTEDNESS.

Notwithstanding the provision of Code Civ. Proc. § 426, that the complaint shall contain a plain and concise statement of the facts constituting a cause of action, the common counts may be used to state a claim for indebtedness.

2. APPEAL AND ERROR ⟸501(3)—SUFFICIENCY OF EVIDENCE NOT REVIEWABLE UNLESS BILL OF EXCEPTIONS SPECIFIES INSUFFICIENCY.

Under Code Civ. Proc. § 648, the sufficiency of the evidence to sustain findings as to indebtedness and on defense of limitations, being findings of fact, cannot be considered on appeal, where the bill of exceptions relied on contained no specification of insufficiency of evidence to support a finding.

3. APPEAL AND ERROR ⟸262(2) — ORDER DENYING NONSUIT IS REVIEWABLE AS ERROR OF LAW WITHOUT EXCEPTION.

An order denying a nonsuit is, under Code Civ. Proc. § 647, deemed to have been excepted to, and may be reviewed on appeal from the judgment as an error of law upon any ground precisely and specifically stated in the motion

for nonsuit, notwithstanding that such review may involve a question of the sufficiency of the evidence to make a prima facie case, and that the bill of exceptions contains no specification of insufficiency to support the finding.

4. TRIAL ⟸419—ERROR IN DENYING NONSUIT NOT WAIVED BY PROCEEDING WITH TRIAL.

An error in denying a motion for nonsuit is not waived by defendant introducing evidence.

5. LIMITATION OF ACTIONS ⟸13—ADMISSION OF INDEBTEDNESS DOES NOT PRECLUDE DEFENSE OF LIMITATIONS.

A debtor is not estopped from asserting the defense of limitations by his admission of indebtedness.

6. PLEADING ⟸36(5)—FAILURE TO EXPRESSLY DENY ALLEGATIONS NOT ADMISSION OF THEIR TRUTH.

Where debtor in his answer, relying on the statute of limitations, admits indebtedness and fails to specifically deny allegation that the account sued upon was mutual, there was no such admission in the answer as to preclude defendant from showing in support of his defense of limitations that the account was not mutual.

7. LIMITATION OF ACTIONS ⟸53(3)—FORM OF ACCOUNT NOT DECISIVE IN DETERMINING WHETHER IT IS MUTUAL.

In action by representative of deceased lawyer for unpaid attorney's fees and costs, where the defense was two-year limitations, and plaintiff asserted the indebtedness to be on mutual account, the form or method of keeping the account is unimportant and immaterial, and, if all the items in the expectation of the parties have reference to and are to be adjusted in one accounting, it may be considered as one transaction so far as the statute of limitations is concerned.

8. TRIAL ⟸165—EVIDENCE TO BE REVIEWED MOST FAVORABLY FOR PLAINTIFF ON MOTION FOR NONSUIT.

On a motion for nonsuit, evidence and every fair inference therefrom must be viewed in the light most favorable to the plaintiff.

9. ATTORNEY AND CLIENT ⟸166(1) — EVIDENCE SUFFICIENT TO ESTABLISH CLAIM FOR SERVICES.

In an action by a representative of a lawyer to recover attorney's fees and costs due decedent, evidence *held* to show a valid claim for services.

10. LIMITATION OF ACTIONS ⟸54(2) — MUTUAL ACCOUNT NOT CREATED MERELY BY CHARGES AND PAYMENTS.

That an account consists of items of charges on one side and entries of payments merely on the other side does not make it a mutual account, within the four-year limitation.

11. LIMITATION OF ACTIONS ⟸54(2)—MUTUAL ACCOUNT NOT CREATED MERELY BY CHARGES AND CREDITS.

In an action by the representative of a deceased lawyer on an account for counsel fees and for costs advanced by decedent, the fact that defendant directed the application of money due him from decedent to his indebtedness on more than one occasion did not give the account the character of a mutual account, since such transactions merely operated as credits or payments.

In Bank.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Armenia Carter, as executrix of will of Stanton L. Carter, deceased, against D. J. Canty. Judgment for plaintiff, and defendant appeals. Reversed.

R. B. Tappan and F. A. Berlin, both of Oakland, for appellant.

De Lancey C. Smith, of Oakland, for respondent.

PER CURIAM. This is an action brought by plaintiff, as executrix of the will of her husband, Stanton L. Carter, by which she seeks to recover from defendant a balance claimed to be due for legal services rendered by said Carter to defendant, and for costs paid out by Carter for and on behalf of defendant. The case was tried before the court without a jury, and judgment was given in favor of plaintiff for $1,696.30 with interest. Defendant appeals from such judgment.

In her complaint, plaintiff stated her cause of action in two separate counts, each in the form of a common count, the first being for a balance due upon a mutual, open, and current account for services rendered and money paid out and expended and money advanced in the sum of $2,395.20, less $156 paid; and the second being for a balance due upon a mutual, open, and current book account, for such sum. The judgment was given upon the first count. By his answer, in so far as the first count is concerned, defendant denied any indebtedness in excess of the sum of $1,000, failed to deny that any sum due was due upon a mutual, open, and current account, alleged payment of all amounts due, "excepting only the sum of $1,000," and set up as affirmative defenses that the cause of action was barred by subdivision 1 of section 339, Code of Civil Procedure, and subdivision 2, section 337, Code of Civil Procedure. The trial court found in accord with the allegations of the complaint, except that it found the amount of indebtedness to be $1,852.30 instead of $2,395.30, as alleged, and further found that it was not true or a fact that the cause of action was barred by subdivision 1 of section 339, Code of Civil Procedure, or subdivision 2, section 337, Code of Civil Procedure.

[1, 2] The record on appeal consists of the judgment roll and a bill of exceptions. It is settled in this state that the common counts may be used to state such a cause of

action as is here involved, notwithstanding the requirement of our Code of Civil Procedure (section 426) that the complaint shall contain a plain and concise statement of the facts constituting the cause of action. See Pleasant v. Samuels, 114 Cal. 34, 37, 45 Pac. 998; McFarland v. Holcomb, 123 Cal. 84, 55 Pac. 761; Minor v. Baldridge, 123 Cal. 187, 55 Pac. 783. The findings of the trial court in regard to indebtedness are substantially in accord with the allegations of the complaint except as to amount, and were findings of fact, and not mere conclusions of law, as claimed by appellant. So, also were the findings of the court on the defense of the statute of limitations. None of these findings was attacked in the bill of exceptions by specification of insufficiency of evidence; the bill of exceptions being absolutely barren of any suggestion that either the decision or any particular finding of fact embraced therein is not sustained by the evidence. It is thoroughly settled by our decisions that, in view of our statutes, the question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from a judgment where the bill of exceptions relied on contains no specification of insufficiency of evidence to support a finding. See Millar v. Millar, 175 Cal. 797, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184. This court has been exceedingly liberal in determining whether attempted specifications sufficiently comply with the requirements of the law, but here there is not even the suggestion of an attempt to make any specification. The law in this regard, which is contained in section 648, Code of Civil Procedure, has not been changed by recent amendments of other sections. It follows that we are not at liberty to consider any claim that any finding is not sufficiently supported by the evidence.

[3, 4] At the conclusion of plaintiff's case defendant made a motion for a nonsuit, and this motion was denied. An order granting or denying a nonsuit is, by virtue of our statute, deemed to have been excepted to. Section 647, Code Civ. Proc. An exception to this ruling was also expressly reserved. Undoubtedly this ruling may be reviewed upon this appeal as an error of law, upon any ground precisely and specifically stated in the motion for nonsuit (see Martin v. Southern Pacific Co., 150 Cal. 124, 131, 88 Pac. 701), notwithstanding that such review may involve a question of the sufficiency of evidence to make a prima facie case for a plaintiff. Plaintiff claims that, inasmuch as defendant proceeded with his case after denial of the motion and introduced evidence, such ruling will not be reviewed; the theory being that under such circumstances the only question is whether the evidence actually given by both parties was such as to sufficiently support the findings, and, there being no specification of insufficiency of evidence, that question cannot be considered. An error in denying a motion for a nonsuit is not waived by a defendant solely by reason of the fact that after such denial he introduces evidence in defense. The rule enunciated by our decisions in this respect is substantially simply to the effect that the order denying the motion will not be disturbed, although at the time such order was made it was well based, if the defect is overcome by evidence subsequently introduced. In other words:

"If all the evidence given on the trial by both plaintiffs and defendant, considered together, sufficiently supports the verdict, 'the order denying the motion for a nonsuit will not be disturbed, however weak the case may have been at the time plaintiff closed his evidence.'" Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 576, 98 Pac. 678.

This does not mean, however, that the ruling on the motion for nonsuit may not be considered on an appeal where, after denial of the motion, the defendant has introduced evidence. The situation described in the foregoing quotation accomplishes no more than to establish that the error in denying the motion for nonsuit was without substantial prejudice, and it devolves on the plaintiff to show that such a situation exists. Of course, we will always consider any claim that a defect was supplied by evidence subsequently introduced, and, if we find such claim well based, disregard the error in denying the motion. Here it is not suggested that any alleged defect was so supplied. By reason of his failure to specify particulars wherein the evidence fails to support the findings defendant is vitally interested in having the alleged error in the ruling on motion for nonsuit reviewed, and we are satisfied he is not precluded from so doing.

[5, 6] The substantial question arising in the matter of the denial of the motion for nonsuit is on the defense of the statute of limitations, which defendant claims was established by the evidence introduced by plaintiff. Defendant by his answer did substantially admit an indebtedness of $1,000, and appears throughout his answer to both counts to have been most particular to make it plain that his denial of indebtedness was limited to any indebtedness exceeding $1,000. Clearly he was not entitled to a nonsuit on any ground of want of proof of indebtedness. He also apparently failed to deny that in so far as the admitted indebtedness was concerned it was upon "a mutual, open, and current account." The case was, however, tried upon the theory that its character as to being a mutual account or not was in issue, and it was upon the theory that it was not a mutual account that the defense of the statute of limitations was mainly based. If it was not a mutual account, the claim of plaintiff was

wholly barred. Defendant was not estopped by his admission of indebtedness from asserting his affirmative defense of the statute of limitations, for there is nothing inconsistent between the admission of indebtedness and such affirmative defense. It is elementary law that the statute of limitations does not extinguish a debt, but simply operates to bar a recovery thereon. Nor do we think it may fairly be held that there was any such admission in the answer as to preclude defendant from showing, in support of this defense, that the account was not a mutual account. There was no express admission as to the character of the account, but simply a failure to expressly deny, and the allegation of payment of all sums, excepting the sum of $1,000, said "whether said sums were due upon a mutual, open and current account, or for services rendered, or for money paid out or expended, or for money advanced, or in any other wise."

[7] The deceased, Stanton L. Carter, died December 31, 1910, and this action was commenced within four years thereafter, viz. on December 23, 1914. The evidence introduced by plaintiff showed that for some six years immediately preceding his death Mr. Carter had been acting as the attorney for defendant in various matters of litigation, some of which were still pending at the time of his death, and that there was then an unsettled account between them, consisting on Mr. Carter's side of claims for legal services and money advanced by him for costs. There was no formal general book account kept by Mr. Carter, showing all his transactions with defendant; the various entries so far as made, with one exception, being made on sheets of paper constituting a "loose-leaf ledger account" with relation to specific matters of litigation, the entries as to each matter being on the sheet devoted to that matter, and some of the charges made for services not having been actually entered on any account until after Mr. Carter's death. The one exception noted was that one of these leaves contained what was called a general account, which included some few of the matters relied on. But, as said in Millet v. Bradbury, 109 Cal. 173, 41 Pac. 866, with relation to a mutual account:

"It is immaterial whether the account of these transactions is kept by one or by both of the parties, nor is the form in which the account is kept material. 'The particular mode of keeping the account, whether on book or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different forms * * * is unimportant. If all the items in the expectation of the parties have reference to, and are to be adjusted in, one accounting, it may be considered as one transaction, so far as the statute of limitations is concerned.'"

[8, 9] Upon Mr. Carter's side, as has been noted, there were the charges for money advanced for costs, etc., of litigation and for legal services. Bearing in mind the well-settled rule that, on a motion for a nonsuit, the evidence, and every inference that may be fairly drawn from it must be viewed in the light most favorable to the plaintiff's claim (Rauer v. Hertweck, 175 Cal. 280, 165 Pac. 946), it must be held further that the evidence sufficiently showed a valid claim accruing as of the date of death of Mr. Carter (December 31, 1910) for legal services rendered to that date in cases still pending, and in which he was still acting as Mr. Canty's attorney. There were some such cases, and, altogether regardless of what constituted a proper charge in the various cases, the amount actually charged or some much smaller amount, and also regardless of when the actual entry of charge was made, or even not made at all, such claims were part of the account, becoming such on the date of Mr. Carter's death, December 31, 1910. So that if the account was a "mutual" account, the date of the last item must be regarded as December 31, 1910, and the action was not barred, the statute prescribing four years on such an account where it is still open and current (section 337, Code Civ. Proc.), and providing that "the cause of action is deemed to have accrued from the time of the last item proved in the account on either side" (section 344, Code Civ. Proc.).

On Mr. Canty's side the account, with two possible exceptions consisted solely of payments by him to Mr. Carter, the last of these payments being one of $100 on the day of his death or the day before. As it is universally recognized that an account consisting of items of charges on one side and payments merely on the other is not a "mutual" account (see Norton v. Larco, 30 Cal. 126, 89 Am. Dec. 70; Rocco v. Klein, 74 Cal. 526, 16 Pac. 323; Santa Rosa Bank v. Barnett, 125 Cal. 407, 58 Pac. 85; 1 Corpus Juris, 598), plaintiff is compelled to rely upon the two possible exceptions as giving to the account the character of a mutual account embracing reciprocal demands, and this claim presents the principal question in the case. As to these we are satisfied that there was nothing in the evidence from which it could fairly be inferred that they were anything more than mere payments on account, and were so regarded and intended by the parties.

The first of these was a credit of $38.25, of date August 10, 1907. As to this the written evidence was a loose ledger leaf showing debits and credits in the case of Canty v. Englund, in which Mr. Carter was Canty's attorney. On the debit side thereof were charges for money paid out by Carter in the case, aggregating $86.75, and the credit side, "Cr. by cash coll. on judg." $125. The debit

side was posted to show, with an item "Cr. balance $38.25," a total of $125, to correspond with the total on the other side. Underneath the postings and on the credit side was entered, "Aug. 10. Credit to Canty by balance $38.25." The only other evidence as to this was given by Mr. Royle A. Carter. He said that the money was collected August 10, 1907. He further said:

"My father notified Mr. Canty that there was $38.25 to his credit. He told me to apply it on his account. Canty told me about it after my father's death. He told me that the amount of credit due him in that case had been applied on account of my father's account. That was applied in 1907, August 10th."

[10] We have here an attorney attending to various law matters for a client, and advancing moneys for costs therein, and a client whose only apparent dealings in a business way with his attorney were to pay him for his services and advances. As the result of a certain piece of litigation there remains in the attorney's hands, after payment of costs thereof, $38.25. When the attorney notifies the client that he has in his hands this sum of money belonging to the latter, it is agreed that "it," i. e., that sum of money, shall be applied on his, the client's account, meaning, of course, on the indebtedness due from the client to the attorney. The sum is actually applied on the written account in the manner already described. To our minds no inference may reasonably be drawn from this situation other than that this transaction was mutually intended to operate as payment pro tanto of the indebtedness of Canty to Carter, leaving Canty without any demand or right of action for the money. If this be so it could not have the effect, in view of our own decisions and the overwhelming weight of authority elsewhere, to give to the account the character of a "mutual" account, one where there are reciprocal demands between the parties.

[11] Much reliance is placed by learned counsel for plaintiff upon the case of Copriviza v. Rilovich, 4 Cal. App. 26, 87 Pac. 398. In the opinion in that case the District Court of Appeal fully recognized the law to be as we have stated it, but concluded that it could not be held that there was not sufficient evidence to sustain a conclusion that certain moneys advanced by the defendant to third parties at the request of the plaintiff were not intended as payments, although the facts were such that the decision might well be the other way. We have no disposition to here question the correctness of the conclusion reached in that case, but it certainly goes to the border line, and the case is distinguishable in its material facts from this case.

The second item relied on was one in the general account, which consisted on the debit side of certain charges for services and some small items of expenditure, aggregating in all (to and including February 1, 1910) $220.11, and on the credit side of the account, to and including December 31, 1910, of the following: "July 11, 1910, Cr. Cash coll. Rent Land $40." and "Dec. 31, Cash 2 cks. $100," being the credit for the check or checks for $100 delivered on the day of Mr. Carter's death or the day before. The item of July 11, 1910, is the one relied on by plaintiff. It appears to be conceded by the briefs of both parties that the circumstances of the application of this credit were the same as in the case of the $38.25 item, and the same conclusion must be reached in regard thereto.

There were two certain credits to Canty of dates subsequent to Carter's death, being $40 collected for rent, and $116 in settlement of a case in 1912 and 1913. These credits cannot be held to affect the question of the mutuality of this account, which must be determined by the situation as it existed at the time of Mr. Carter's death. In addition to this, the testimony of Mr. Royle A. Carter shows that these sums so collected were applied in the same way was precisely as was the $38.25.

In view of what we have said, it follows that it must be held that the evidence of plaintiff clearly showed that there was no mutual account, and that her cause of action was therefore barred by the statute of limitations, no item of his charges being within two years prior to the commencement of his action. Code Civ. Proc. § 339. It follows that the motion for nonsuit should have been granted.

The judgment is reversed.

ANGELLOTTI, C. J., and SHAW, LAWLOR, WILBUR, LENNON, and OLNEY, JJ., concur.

181 Cal. 742

In re BAIRD'S ESTATE.

BAIRD v. BAIRD et al.

(S. F. 8997.)

(Supreme Court of California. Dec. 23, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⟸333—DECREE DISTRIBUTING ESTATE TERMINATES JURISDICTION TO SELL LAND.

Upon the making of a decree distributing the estate of decedent, or a part thereof, the court in probate loses jurisdiction of that property, except so far as may be necessary to compel the executor or administrator to obey the decree and deliver the property to the distributee, and, after making of a decree of distribution of land to a certain heir, the court had no authority to order the executor to sell the land distributed, notwithstanding Code Civ. Proc. § 1049, which declares an action to be pending until the time for appeal has passed, and section 473.

2. EXECUTORS AND ADMINISTRATORS ⟸333—JURISDICTION TO SELL LAND TERMINATED BY DECREE OF DISTRIBUTION NOT RESTORED BY APPEAL.

Since by a decree distributing the estate of a decedent the superior court had divested itself of all jurisdiction over the property distributed, except in such proceedings as it might lawfully entertain in the way of a review, such as a motion for a new trial, or a motion under Code Civ. Proc. § 473, to vacate the decree, it had no power to order the executor to sell the land distributed, and such jurisdiction was not restored by an appeal subsequently taken from the decree of distribution, the appeal merely transferring to the appellate court, during the pendency of such appeal, jurisdiction of the distribution ordered.

Department 1.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

In the matter of the estate of David J. Baird, deceased. From an order for the sale of real property belonging to the decedent, David Jennings Baird, Jr., appeals. Reversed.

C. M. Fickert and E. A. Cunha, both of San Francisco, for appellant.

Alexander T. Vogelsang, Vogelsang & Brown, Mastick & Partridge, Karl C. Partridge, W. F. Stafford, H. I. Stafford, and Stafford & Stafford, all of San Francisco, for respondents.

SHAW, J. This is an appeal by David Jennings Baird from an order for the sale of the real property belonging to the decedent.

On April 9, 1914, David Jennings Baird filed a petition in the proceeding for the administration of the estate of David J. Baird, praying for a distribution to him of a part of the property of the estate. He claimed the right thereto on the ground that he was the illegitimate son of the decedent, duly legitimated by the decedent in the manner provided in section 230 of the Civil Code. The decedent had no other children, and the claimant, if lawfully legitimated, would be the only heir of the decedent. This claim was contested by the next of kin. A trial was had, and judgment was given against the claimant. This judgment was reversed on appeal by the Supreme Court. Estate of Baird, 173 Cal. 617, 160 Pac. 1078. Thereupon there was a new trial of the matter before a jury. A verdict in favor of the claimant was rendered on November 28, 1917. Upon this verdict a decree distributing to said David Jennings Baird the lands in controversy was made on June 14, 1918.

In the meantime, on May 1, 1918, Brown, as executor, filed a petition for an order authorizing him to sell the said lands, on the ground that such sale would be for the advantage, benefit, and best interest of the estate and of the persons interested. This petition came on for hearing on June 3, 1918, upon objections filed by said claimant, and was thereupon submitted for decision. On July 22, 1918, more than a month after the court had made the order distributing the land to said David Jennings Baird, the court made an order authorizing Brown, as executor of said estate, to sell the same land at public auction. The latter is the order appealed from.

[1] Upon the making of a decree distributing the estate of a decedent, or a part thereof, the court in probate loses jurisdiction of that property, except so far as may be necessary to compel the executor or administrator to obey the decree and deliver the property to the distributee. Code Civ. Proc. §§ 1666, 1697; Morffew v. S. F., etc., Co., 107 Cal. 594, 40 Pac. 810; Wheeler v. Bolton, 54 Cal. 305; Buckley v. Superior Court, 102 Cal. 10, 36 Pac. 360, 41 Am. St. Rep. 135; Barker v. Stanford, 53 Cal. 455; More v. More, 133 Cal. 495, 65 Pac. 1044, 66 Pac. 76. It necessarily follows that the court below, after the making of the decree of distribution, had no authority to order the executor to sell the land distributed, and that the order of sale was erroneous.

This rule is not affected by section 1049 of the Code of Civil Procedure, declaring that an action is deemed to be pending until its final determination upon appeal, or until the time for appeal has passed. By its order the superior court had divested itself of all jurisdiction over the property distributed except in such proceedings as it might lawfully entertain in the way of a review, such as a motion for a new trial, or a motion under section 473, Code of Civil Procedure, to vacate the decree on the ground that it was made through mistake, inadvertence or excusable neglect. It had no power to proceed

regarding this property in the way of administration.

[2] It appears from our own record that an appeal to this court from the decree of distribution was taken after the making of the order of sale. This did not restore jurisdiction to the superior court, or impart validity to the order of sale. It merely transferred to this court, during the pendency of such appeal, jurisdiction of the distribution ordered. If that order be affirmed, the proceeding for the sale would necessarily lapse. Estate of Garrauds, 36 Cal. 280. If it should be reversed, the jurisdiction of the superior court over the proceeding to sell, which was suspended during the time of the pendency of the appeal from the decree of distribution, would be revived and the court would then have authority to proceed with the matter of the sale.

The order of sale is reversed.

We concur: LAWLOR, J.; OLNEY, J.

181 Cal. 745

In re JEPSON'S ESTATE.

NIELSEN et al. v. JEPSON.

(L. A. 6253.)

(Supreme Court of California. Dec. 23, 1919.)

1. WILLS ⇐753—WHETHER LEGACY IS GENERAL OR SPECIFIC DEPENDS ON TESTATOR'S INTENT.

Though legacy is general unless clearly specific, especially if of a pecuniary character, the intent of testator necessarily controls, and where it appears that his intent was to give a particular thing, or a given sum of money, not generally, but only from a specified and definitely ascertained source, effect will be given to such intent.

2. WILLS ⇐754 — LEGACY OF MORTGAGES SPECIFIC.

Legacy of specifically described mortgages is specific, and not general.

3. WILLS ⇐754, 767—LEGACY OF MORTGAGE IS SPECIFIC AND ADEEMED BY CANCELLATION OF MORTGAGE.

Legacy "of the sum of $12,000, which is invested at interest as follows," specifying property subject to mortgages in such amount, and providing that the interest upon the specified mortgages should go to testator's wife, *held* a specific, and not a general or demonstrative, legacy, and did not entitle legatees to be paid out of general assets of estate, where mortgages had been paid and canceled before testator's death.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Frederick Emil Jepson, deceased. From a decree of distribution in favor of Elise Jepson, Jacob Charles Nielsen and others appeal. Affirmed.

See, also, 174 Cal. 684, 164 Pac. 1; 176 Cal. 648, 170 Pac. 1182; 172 Pac. 1107.

Stewart & Stewart, of Los Angeles, for appellants.

Frank Stewart, J. W. Howell, A. I. McCormick, and E. G. Deery, all of Los Angeles, for respondent.

LENNON, J. This is an appeal from a decree of distribution. Appellants claim as beneficiaries under a legacy the subject of which was the sum of $12,000 invested at interest in certain mortgages. The mortgages in question were paid and canceled before the death of the testator. The lower court held that the legacy was specific, and that there was therefore, a plain case of ademption. Appellants, on the other hand, contend that the legacy was general or demonstrative, and that they are consequently entitled to $12,000 out of the general assets of the estate.

The disposing clauses of the will read as follows:

"As I have recently sold the greater part of my real property and thereby rendered worthless the will made by me two years ago, I do with this instrument hereby declare that upon my death my wife Elise shall have the following and shall have the right to freely dispose of the same: All real property of which I may be possessed. Also: Cash money and bank deposits and all of my personal property, with the exception: Of the sum of $12,000 which is invested at interest as follows: $7,000.00 upon property at Nos. 173–175 Linden street, Yonkers, N. Y.; and $5,000.00 on property at No. 45 Park Hill Ave., Yonkers, N. Y., the interest upon these mortgages amounting together to $12,000.00 shall go to my wife Elise to be used for her benefit as long as she lives: In the event of the said mortgages or any part thereof being paid the sum so paid shall be reinvested in a similar manner. Upon the death of my wife Elise, the above-mentioned sum of $12,000.00 shall go to the children of my deceased brother Jacob Jepsen and my deceased sister Christine. * * *"

[1] While it is true that a legacy is presumed to be general unless it clearly appears to be specific, especially where it is of a pecuniary character, the intent of the testator necessarily controls, and where it appears that his intent was to give a particular thing or a given sum of money, not generally, but only from a specified and definitely ascertained source, the court has no choice but to give effect to that intent.

[2] Unquestionably the legacy under consideration in the instant case would have been specific had its subject been described as the mortgages themselves rather than as a given sum of money. Charworth v. Beech, 4 Ves. Jr. 555. But the fact that the "sum of $12,000" was named as the subject of the

legacy does not make it general or demonstrative if the testator intended to bequeath the very sum which was owing to him on the mortgages in question. In other words, if it was the sum owing on the mortgages which was bequeathed, and that sum, for the sake of convenience, was described as amounting to the total of the sums secured by the mortgages, the legacy must be considered specific. Davies v. Morgan, 1 Beav. 405; Gillaume v. Adderley, 15 Ves. Jr. 384.

[3] Considering first the words of the will itself, it will be noted that the testator does not bequeath *any* sum of $12,000 or $12,000 *out* of a specified fund, but *the* sum of $12,000 which was invested at interest in a designated manner. It is true that the fact that the word "sum" as used tends to show that the question of the particular source of the amount named was of secondary importance in the mind of the testator. But, on the other hand, it may equally well be argued that the fact that the source is named tends to show that it was not $12,000 generally which was bequeathed, but that the testator at least had a preference that it should come from the source named. And if the testator was merely expressing a preference and nothing more, it is, to say the least, singular that he did not use language apt to indicate the mortgages as merely the fund or source out of which he desired an independently existing gift to be satisfied. In re Pratt [1894] 1 Ch. 491. Again, it is provided in the will that the income from the sum mentioned shall go to the wife of the testator during her life, the income being described, not as the interest on $12,000 generally, but as "the interest upon *these mortgages*." (Italics are ours.) Moreover, it is provided that in the event of the payment of the said mortgages or any part thereof "the sum so paid" shall be reinvested. It is significant that this provision is not framed in terms permitting the investment of $12,000 or of any sum from the general assets of the estate, but requires the reinvestment of the proceeds of the mortgages described. Finally, it is provided that upon the death of the testator's wife the nieces and nephews should have not any $12,000, but the "above-mentioned sum of $12,000."

Taken singly, as well as when they are construed together, these provisions indicate, we think, an intent on the testator's part to dedicate the sum invested in the specified mortgages, and that sum alone, to the satisfaction of the legacy.

This construction is also supported by the authorities. A very similar situation was presented in Le Grice v. Finch, 3 Mer. 50. Sir William Grant in that case construed a will which recited that it was the wish of the testatrix and her mother that the £500 which they then had out on mortgage should be given to the plaintiff and bequeathed that sum accordingly. It was held that the circumstance that the sum was out on mortgage was merely incidental and constituted no ingredient in the gift, which was therefore construed as a general legacy. The authority of this case was somewhat shaken by Gardner v. Hatton, 6 Sim. 93, where the language of the will was as follows:

"Also I give and devise the interest of £7,000 secured on mortgage of an estate at Worstead in the county of Norfolk, belonging to Mr. Robert Tuck. * * *"

Sir L. Shadwell, V. C., noted the construction adopted in Le Grice v. Finch, supra, but declined to follow it, holding that this was a plain case of a specific legacy, and that, the testator having received the whole amount of the debt prior to his decease, there was a clear case of ademption. The construction adopted by the learned Vice Chancellor in Gardner v. Hatton, supra, was followed by Sir W. Page Wood, V. C., in Sidebotham v. Watson, 11 Hare, 170. In that case the testator bequeathed to his wife, Mary Ann Orme, "the sum of £500 owing to me by Mr. Robert Leah upon a mortgage of a public house and premises situate on Shaw Heath within Stockport aforesaid, and the interest due thereon at the time of my decease." The court held that the legacy was specific, and while it attempted to distinguish Le Grice v. Finch, supra, it in effect disapproved it. The Le Grice Case was finally expressly disapproved in Harrison v. Jackson, L. R. 7 Ch. D. 339, Jessel, M. R., expressing the opinion that not only was it the intent of the testatrix to bequeath a specified and particularly designated sum, but that upon calling in the mortgage the legacy was adeemed.

To the same effect is Baldwin's Ex'rs v. Baldwin, 7 N. J. Eq. 211. The testator in that case, by the fourth item of his will, directed his executor to pay the interest of a bond and mortgage which he held against one Pruden Alling, for $6,000, to his wife for her life, and then to one Isaac Baldwin for his life, and then to pay the principal sum to Isaac's children. The court held that the legacy was specific. See, also, Hayes v. Hayes' Ex'x, 45 N. J. Eq. 461, 17 Atl. 634; In re Bouk's Estate, 80 Misc. Rep. 196, 141 N. Y. S. 922.

Construing the will in the light of these authorities, we are constrained to uphold the decision of the lower court that the legacy here involved was specific.

The decree is affirmed.

We concur: WILBUR, J.; KERRIGAN, Judge pro tem.

(181 Cal. 700)

STACKPOLE v. PACIFIC GAS & ELECTRIC CO. (S. F. 8597.)

(Supreme Court of California. Dec. 16, 1919.)

1. MASTER AND SERVANT ⟸389—EMPLOYER AND INSURANCE CARRIER SUBROGATED TO RIGHT OF CLAIMANT UNDER WORKMEN'S COMPENSATION ACT.

Under Workmen's Compensation Act, § 31, and section 34, subd. "f," the act of plaintiff in collecting compensation from his son's employer worked an assignment to the employer or insurance carrier of any cause of action against defendant electric company for son's death, and the employer or his carrier could maintain such action in their own names, in view of Code Civ. Proc. § 369.

2. MASTER AND SERVANT ⟸389—SUBROGATED EMPLOYER AND INSURANCE CARRIER NECESSARY PARTIES TO ACTION AGAINST THIRD PERSON FOR DEATH.

Though plaintiff had collected compensation from his son's employer for the son's death due to contact with high-voltage wire of defendant electric company, plaintiff, in view of Workmen's Compensation Act, § 31, still retained an interest in any recovery that might be had against defendant, and was a proper party plaintiff under Code Civ. Proc. §§ 367, 378, but he could not, in view of section 382, prosecute the action without joining as plaintiffs or defendants the employer and insurance carrier.

3. PARTIES ⟸1 — STATUTE AS TO MAINTENANCE OF ACTION IN SOLE NAME OF ONE NOT BENEFICIALLY INTERESTED PERMISSIBLE.

While Code Civ. Proc. § 369, permits in certain cases the maintenance of an action in the sole name of one who is not beneficially interested, or who is not alone beneficially interested, it does not prevent those who are interested from themselves maintaining the action, or being parties to it, in view of section 378.

4. PARTIES ⟸80(1) — TRIAL ⟸169—OBJECTION TO NONJOINDER CANNOT BE MADE ON MOTION FOR NONSUIT.

Objection that there was a nonjoinder of necessary parties must be made in the manner prescribed by statute, and not on motion for nonsuit.

5. ELECTRICITY ⟸16(7) — PROXIMATE CAUSE OF DEATH NEGLIGENCE OF EMPLOYER AND NOT OF ELECTRIC COMPANY.

In action for death of plaintiff's son, resulting from contact with high-voltage wire of defendant electric company, *held*, that proximate cause of death was negligence of son's employer in moving pile driver before wires had been set back as agreed to avoid danger.

In Bank.

Appeal from Superior Court, Marin County; Benj. K. Knight, Judge.

Action by Frank Leslie Stackpole against the Pacific Gas & Electric Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Clayberg & Nutting, of San Francisco, for appellant.

Stanley Moore, of San Francisco (Wm. B. Bosley, of San Francisco, of counsel), for respondent.

OLNEY, J. This is an action by the father of a minor son to recover damages for the latter's death, alleged to have been caused by the defendant's negligence. At the trial a nonsuit was granted at the close of the evidence for the plaintiff, and judgment entered for the defendant, from which the plaintiff appeals.

The motion for nonsuit was upon two grounds. The first was that it appeared from the evidence that the plaintiff's son was killed while in the employ of one Price, and the plaintiff had collected from the insurance carrier for Price the amount to which, as the plaintiff's father he was entitled under the Workman's Compensation Act. Defendant's contention is that any right of recovery which might exist against it because of the defendant's death was by the plaintiff's act in claiming and collecting compensation from the decedent's employer transferred to the latter, and that plaintiff therefore could not maintain the action. This defense is both pleaded and discussed as an objection to the plaintiff's capacity to sue, but it is plain that it is not that. It is an objection, not that the plaintiff has not the capacity to maintain the action, but that he has no cause of action to maintain, that whatever cause of action may exist because of the decedent's death now belongs to some one else.

The contention is based upon section 31 of the Workmen's Compensation Act (St. 1913, p. 295) as it read at the time of the accident. The section was as follows:

"Sec. 31. The making of a lawful claim against an employer for compensation under this act for the injury or death of his employé shall operate as an assignment to the employer of any right to recover damages which the injured employé, or his personal representative, or other person, may have against any other party for such injury or death, and such employer shall be subrogated to any such right and may enforce in his own name the legal liability of such other party. The amount of compensation paid by the employer, or the amount of compensation to which the injured employé or his dependents is entitled, shall not be admissible in evidence in any action brought to recover damages, but any amount collected by the employer, under the provisions of this section, in excess of the amount paid by the employer, or for which he is liable, shall be held by him for the benefit of the injured employé or other person entitled."

[1, 2] This language is plain and unambiguous, at least as far as the present case is concerned. Under its provisions and those of section 34, subd. "f," subrogating the in-

surance carrier to the rights of the employer, the act of the plaintiff in collecting compensation from his son's employer worked an assignment to the latter or to the latter's insurance carrier of any cause of action against the defendant for the son's death, and the employer or his carrier could maintain such action in their own names. On the other hand, the father, the plaintiff, remained interested in any recovery that might be had, to the extent of any excess recovered over the amount necessary to reimburse the employer or his carrier.

There is nothing novel in the situation so presented. It is the familiar case where a chose in action is transferred, either by voluntary assignment or otherwise, so that the transferee has the right to bring and maintain an action upon it, but the transferor, the original owner, still retains an interest in the right sought to be enforced. So far as the question of proper parties, plaintiff or defendant, is concerned, there is no difference between the situation in the present case and that presented, for example, in the case where the owner of an assignable chose in action assigns it, but the assignment is by way of security, so that the assignor still has an interest. The transfer in the one case is worked by operation of law according to the statute, and in the other by voluntary assignment, but the situation created by the transfer is the same in both.

It is a situation that is governed by the Code sections with relation to parties to actions. Section 367, Code of Civil Procedure, provides that every action must be prosecuted in the name of the real party in interest except as provided in section 369. Section 369 provides, among other things, that a person expressly authorized by statute may sue without joining with him the persons for whose benefit the action is prosecuted. Such cases as the present clearly come within this provision, since the section of the Workmen's Compensation Act (section 31) just quoted expressly authorizes the employer to maintain the action in his own name, and by necessary implication, without joining the original owner of the cause of action, the employé injured, or the representatives of the employé killed.

[3] It is familiar law, however, that section 369 is, in accordance with its language, permissive and not exclusive in its operation; that is, while it permits in certain cases the maintenance of an action in the sole name of one who is not beneficially interested, or who is not alone beneficially interested, it does not prevent those who are interested themselves maintaining the action or being parties to it. Such right is, in fact, expressly given by section 378, Code of Civil Procedure, which reads:

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title."

The injured employé, or in case of his death those having a cause of action because of his death, clearly have an interest in the recovery against a third person responsible for the injury or death, even though compensation has been paid by the employer, because of the right given them to any excess recovered over the amount necessary to reimburse the employer for the compensation he has paid. They therefore come within the provisions of the section just quoted, and are, with the employer, proper parties plaintiff. This was held in Bassot v. United Railroads, 177 Pac. 884.

The situation then being that the plaintiff in the present case was a proper party plaintiff because of his interest in the recovery, the case comes directly within section 382, Code of Civil Procedure, which reads:

"Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint."

The plaintiff could therefore have maintained the present action, jointly with his son's employer or the latter's insurance carrier if they were willing, or alone if they were not, making them in the latter case parties defendant. This was held in Hall v. Southern Pacific Co., 180 Pac. 20.

[4] In the present case neither the employer nor his insurance carrier were made parties, but the plaintiff endeavored to prosecute the action without them, although he had been compensated, and they were directly and beneficially interested in the recovery sought. This he could not do, if suitable objection were made, for they were necessary parties. But the objection is not one which could be made by motion for a nonsuit. The plaintiff had the right to maintain the action, which is all that could be determined on such a motion. The objection is one of nonjoinder of necessary parties, and must be presented in the manner prescribed by the Code for presenting such an objection. For an exactly similar case, see Graham v. Light, 4 Cal. App. 400, 88 Pac. 373. It follows that the nonsuit cannot be maintained on the first ground urged.

The second ground upon which the motion for nonsuit was made was that negligence on the part of the defendant did not appear. The facts, as shown by the evidence, are: The defendant is a light and power company, and, as a part of its plant, maintained a power line of 2,300 volts carried on poles along the side of a country road in Marin county. The line was carried 22 feet or more above the ground on cross-arms, which, in addition to the power wires, carried two other wires, either telephone or telegraph.

The wires were originally insulated, but the insulating material had come loose and in places was hanging in strips. The decedent's employer, Price, obtained a contract from the county to put in a bridge on the road. To do this work Price wished to drive some piles, using a pile driver. The piles were to be driven beside the roadbed, and the wires of the pole line of the defendant were so close that it was necessary to move them in order to place the pile driver, extending above them, in position. Price several times spoke to the local agent of the defendant about moving the wires, and he agreed to move them, but it was not done. Price finally, without waiting any longer for the wires to be set back, proceeded to move the pile driver in. In the course of doing this, it either came in contact with a power wire or came so close to it as to establish a connection between the wire and a wire cable running over the sheave at the top of the pile driver, with the result that the current passed down the cable and killed the decedent, who had had hold of the cable on the ground. Both Price and his foreman knew that the wires were power wires.

[5] It is perfectly apparent from the foregoing facts that the proximate cause of the decedent's death was not any negligence on the part of the defendant, but was the negligence of Price in moving in the pile driver before the wires had been set back so as to avoid danger. The fact that the defendant delayed setting back the wires, although it had promised to do so, or even though we assume it was its duty to do so, is wholly immaterial. The utmost responsibility which would attach to the defendant for such delay would be to compensate Price for the consequent delay to his work. But it was not the delay in setting back the wires that killed the decedent, but the moving in of the pile driver before they were set back and were safely out of the way.

Plaintiff's counsel contend that the defendant was negligent in maintaining a high-voltage line along the highway without placing upon the post or cross-arms any sign indicating that the line was a high-voltage line. But no sign was needed; for the fact that it was a power line must have been evident, and in the present case was actually known. Price and his foreman testified that they knew it, but that they did not know it was carrying a voltage as high as 2,300, or any voltage so high as to be dangerous to life. But it is a matter of common knowledge that any line carrying electricity for power is dangerous to a more or less degree, and here Price's foreman testifies that just prior to moving in the pile driver he called up the defendant's power house and inquired the voltage of the line, and that the person who answered said he was not familiar with the particular line, but that they had lines in that vicinity carrying 2,300 volts and others carrying 110. In the light of this information that the line might be carrying 2,300 volts, Price, to put it very mildly, was not reasonably justified in moving in the pile driver, and the responsibility for any accident resulting from his doing so is solely his, and not the defendant's. The situation is not helped by the fact that the insulation on the wire had come loose and was hanging in strips. Observing this, Price must have known that there would be no protection from the insulation, and should have been doubly careful.

It follows that the nonsuit was properly granted upon the second ground urged.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.

181 Cal. 773

WALKER v. HARBOR BUSINESS BLOCKS CO. (S. F. 9016.)

(Supreme Court of California. Dec. 30, 1919.)

1. VENDOR AND PURCHASER ⟸119 — ABANDONMENT OF CONTRACT BY VENDOR JUSTIFYING IMMEDIATE RESCISSION BY PURCHASER.

Where defendant vendor stated that it would be unable to comply with its contract within the prescribed time limit, plaintiff purchaser may bring a rescission action without waiting for the expiration of the time limit named in the contract.

2. CONTRACTS ⟸277(1), 279(1), 313(2)—ABANDONMENT BY ONE PARTY DISPENSES WITH DEMAND AND TENDER OF PERFORMANCE.

The failure or refusal to perform an obligation, assumed expressly or by implication, or the voluntary abandonment of the contract, releases the obligee from the duty of making demand, and performance or tender, and justifies him in abandoning the contract without waiting until the contract period expires, and gives him immediate right of action for the breach and to rescind.

3. FRAUDS, STATUTE OF ⟸131(2)—WRITTEN CONTRACT NOT EXTENDED BY ALLEGED EXECUTORY ORAL CONTRACT.

Under Civ. Code, § 1698, providing that written contracts may be altered only by another writing or an executed oral agreement, and Civ. Code, § 1624, subd. 1, and Code Civ. Proc. § 1973, subd. 1, requiring contracts not to be performed within a year to be in writing, the time within which a vendor had agreed in writing to improve certain lots was not extended two years by an alleged executory oral agreement, or by a written proposition prepared by the buyer, but not signed by him.

4. CONTRACTS ⟸227—ORAL WAIVER OF WRITTEN CONTRACT CONDITIONS VALID.

The conditions of a written contract may be orally waived.

5. VENDOR AND PURCHASER ⊂=143—EVIDENCE SHOWING NO WAIVER OF TIME LIMIT.

Where plaintiff buyer promptly repudiated and rejected letters written to him by defendant vendor, proposing an extension of time for complying with the contract, *held*, there was no waiver of the time limit named in the contract.

6. CONTRACTS ⊂=261(4) — RESCISSION NOT JUSTIFIED BY PARTIAL BREACH.

Where a stipulation does not go to the root of a contract, so that failure to perform would render the rest of the contract different in substance, there is not ordinarily such a breach as will authorize abandonment by the other party, nor is there a fatal breach, where nonperformance of one of the conditions does not materially impair the contract, and may be compensated in damages.

7. VENDOR AND PURCHASER ⊂=110—VENDOR'S FAILURE TO INSTALL AGREED IMPROVEMENTS JUSTIFYING PURCHASER'S RESCISSION.

Under Civ. Code, § 1689, authorizing rescission if the consideration fails in a material respect, etc., purchaser may rescind on vendor's failure to install, as agreed, water pipes, sidewalks, and curbing in and around the lots to be conveyed.

8. VENDOR AND PURCHASER ⊂=76—IMPROVEMENTS BY VENDOR AND PAYMENT BY PURCHASER CONCURRENT CONDITIONS.

Where defendant vendor agreed to put in certain improvements on the lots to be conveyed within the time that plaintiff buyer was paying purchase-price installments, the defendant's agreement to complete the improvements was a condition concurrent with the seller's agreement to pay the last installment.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Archibald Heesom Walker against the Harbor Business Blocks Company, a corporation. Judgment for defendant, and plaintiff appeals. Reversed.

B. M. Jackson, of San Francisco, for appellant.

J. F. Riley, of San Francisco, for respondent.

LAWLOR, J. The appeal is from a judgment entered in favor of the defendant in an action brought by the plaintiff to recover certain money paid to the defendant on the monthly installment plan, under a contract for the purchase of two lots, on the ground that the defendant had breached the contract in that it had failed to put in the street improvements as agreed within the time specified. After judgment the plaintiff moved for a new trial, which motion was denied. The plaintiff thereupon took this appeal.

The plaintiff sued on his own behalf and as the assignee of Hannah Maria Walker, his sister, to recover the aggregate amount of $1,854.26, which was made up of the sum of $1,188.10, alleged to have been paid in installments by the plaintiff to the defendant upon an agreement for the purchase of a certain lot, in Contra Costa county, and of the further sum of $666.16, which the plaintiff alleged had been paid the defendant by Miss Walker, upon a like agreement for the purchase of a similar lot; it being alleged that the defendant had failed to carry out the terms of the agreement to be performed by it, to wit, to put in certain street improvements. Both of these contracts were dated December 1, 1913. They are identical in form; each providing for certain monthly installments to be paid by the vendee thereunder, and each containing the provision that "the final payment shall be made within 42 months from the date of this contract," which would make the date of final payment June 1, 1917. These agreements also each contain the following provision:

"The seller guarantees that it will, within the period named in this contract as the time within which the property herein described may be paid for, plow and roll all streets opened by the seller within the boundaries of the property described in the map above referred to, to the center of said streets in front of each lot in said tract, either oil or macadamize same to said center, and lay cement sidewalks, put in curbing, sewers, and water pipes at its expense."

The amended complaint contains four counts. In the first of these the plaintiff alleges the making of said agreement between the defendant and the plaintiff and the payment by the plaintiff of the installments due thereon up to the 11th day of May, 1917, making a total of $1,188.10. The complaint then alleges that on or about May 17, 1917, the plaintiff was notified by the defendant that the work to be done by it under the above-quoted clause of the contract had not been performed; that on May 21, 1917, the plaintiff tendered and offered to pay the defendant the balance of the purchase money due from him for said property, but that the defendant then and there informed him that the improvements to be made by it as provided in said contract could not and would not be made in any shorter time than two years after the time specified for their completion under the said contract; that plaintiff thereupon demanded the repayment of the money already paid by him as aforesaid to the defendant, which repayment the defendant refused to make. The second count in the amended complaint is simply one for money had and received, in the amount of $1,188.10, by the defendant for plaintiff's use and benefit. The third and fourth counts repeat the allegations of the former two counts with respect to the agreement made by the defendant with plaintiff's sister, who is alleged to have assigned her cause of action to plaintiff. In

its answer the defendant denied any indebtedness whatever to the plaintiff.

At the trial the plaintiff testified, in his examination in chief, to the facts substantially as set forth in the complaint. While testifying he produced certain letters which had been sent to him and Miss Walker during the month of May, 1917. The first of these was addressed to him and was dated May 14, 1917. It referred to his contract of purchase, and stated that "at your request" the time of payment on said contract was to be extended for a period amounting to nearly three years; that is to say, he was to continue his monthly payments at the regular rate of $15 until the balance of the purchase price was paid. Upon receipt of this letter by him, and a similar one by his sister, the plaintiff testified that, on or about May 17, 1917, he and Miss Walker went to the office of the defendant and there stated to Mr. G. W. Smith, the president and manager, that they had not requested or agreed to any such extension of time as was stated in the letters, and that they wanted their money back because the defendant had not kept the agreement in respect to the work of improvement to be performed. On the following day the plaintiff, as he testified, received another letter from defendant, as did also Miss Walker, again purporting to extend the time of payment, but limiting the extension on this occasion to a period of two years, also extending the time for completing the said work of improvement for a like period. Nothing was said in either of these letters, however, to indicate that the extension of time was being made at the request of the plaintiff and his assignor. This extension, the plaintiff testified, had also been repudiated by himself and his sister on May 18, 1917. On May 21, 1917, according to the testimony of the plaintiff and of certain witnesses introduced in his behalf, he and his assignor went again to the office of the defendant, and this time tendered the entire amount due on both contracts, and then and there demanded of the defendant, through its president and manager, that it make deeds to the lots, improved according to the terms of the contracts. The defendant, through its president and manager, declined to make the deeds at that time, for the reason that the improvements had not in fact been made. Thereafter, namely, on June 1, 1917, the plaintiff brought this action.

It appears, however, from the cross-examination of the plaintiff and the direct testimony of Mr. Smith, that upon receipt by the plaintiff of the first letter from the defendant stating that an extension upon the contract for a period approximating three years had been granted at the request of the plaintiff, he had gone to the office of the defendant, where a discussion arose as to the work to be done and the time to which the agreements should be extended; that at such interview the plaintiff had produced a form of extension which he himself had written and which Mr. Smith, acting for the defendant, agreed to adopt; that this tentative form was left with Mr. Smith as the basis of an extension which he was to prepare and send to the plaintiff and Miss Walker. This form of extension reads as follows:

"On account of the failure of the Harbor Business Blocks Company to carry out the terms of the clause named in said contract, to wit: * * * The said Harbor Business Blocks Company hereby extends the time of payment as follows and guarantees that it will within months from date plow and roll all streets, etc., at its expense in accordance with the terms of said contract."

This document was neither dated nor signed. An extension in substantially the language employed in the above form was prepared by Mr. Smith, on behalf of the defendant, and sent to the plaintiff and his sister, through the mails; the plaintiff having given the names and addresses of himself and Miss Walker on the occasion of his visit to the office of the defendant on May 14, 1917.

The court found that all the allegations of the complaint were untrue, except the allegation as to the corporate existence of the defendant, and stated as a conclusion of law that the plaintiff take nothing in this action, and the defendant is entitled to judgment against the plaintiff for its costs.

[1, 2] 1. The respondent contends that the decision of the trial court can be upheld upon the ground that the demand for the deeds to the lots, together with their improvement, was premature, and also that appellant had no right to sue until after June 1, 1917. We think that the position thus taken by the respondent cannot be maintained. It is clear, from the record before us, that the defendant corporation, through its president and manager, had notified the plaintiff and his assignor that it would be impossible to put in the improvements according to the terms of the agreement within the time specified. This was tantamount to a declaration on the part of the president that the corporation could not and would not perform its obligation under the contract within the time prescribed therein. Such being the case, it was not necessary for the plaintiff to defer bringing his action until the full time had expired during which the defendant might have made the improvements. The rule is thus laid down in 7 Am. & Eng. Encyc. of Law (2d Ed.) at page 150:

"The failure or refusal to perform an obligation assumed expressly or by implication, or the voluntary abandonment of the contract, releases the obligee from the duty of making demand, and performance or tender, and justifies him in abandoning the contract without waiting until the contract period expires, and gives him immediate right of action for the breach and to rescind."

See, also, Wolf v. Marsh, 54 Cal. 228; Burks v. Davies, 85 Cal. 113, 24 Pac. 613, 20 Am. St. Rep. 213; Cabrera v. Payne, 10 Cal. App. 678, 103 Pac. 176.

2. Respondent contends, also, that the finding of the court, which is, in effect, that the defendant was not indebted to the plaintiff at the time specified in the complaint, can be upheld on the ground that a new agreement had been entered into between the parties on or about May 17, 1917, whereby the performance of the mutual obligations under the original contract was extended for a period of two years. In support of this contention the respondent relies on the fact that the plaintiff went to the office of the defendant corporation on May 17, 1917, and left the tentative draft for an extension of time, which we have set out above, and which Mr. Smith used as a basis for the letters which were sent to the plaintiff and his assignor on that day. This transaction, respondent argues, furnished sufficient evidence upon which the trial court might have based a finding that the minds of the parties had met and that the new contract had been entered into between them.

Without going into the realm of speculation as to what the trial court might have done it is sufficient to point out that the court did not as a matter of fact make such a finding. But even if the trial court had concluded that a new contract had been entered into between the parties, such a finding could not be upheld. Section 1698 of the Civil Code provides that—

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The evidence shows, without conflict, that a new contract was not entered into between the parties whereby the terms of the original contract were altered. Nor was there an "executed oral agreement." While there is a conflict in the evidence as to whether there was an executory oral agreement that there should be an extension of time for both parties to perform under the contract, the trial court made no finding on this point, and even if this conflict should be resolved in favor of the defendant such a finding would avail the defendant nothing, since the alleged agreement was for a period of two years.

[3] Subdivision 1 of section 1624, Civil Code, and subdivision 1 of section 1973, Code of Civil Procedure, provide that a contract which by its terms is not to be performed within a year from the making thereof is invalid, unless a note or memorandum thereof be in writing and subscribed by the party to be charged. While it may be conceded that the proposed form of extension which was left by plaintiff at the office of the defendant on May 17, 1917, was, in the contemplation of the statute of frauds, such a memorandum, it is clear, nevertheless, that it does not meet the requirements of the statute, for the reason that it was not signed by the party to be charged.

[4, 5] 3. Respondent contends further that the plaintiff and his assignor waived the time of performance of the work on the part of the defendant. That the conditions of a contract in writing may be waived orally is too well established to require citation of authority. But the record before us establishes the fact by uncontradicted testimony that the plaintiff and his assignor did not waive the performance of the work of improvement on the part of the defendant. There is a conflict in the testimony as to what conversation took place between the plaintiff and Mr. Smith on the two occasions that the former visited the office of the defendant. But the point in the proceedings about which there is no conflict, and the element which we think is determinative of the whole matter, is that the letters which were addressed to the plaintiff and his assignor on the two occasions proposing an extension of time were on each occasion promptly repudiated and rejected by them. It cannot, therefore, be said that the plaintiff and his assignor agreed to an extension of time or waived the performance of the work to be done by the defendant.

[6, 7] 4. Another point urged by respondent in support of the action of the trial court in the premises is that the plaintiff has mistaken his remedy in that the alleged cause of action is properly one for damages, and not one for recission, for the reason that the agreement to put in improvements is an independent covenant, not going to the root of the contract. Respondent has cited a number of cases in support of this contention, and it must be conceded to be elementary that—

"Where the stipulation does not go to the root of the contract so that a failure to perform it would render the performance of the rest of the contract a thing different in substance from what was contracted for, there is ordinarily not such a breach as will authorize an abandonment of the contract by the other party. Neither is there a fatal breach in cases where the nonperformance of one of the conditions does not materially impair the benefit from the performance of the others and the loss occasioned by the breach of the particular condition is capable of compensation in damages." 3 Elliott on Contracts, § 2046, p. 230.

In all of the cases relied on by respondent in support of the contention that the covenant, the breach of which is complained of herein, comes within the rule just quoted, the courts have construed the stipulations involved as being independent and not dependent or concurrent. Section 1689, Civil Code, provides that a party to a contract may rescind it, "if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part," and also "if such consideration, before it is rendered to him, fails in a material respect, from any cause." In Blahnik v. Small Farms Improve-

ment Co., 184 Pac. 661, where an action was brought to rescind a contract for the purchase of land on the ground that the vendor had breached the covenant which provided that—

"The seller agrees that it will have the roads in said division R constructed during the fall of 1913 after the rains, or when the ground is able to be worked, and construct the necessary bridges."

The identical point was there raised which is now under consideration here. In passing upon the point, Mr. Justice Shaw, speaking for the court, said:

"The contract shows that in consideration of the price to be paid the plaintiffs were to have the lots described, with roads constructed leading thereto for access and egress. *That the roads were a material part of the consideration which they were to receive is apparent.* The complaint alleges that the defendant failed and refused to render this consideration within the time fixed in the contract. That part of the consideration had failed through the defendant's fault. Where the consideration fails in whole or in part through the fault of the party whose duty it is to render it, the other party may rescind. Civ. Code, § 1689." (Italics ours.)

Construing the contract herein as a whole, we are of the opinion that the consideration for which the plaintiff and his assignor agreed to pay the sums specified was the lots improved according to the terms of the contract. While it appears from the testimony of Mr. Smith that a large part of the work had been done; that all of the streets in the tract had been opened and that the plowing, rolling and grading had been done thereon; that there had been constructed "a main sewer for two blocks down Twenty-Third street, and all the laterals in the upper part of the tract surrounding this entire block in which the lots are located"; and that these sewers were connected with an outlet. He also testified on cross-examination that there was a large part of the work which had not been done, namely, that there had been no water pipes, sidewalks, or curbing put in. It is thus apparent that there was a failure of the consideration of the obligation to pay to the extent that the lots were less valuable without the improvements than with them; also that it was a failure of the consideration "in a material respect" before it was rendered—that is to say, before the title was conveyed. The cost of these improvements would certainly amount to a considerable sum, and the value such improvements would add to the lots must be presumed to be a material part of the consideration to the vendees.

[8] Furthermore, we think that the agreement to put in the improvements was a condition concurrent with the agreement to make payment of the last installment. As we have seen, the latter was to be made within 42 months from the date of the contract. The seller was given the same length of time to complete the improvements. Fairly construed, it must be held that the final payment of the purchase price and the completion of the work were due on the same day.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.: OLNEY, J.; J. SHAW, J.; LENNON, J.; WILBUR, J.

44 Cal. App. 313

KAUFMANN v. NEW YORK LIFE INS. CO.

(Civ. 2977.)

(District Court of Appeal, First District, Division 2, California. Nov. 17, 1919. Rehearing Denied Dec. 16, 1919.)

1. DEATH ⟸2(3) — PRESUMPTION FROM ABSENCE REBUTTABLE.

The presumption of death based on seven years' absence is controvertible, and may be rebutted by proof of facts and circumstances sufficient to overcome it.

2. DEATH ⟸4—FINDING OF DILIGENT INQUIRY TO ESTABLISH PRESUMPTION OF DEATH OF ABSENTEE SUSTAINED BY EVIDENCE.

Evidence of diligent inquiry to establish presumption of insured's death, arising from seven years' absence, *held* sufficient to sustain court's finding that such inquiry was made.

3. APPEAL AND ERROR ⟸1010(1)—FINDINGS BASED ON EVIDENCE NOT DISTURBED ON APPEAL.

Where the trial court has found on an issue and there is some evidence to support it, the finding, if sound as a matter of law, will not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Mary Kaufmann against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McCutchen, Willard, Mannon & Greene, of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of plaintiff and against the defendant on a policy of life insurance issued by the defendant to plaintiff's husband, who it is claimed was presumed to be dead because not heard from in seven years. The defendant denied the death of the insured and the receipt of proofs of death.

The evidence in support of the allegations of the complaint was that plaintiff and the insured were married in 1903, and lived together in harmony until 1909, when, without

plaintiff's knowledge, her husband withdrew all of the money deposited to his credit in certain savings banks in San Francisco. He failed to come home for his lunch on that day, as was his custom, and plaintiff has not heard from him since. A letter dated the same day, and received by plaintiff on the day following, bade her good-by in the following terms:

"Good by I am gone can't stand it any longer I am so nervous and can't rest must find reliefe I don't care what become of me My Life is not worth living any longer * * * Good by Dear Mary and Got bless you for you are a good true Weman and believe me I have been true to you and always tried to make a good comfortable living for you but I can not stand this strain any longer Good by Got bless you Your loving Husband E. Kaufmann."

Soon after the disappearance plaintiff and one other reported the fact to the manager of the defendant company and were assured by him that the defendant would make a search for the insured. A detective employed by the company was assigned to that work. A number of witnesses who had known the insured in his lifetime were produced at the trial. They all testified that they had heard nothing of him since his disappearance. The complaint was filed in June, 1918, more than nine years after the date of the disappearance. Ample proof was made of the receipt of proofs of death, based upon the presumption. The only points urged upon appeal are: (1) That the circumstances surrounding the disappearance may be inquired into to rebut the controvertible presumption of death of a person not heard from in seven years; and (2) diligent inquiry must be made to establish the presumption of death of a person not heard from in seven years.

[1] (1) The first point raised is conceded by respondent, as it may well be, without having any effect upon the judgment. The presumption of death, based upon seven years' absence, is a controvertible one, and may be rebutted by proof of facts and circumstances sufficient to overcome it. No such facts are in evidence in this case, and the court did not deny appellant the opportunity to make proof of such facts if any existed.

[2, 3] (2) It may be conceded for the purpose of this opinion that diligent inquiry must be made to establish this presumption of death. Here the trial court found that such diligent inquiry had been made. When respondent rested her case appellant offered no evidence. The facts as outlined above show that some inquiry was made. Whether such inquiry was diligent depends upon all the facts and circumstances of the case. Respondent testified that she did make inquiry, and detailed some instances where such inquiry was made. The trial court, having before it the evidence of this inquiry, could properly determine whether it was diligent. Though the testimony upon the issue may be meager or insufficient in itself, the evidence consists of such testimony and all legal presumptions and inferences which may be drawn upon the issue tendered. Where the trial court has found upon the issue and there is some evidence to support it, the finding, if sound as a matter of law, will not be disturbed on appeal.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 307

PEOPLE v. BRESHI et al. (Cr. 479.)

(District Court of Appeal, Third District, California. Nov. 17, 1919.)

1. CRIMINAL LAW ⊂⊃240—COMMITMENT FOR ROBBERY INCLUDES COMMITMENT FOR ATTEMPT.

When defendants were held by the committing magistrate for the crime of robbery, they were held also for the crime of attempt to commit the offense; the lesser being included in the greater.

2. CRIMINAL LAW ⊂⊃230—PRELIMINARY EXAMINATION SUFFICIENT.

Preliminary examination of defendants for robbery *held* a substantial compliance with Pen. Code, § 858, requiring that defendant be taken before the nearest magistrate, that depositions and warrant with return indorsed be delivered to him, and that the magistrate then proceed as on a warrant issued by himself.

3. CRIMINAL LAW ⊂⊃968(1)—MOTION IN ARREST GOES ONLY TO SUFFICIENCY OF INFORMATION OR JURISDICTION.

A motion in arrest of judgment goes only to the sufficiency of the information to state a public offense, or to the jurisdiction of the trial court.

4. CRIMINAL LAW ⊂⊃274—NO ABUSE OF DISCRETION IN REFUSAL TO PERMIT WITHDRAWAL OF PLEA OF GUILTY OF ATTEMPT AFTER PLEA OF GUILTY OF OFFENSE ITSELF.

Refusal of trial court to permit defendants to withdraw their pleas of guilty of an attempt to commit robbery *held* not an abuse of its discretion, in view of the court's great consideration and care for all rights of defendants, who first pleaded guilty of robbery, were allowed to withdraw that plea and pleaded not guilty, then withdrew such plea and pleaded guilty of attempt.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Dino Breshi, Thomas Littlejohn, and Joe Caneva were convicted of robbery, and Littlejohn and Caneva appeal. Affirmed.

W. C. Cavitt, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

ELLISON, Presiding Judge pro tem. The defendants above named were jointly charged by information filed by the district attorney of Placer county, state of California, of the crime of robbery, alleged to have been committed upon one Henry Wortell, by taking from his person by means of force and intimidation the sum of $185, lawful money of the United States. To this information the defendant Dino Breshi pleaded guilty and was sentenced to imprisonment in the state prison. The defendants Thomas Littlejohn and Joe Caneva pleaded guilty to the offense of an attempt to commit robbery, which plea was accepted by the court, and they, too, were sentenced to a term in the state prison.

The defendants Littlejohn and Caneva appeal from the judgment and for reversal claim:

(1) That they have never been examined and committed for the crime of an attempt to commit robbery, and therefore that the plea of guilty to such an offense is a nullity; (2) that the proceedings in the justice court at the preliminary examination were illegal, because, as claimed, the defendants were not properly arraigned and sufficiently informed of their rights, and upon this ground in the superior court a motion was made in arrest of judgment and denied; (3) that the court abused its discretion in not permitting the defendants Littiejohn and Caneva to withdraw their plea of guilty of an attempt to commit robbery and permit them to enter a plea of not guilty and go to trial before a jury.

I. Section 1159 of the Penal Code provides that the jury may find a defendant guilty of any offense the commission of which is necessarily included in that of which he is charged, or of an attempt to commit the offense.

[1] When the defendants were held by the committing magistrate for the crime of robbery, they were held also for the crime of an attempt to commit such an offense, the lesser being included in the greater. In People v. Ah Lung, 2 Cal. App. 278, 83 Pac. 296, it is said:

"It must be held that every information charging a public offense includes an attempt to commit the crime charged."

[2, 3] II. The record shows that at the preliminary examination the court used the following language to the defendants:

"The Court: You, the defendants, are instructed and advised that you are entitled to counsel at every stage of these proceedings; that you are not required to talk, or make any statement, or take the witness stand as a witness, but you may take the witness stand, however, and if you do you will be subject to cross-examination by the district attorney and also by the court. You may call such witnesses to testify on your behalf as you may desire. Have you an attorney?

"Defendants: No, sir."

"The examination was then proceeded with, and the defendants held to answer to the superior court on the charge of robbery."

This was in substantial compliance with section 858 of the Penal Code. But if the fact were otherwise, a motion in arrest of judgment only goes to the sufficiency of the information to state a public offense or to the jurisdiction of the court. No point seems to have been made by counsel in this case that the information filed against the defendants does not in all particulars state facts sufficient to constitute the crime of robbery. The motion in arrest of judgment was properly denied.

[4] III. The court did not abuse its discretion in refusing to permit the defendants to withdraw their plea of guilty of an attempt to commit the crime of robbery. A brief reference to what occurred in the superior court in the matter of the plea of the defendants will be sufficient to show that the court acted with the greatest consideration and care for all their rights.

The record shows that on April 14, 1919, the defendants appeared in the superior court for arraignment. After the information had been read to them, the court asked each of the defendants if he had a lawyer, and received a negative answer. Each was asked if he wanted one, and each replied no. They were then asked if they were ready to plead guilty or not guilty, and each answered that he pleaded guilty. Upon being told by the court that they were entitled to have the matter of pronouncing sentence put off for a time, each expressed a desire to have the matter then disposed of. The defendants were then called to the witness chair separately, and, without being sworn, were questioned by the court at considerable length about their antecedents, age, place of birth, residence in the state, and the facts connected with the commission of the offense with which they were charged. The defendants, in effect, stated that, while they pleaded guilty to the crime of robbery, they were not guilty, and made some other remarks along those lines.

After the conclusion of this examination of the defendants, which was quite lengthy, the court, of its own initiative, and without any suggestion therefor from the defendants, or either of them, said:

"I will put the matter off until 10 o'clock tomorrow. You can make up your minds between now and 10 o'clock to-morrow whether you want to withdraw your plea of guilty or not. I want to say to you, if you did not commit the robbery, of course you should not plead guilty. If

you did commit it, it is your own affair whether you plead guilty or not; and, if you want to withdraw your plea by 10 o'clock to-morrow, I will permit you to do so, and then you can stand trial."

On the next day, after some remarks between the court and the defendants, the court said:

"You can both withdraw your pleas of guilty and tender pleas of not guilty, if you desire."

Whereupon both defendants withdrew their pleas of guilty, and each entered a plea of not guilty to the offense. The court thereupon sent for an attorney, Mr. Slade, and upon his appearance appointed him as an attorney to defend the two defendants. They retired to an adjoining room for consultation, and, upon their return to the courtroom, the court, with the approval of Mr. Slade, appointed Friday, April 18th, as the time for trial, and a jury was ordered to appear at that time. On Thursday, April 17th, the defendants and their attorney, Mr. Slade, appeared in court, and Mr. Slade informed the court that, after an examination of the record made in the justice's court at the preliminary examination, he wished to withdraw their plea of not guilty of robbery, and that each desired to enter a plea of guilty of an attempt to commit robbery. Mr. Slade also stated to the court that, in view of the record at the preliminary examination and subsequent arraignment before the said superior court, a trial would be practically without hope of a favorable verdict for the defendants. Said defendants, upon being asked by the court if they desired to plead guilty of an attempt to commit robbery, assented thereto. Said plea was entered, and the court thereupon adjourned until April 18th, at 10 o'clock, to permit the introduction of a witness on behalf of each defendant.

On the ensuing day, April 18, 1919, the defendants appeared before the court, and Mr. W. A. Cavitt appeared as counsel for the defendant Littlejohn, and moved the court for permission to withdraw the plea of guilty of an attempt to commit robbery and enter a plea of not guilty of an attempt to commit robbery. Mr. Slade made a like motion on behalf of Mr. Caneva. The court stated there had already been three pleas interposed in the action and there would have to be something presented to the court to convince the court that the defendants were not guilty, or that there was quite reasonable ground for questioning their innocence. The court said:

"The defendants, of course, have not a right to withdraw a plea arbitrarily, and particularly not after having tendered three pleas. But the court would even for a fourth time permit such procedure if in the interest of justice. Now, if the defendant has witness whose testimony he can submit to the court tending to show his innocence, why the court will permit the withdrawal of the plea; otherwise, the court will deny the motion."

After a discussion between the court and the attorneys relative to testimony introduced at the former hearings against defendants, the court denied the motion to withdraw the pleas of guilty of an attempt to commit robbery, stating that he had no reasonable doubt or otherwise that defendants were guilty. An exception was thereupon noted by the attorney for the defendant Littlejohn, and the court proceeded to hear testimony in mitigation of sentence.

An application also was made by the defendants for probation, and upon which testimony was also taken by the court. The application for probation was denied, and the defendants sentenced to the state prison.

A bare recital of the above facts is sufficient to show that the court did not abuse its discretion in refusing to permit the defendants to withdraw their plea of guilty of an attempt to commit robbery.

"It is wholly within the discretion of the court whether a plea of any sort may be withdrawn. Permission may always be granted, but unless an abuse of discretion is shown, the refusal of permission to withdraw a plea is not error." 12 Cyc. 350.

It is contended by counsel that there has been an abuse of discretion in this case, but a thorough perusal and study of the entire record, in the language used by Justice Henshaw, in People v. Miller, 114 Cal. 17, 45 Pac. 988, "not only fails to show an abuse of discretion, but, to the contrary, from first to last, makes manifest that the trial judge * * * conducted all the proceedings with a just and even solicitous regard for the defendant's rights, and ruled as alone it was permissible for him to rule under the facts before him."

An examination of the record made at the preliminary examination and of the testimony taken in the superior court upon the hearing of the various matters that came up during the arraignment and sentence of the defendants amply justified the court in stating that there was no reasonable grounds for questioning the guilt of the defendants.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

44 Cal. App. 320

MacINTOSH v. CHICAGO ELECTRIC MOTOR CAR CO. (Civ. 2470.)

(District Court of Appeal, Second District, California. Nov. 17, 1919.)

LIVERY STABLE AND GARAGE KEEPERS ⚖6—EVIDENCE INSUFFICIENT TO SUPPORT VERDICT FOR GARAGE KEEPER FOR LABOR AND MATERIALS.

In an action by a garage keeper for the reasonable value of work and labor done and materials furnished, evidence *held* insufficient to support a judgment for plaintiff in the amount entered by the trial court.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Elsie D. MacIntosh, doing business as the Washington Street Garage against the Chicago Electric Motor Car Company. Judgment for plaintiff, and defendant appeals. Reversed.

Frank W. Wheeler, of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

SHAW, J. In this action the court found that defendant was indebted to plaintiff for the reasonable value of work and labor done and materials furnished at the defendant's special instance and request, in the sum of $679.26. In accordance with such finding, judgment was rendered for plaintiff, from which defendant appeals, claiming the finding is not supported by the evidence.

Testimony was received tending to prove that plaintiff, at defendant's request, repaired an electric car, the reasonable value of which service was $350; upon another car, put in new spring bolts and glass, the value of which was $5.25; and furnished garage service of the value of $81.60, making a total of $436.85. In addition to this testimony, plaintiff introduced no evidence other than some memoranda made upon loose sheets of paper, duplicates of which were sent to defendant after it had gone out of business, and which memoranda were made at or about the dates shown thereon. No proof whatever was made that the so-called charges therein appearing were reasonable, nor any explanation made as to the meaning of the entries, without which they were wholly unintelligible. The memoranda are headed, "Chicago Electric Motor Car Co., 3612 S. Morgan Street, Chicago, Illinois," and among other like entries therein is the following: "Nov. 1, 7 Hub odometers, held for credit, $20.00, 140.00." This item and charge, without suggestion or statement of its meaning, was by the court included as a part of the indebtedness found due to plaintiff. It is impossible to understand why defendant should be charged $140 for seven hub odometers which plaintiff holds for defendant's credit. There is no evidence whatever that defendant is indebted in the sum named for the odometers, to plaintiff. Indeed, we are justified in assuming they were by defendant consigned to plaintiff, who held them subject to the former's order. Another item, likewise under date of November 1, 1914, is, "Toilet case and vase shortage on Model 142, shipped in Dec., $17.00," with the notation, "Mr. Penrose Reed can tell you about it." Another charge included in the amount found due by the court is, under the head of "Advertising under contract," $101.98. There is no finding that any contract existed under which plaintiff was authorized to charge defendant any sum for advertising. Neither is there any allegation in the complaint that plaintiff expended any money for and on behalf of defendant. In short, in the jumbled record a large part of which appears to relate to another action upon a promissory note, brought by a plaintiff other than a party to this suit and against defendants, one of whom is a stranger to this action, we find no legal proof whatever that defendant is indebted to plaintiff in any sum other than the $436.85, notwithstanding which fact the court, upon such unwarranted finding, has rendered judgment for $679.26. The finding is not supported by the evidence, and the judgment is therefore reversed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 227

UNITED STATES FILM CO. v. UNITED STATES FIDELITY & GUARANTY CO. (Civ. 2300.)

(District Court of Appeal, Second District, Division 1, California. Nov. 8, 1919.)

1. PLEADING ⚖248(1)—STATEMENT OF NEW CAUSE OF ACTION IN AMENDED COMPLAINT NOT PERMISSIBLE.

Amended complaint must not state a new and distinct cause of action from that contained in the original complaint.

2. APPEAL AND ERROR ⚖900 — RULINGS OF COURT OF GENERAL JURISDICTION PRESUMED REGULAR.

On appeal every presumption must be indulged in favor of the regularity of the rulings of a court of general jurisdiction.

3. APPEAL AND ERROR ⚖901 — APPELLANT MUST PRODUCE RECORD SHOWING ERROR COMPLAINED OF.

Appellant, complaining of errors made by the trial court, must produce a duly authenticated record affirmatively showing alleged error, otherwise the court on appeal must, if under any circumstances the ruling can be deemed correct, assume that such condition or circumstance was made to appear.

4. APPEAL AND ERROR ⟸907(3)—ERROR NOT SHOWN BY JUDGMENT ROLL WILL NOT BE CONSIDERED ON APPEAL ON ROLL ALONE.

On appeal on judgment roll alone, where appellant claims that court erred in permitting respondent to file amended complaint setting up a new cause of action, court will assume that appellant consented to the filing thereof where judgment roll does not show objection thereto, notwithstanding there is printed in the transcript a copy of a minute order showing objection; such entry being no part of the judgment roll under Code Civ. Proc. § 670, and therefore not to be considered.

5. APPEAL AND ERROR ⟸883 — DEFENDANT CONSENTING TO FILING OF AMENDED COMPLAINT CANNOT COMPLAIN THEREOF ON APPEAL.

Defendant who consents to the filing of an amended complaint cannot complain on appeal that such amended complaint set up a new cause of action.

6. APPEAL AND ERROR ⟸1229, 1241 — AMOUNT SPECIFIED IN APPEAL BOND RECOVERABLE ON APPELLANT'S FAILURE TO DELIVER PROPERTY AS DIRECTED BY JUDGMENT.

Where judgment directed defendant to deliver certain property or pay specified amount on default thereof, defendant's failure to deliver the property within a reasonable time after Supreme Court had affirmed the judgment and transmitted remittitur to trial court constituted a breach of defendant's undertaking on appeal requiring defendants to obey any order of appellate court, and entitled plaintiffs to recover the amount of money specified in the undertaking to be paid in lieu of the delivery of the property; such right not being affected by tender of the property during a trial on the undertaking.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the United States Film Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Patterson Sprigg, of San Diego, for appellant.

Lewis R. Kirby, of San Diego, and Charles E. Dow, of Los Angeles, for respondent.

SHAW, J. In an action brought by this plaintiff against one J. Arthur Nelson, the subject of which was the right to the possession of a certain moving picture film entitled "Slim and the Mummy," valued at $1,000, the court rendered a judgment requiring Nelson, defendant in said action, to deliver the same to plaintiff. Defendant appealed from the judgment, and, for the purpose of staying execution thereof, procured defendant herein to execute an undertaking in the sum of $1,000, conditioned as required by section 943, Code of Civil Procedure, that appellant should obey any order of the appellate court made on said appeal. The judgment was affirmed and the remittitur filed with the clerk of the lower court on March 28, 1916, notice of which fact was, on April 7, 1916, duly given to defendant's attorney of record. No delivery, however, of the film was made, and on May 4, 1916, plaintiff demanded of defendant herein payment of the sum of $1,000, found by the court to be the value thereof, and which sum defendant by said undertaking agreed to pay in the event of Nelson's failure to deliver the film. In the absence of such delivery and payment of said sum so demanded not being made, plaintiff, on May 5, 1916, brought this action to recover upon the undertaking, and as a result of the trial thereof judgment was rendered in favor of plaintiff, from which defendant has appealed upon the judgment roll alone.

[1] The chief error complained of is that the court erred in permitting plaintiff during the trial to file an amended complaint, over the objection of defendant that the undertaking declared on in the original complaint was a different undertaking from that set forth in the amended complaint, and therefore the last complaint stated a new and different cause of action from that involved in the original complaint; in other words, that the cause of action set forth in the amended complaint was a new and distinct cause of action from that contained in the original complaint, a course of procedure which, as held in Bowman v. Wohlke, 166 Cal. 128, 135 Pac. 37, Ann. Cas. 1915B, 1011, is not permissible.

[2-5] On appeal every presumption must be indulged in favor of the regularity of the rulings of a court of general jurisdiction. Hence, where an appellant complains of errors committed by the trial court, it devolves upon him to produce a duly authenticated record affirmatively showing the alleged error; otherwise the court on appeal must, if under any circumstances the ruling could be deemed correct, assume that such condition or circumstance was made to appear. As stated, the appeal is on the judgment roll alone, and, while there is printed in the transcript a copy of a minute order showing that defendant objected to the filing of the amended complaint, such minute entry is no part of the judgment roll (Code Civ. Proc. § 670), and, since the alleged erroneous ruling is not authenticated as required by law, we cannot review the error predicated thereon for the purpose here invoked by appellant. Nolte v. Nolte, 29 Cal. App. 126, 154 Pac. 873; De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787. In the absence of any record showing that defendant objected to the filing of the amended complaint, we must assume, for aught that appears to the contrary, that defendant in express terms consented to the filing thereof, in which case, conceding that without such assent the court erred, it is in no position to complain.

[6] As stated, the defendant in the suit of this plaintiff against Nelson was notified on April 7, 1916, that the Supreme Court had affirmed the judgment from which the appeal was prosecuted, and transmitted the remittitur therein to the clerk of the trial court. The failure within a reasonable time to deliver the film as required by the judgment constituted a breach of the undertaking and agreement contained therein for such conditional delivery, for which breach plaintiff was entitled to recover the sum thereby fixed by the court as the value of the property. The court found that not until July 12, 1916, and after the commencement of this action and during the progress of the actual trial thereof, was a delivery tendered, and that such delay in delivering the film was without excuse or justification. Plaintiff's right to recover the amount of money specified in the undertaking to be paid in lieu of the delivery of the property so ordered was unaffected by the tender thereof made during the trial.

There is no merit in appellant's contention that plaintiff in its action should have sued for a delivery of the personal property, rather than for the amount specified in the undertaking.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 196

ROSENBERG et al. v. ROGERS. (Civ. 2021.)

(District Court of Appeal, Third District, California. Nov. 7, 1919. Hearing Denied by Supreme Court Jan. 5, 1920.)

1. CONTRACTS ⟸10(4)—BUYER'S OPTION AS TO ACCEPTING DEFECTIVE GOODS NOT VOID FOR LACK OF MUTUALITY WHERE PART OF CONTRACT SUPPORTED BY CONSIDERATION.

Option given to buyer by fig crop sale contract to accept or reject defective figs was not void for lack of mutuality, being part of the entire contract, which was supported by mutual promises and a money consideration.

2. SALES ⟸71(4)—OBLIGATION TO DELIVER ENTIRE CROP SOLD NOT AFFECTED BY BUYER'S RIGHT TO REJECT DEFECTIVE PORTION.

Seller of "entire crop of figs" to be grown under contract requiring seller to deliver crop free from defective figs in merchantable condition, and making it optional with buyer to reject defective figs, required seller to tender the defective as well as the good figs.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Abraham Rosenberg, Adolph Rosenberg, and Max L. Rosenberg, doing business under the firm name and style of Rosenberg Bros. & Co. against S. M. Rogers, sometimes known as Hattie L. Rogers. Judgment for defendant, and plaintiffs appeal. Reversed.

T. W. Ward, of Merced, for appellants.

F. W. Henderson, of Merced, for respondent.

ELLISON, Presiding Judge pro tem. On the 29th day of January, 1918, the parties hereto entered into a written contract for the sale of a crop of figs, the property of the defendant, to the plaintiff. We quote from the contract the following paragraphs:

"In consideration of prices per lb. dried herein specified, Mrs. S. M. Rogers and McDonald Bros., sellers, has sold, and Rosenberg Bros. & Co., buyer, has bought the *entire crop* of figs stated herein grown during the current year on place known as Rogers place, situate in Merced county, Cal., at prices and in quantities (estimated by seller) as follows:

Quantity (Tons)	Variety	Price per lb. In cents.
35 tons	W. Adriatic Figs	8¾¢
200 lbs.	Culls, Birdpecks, etc.	4¢

"Sax furnished by buyer.

"Seller agrees properly to dry, bleach with sulphur on trays, and cure *all of the crop* and to deliver the same thoroughly and properly dried, choice in quality, of good color, ungraded as to size, in original condition, without the addition of water, free from dark and defective figs and damage of every kind and in good merchantable condition at or f. o. b. cars Merced, Cal., and not later than the 25th day of October, 1918. * * *

"It is agreed that, should any fruit tendered on this contract not conform with the above terms and conditions, it shall be optional with the buyer to reject same, or take such fruit in, assort and weigh back at seller's expense, and reject any portion of the lot not so conforming, without in either case relieving the seller from his obligation to deliver any other portion of the fruit herein contracted for.

"Buyer may demand culls of each variety from said crop at a reduction of one cent per pound from the price above specified.

"Seller shall be released from his obligation to deliver any portion of the fruit herein contracted for owing to its destruction by frost or other similar unavoidable casualty."

(Italics the writer's.)

During the season there was grown upon defendant's land a total of 64,801 pounds of figs. Of this amount only 44,499 pounds were delivered to the plaintiff. The remaining 20,302 were sold by the defendant to another party at 13½ cents per pound for 18,100 pounds and 7 cents per pound for 2,202 pounds. After the sale of the 20,302 pounds the plaintiff demanded possession of the same from the defendant, and, the figs not having been delivered, brought this action for damages caused, as alleged, by the defendant's failure to deliver the figs.

The cause was tried before a jury, and the verdict was in favor of the defendant. Judg-

ment was entered accordingly, and from such judgment the plaintiff appeals.

It is set forth in defendant's answer that, after the 44,499 pounds of figs were dried and delivered, heavy and destructive rains fell in Merced county and injured and destroyed said 20,302 pounds of figs and made the same impossible to properly dry, poor in quality, off color, dark and defective, and not in good merchantable condition.

Paragraph II of the answer is as follows:

"Defendant alleges that subsequent and immediately following said rainfall defendant offered to deliver to plaintiff and plaintiff requested instructions from them with reference to the delivery thereof of said 20,302 pounds of figs; that plaintiff notified said defendant that they would not accept said figs; that they would take no figs that were mildewed or damaged by rain. In this connection defendant alleges that practically all of said 20,382 pounds of figs were mildewed and damaged by rain, and that no portion of them measured up to the requirements of said contract with reference to quality and condition of figs to be delivered by defendant as hereinbefore alleged and as in said complaint stated."

It is also alleged in the answer that because of the condition of the figs, in that they did not come up to the standard of the contract, defendant was under no obligation to deliver them nor plaintiff to receive them.

The cause was tried by the court upon the theory that defendant was under no obligation to deliver any figs that did not measure up to the standard fixed by the contract, and specifically was under no obligation to tender any figs that were of poor quality, off color, dark and defective, and not in good merchantable condition.

In its instructions to the jury the court emphasized this view of the case in the modification of certain instructions asked by the plaintiff and in giving certain instructions as asked by defendant. Thus the plaintiff requested the following instruction:

"The court instructs the jury that the burden was upon the defendant to establish each of said defenses by a preponderance of the evidence. [You may believe from the evidence that said figs were to some extent damaged or mildewed by rain, or that they were poor in quality, dark and defective, and not in good merchantable condition, or that they were impossible to properly dry; yet the court instructs you that none or all of said conditions of said figs in any wise excused defendant from delivering said figs to the plaintiff. Under the terms of said contract the only condition by which defendant could be released from his obligation to deliver to plaintiff said figs was the destruction thereof by frost or other similar unavoidable accident.] By the word 'destruction' is meant that which is destroyed, and a thing is destroyed when its value or usefulness is completely taken away.

"Unless you are convinced by a preponderance of the evidence that said 20,302 pounds of figs were entirely destroyed by frost or other similar unavoidable casualty, then I instruct you that it was the duty of defendant to deliver or tender delivery of said figs to the plaintiff *if they were of the kind and quality of figs required to be delivered by the terms of the contract.*"

The court modified the instruction by striking out all inclosed in brackets and by adding the part in italics, and, as thus modified, gave it to the jury.

In order to determine the correctness of the court's action in modifying this and other instructions, a brief reference to the terms of the contract is necessary; for by its terms are the rights and obligations of the parties fixed.

1. The contract states that the buyer (plaintiff) has bought the entire crop of figs on the Rogers place.

2. Seller (defendant) agrees to dry, bleach with sulphur on tray, and cure all the crop and to deliver the same thoroughly, and properly dried, choice in quality, of good color, ungraded as to size, in original condition without addition of water, free from dark and defective figs and damage of every kind, in good merchantable condition, f. o. b. cars at Merced, Cal., not later than October 25, 1918.

3. It was agreed that, should any figs tendered not conform to the above terms and condition, it shall be optional with plaintiff to reject same or take it in, assort and weigh back to seller, and reject any portion of the lot not so conforming.

The plaintiff bought the entire crop of figs at an agreed price. The defendant contracted to care for the crop, cure it, and deliver it in good merchantable condition, as above defined. But it was foreseen that all of the crop, when tendered, might not come up to the above standard. In that event the option was given the buyer to reject such parts as did not conform to the standard or keep it all or such part as it desired and return the remainder to the defendant.

[1, 2] Manifestly, in construing this provision of the contract, the court took the position that, as the buyer was under no binding obligation to accept and pay for any defective figs, the seller was under no obligation to tender them; that as to this clause of the contract there was a lack of mutuality by reason whereof it was not binding on either party. In thus holding there was error. The clause is only a part of an entire contract dealing with the entire crop of figs, supported by mutual promises and by a money consideration. The contract required defendant to cure the entire crop and deliver it all, good and defective, to the plaintiff. It left her no discretion in this regard. The privilege was given to the plaintiff, when figs were tendered, to reject those that did not come up to the standard, or to take part, or all of them, at the contract price.

This provision was inserted for the benefit of the buyer. When figs were ready for delivery, it was contemplated that the market might be such that the buyer could afford to accept defective figs and pay the contract price for them, and he was given the right to do so. It was for the buyer to decide whether the figs were defective or not, and for it to decide what defective figs, if any, it would accept, but nowhere in the contract is there a word looking to the right of the seller to decide what figs she would or would not deliver. Her contract was to deliver them all—those that came up to the standard fixed by the contract and those that did not.

This contract is binding upon her unless for some reason it is unenforceable. It is claimed that it merely gave the plaintiff an option to buy the defective figs; that it could not be compelled to do so, and, being unenforceable against it, it was not enforceable against the defendant; that it lacked mutuality. The entire contract, of which this paragraph is an important part, is supported by a consideration. It deals with the entire crop of figs and was founded upon the mutual promises of the parties and the money consideration agreed to be paid by the plaintiff.

An option given to one to buy either real or personal property, if supported by a consideration, is binding upon the party giving it.

"If an offer to sell is supported by a sufficient consideration, it cannot be withdrawn prior to the time specified." Elliott on Contracts, § 232.

"Quality of goods cannot, in absence of agreement to that effect, be determined by the judgment of one of the parties." 35 Cyc. 225.

"The purchaser has generally the right to an inspection and examination of the goods, in order to determine whether they are of the quality contracted for. It is the duty of the seller to afford opportunity for inspection, and if such opportunity is not afforded or inspection is prevented by the acts of the seller, there is no proper delivery in the performance of the contract." 35 Cyc. 225, 226.

These reflections lead us to the conclusion that the case was tried and submitted to the jury upon an erroneous construction of the contract; that it was the duty of the defendant to deliver all the figs grown on her land during the season of 1918 to the plaintiff, and, if some were defective, give it the opportunity of deciding whether it would accept them and pay the agreed price for good figs, or reject a part or all of them, not coming up to the standard; that their defective condition did not release defendant from her written obligation to deliver all the figs to the plaintiff. It was perfectly competent for the parties to make such a contract and the general consideration of the contract supports all parts of it.

We are also of the opinion that the tendered instruction above quoted contains a clear and accurate statement of the rights and duties of the parties under the contract, and should have been given to the jury without amendment or addition. The error in not giving the instruction as presented was not cured by any other instruction given, but, to the contrary, the same erroneous view of the case was carried into the other instructions.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 174

SPELLACY et al. v. YOUNG et al.

(Civ. 3033.)

(District Court of Appeal, First District, Division 2, California. Nov. 6, 1919.)

1. EXECUTION ⊂⊃256(2) — ALLEGATIONS NOT SUFFICIENT TO SUPPORT CLAIM FOR RELIEF FROM EXECUTION SALE.

Allegations that judgment debtor and his attorney had been absent from city and had had no actual notice that judgment had been entered, or that execution had issued or the sale noticed, in absence of allegations that the notice required by statute was not in fact given, and that execution was not properly issued and the sale legally and fairly conducted, *held* insufficient to support claim for equitable relief from the execution sale.

2. LIMITATION OF ACTIONS ⊂⊃127(12)—AMENDMENT ATTACKING EXECUTION SALE FOR FRAUD STATES DIFFERENT CAUSE OF ACTION FROM ORIGINAL COMPLAINT ALLEGING NONCOMPLIANCE WITH STATUTE.

Amended cross-complaint for setting aside of execution sale on ground of fraud, filed more than four years after discovery of fraud, was barred by limitations, under Code Civ. Proc. § 338, subd. 4, though original cross-complaint, asking such relief because of sheriff's failure to comply with statutory requirements, was filed within required time; the amended cross-complaint, setting up fraud, stating a new cause of action.

3. APPEAL AND ERROR ⊂⊃1011(1) — FINDING ON CONFLICTING EVIDENCE CONCLUSIVE.

Where evidence is conflicting, finding cannot be disturbed.

4. EVIDENCE ⊂⊃432—FAILURE OF CONSIDERATION TO BE SHOWN BY EXTRINSIC EVIDENCE.

Note imported a consideration, and, if none was given, such fact must be shown by other evidence.

5. APPEAL AND ERROR ⊂⊃761 — MERE STATEMENT THAT ERROR WAS MADE NOT TO BE CONSIDERED.

Where assignments of error are merely noted, without any citation of authority or ar-

gument, beyond the bare statement that error was made, court will not consider the point presented.

6. ESTOPPEL ⊂=75—FROM CLAIMING THAT APPARENT OWNER HAS ONLY LIMITED TITLE.

Where a party clothes another with the indicia of ownership of shares of stock, he cannot claim as against bona fide purchaser that the apparent owner has a limited title only when knowledge of the limitation had not been conveyed to purchaser.

7. CORPORATIONS ⊂=123(7)—PLEDGEE OF ASSIGNED STOCK NOT BOUND BY SECRET AGREEMENT BETWEEN ASSIGNOR AND ASSIGNEE.

Bank, which took assignment of stock as security for loan, was not charged with limitation placed on it by borrower's assignor, or of any secret agreement made between borrower and assignor as to use which might be made of assignment.

8. CORPORATIONS ⊂=123(6) — EXECUTION OF RENEWAL NOTE DOES NOT AFFECT STATUS OF STOCK HELD AS SECURITY.

Bank, receiving renewal note to avoid bar of statute of limitation, does not, by retaining stock assignment given it as security for old note, devote such security to a new or different purpose; the old debt not being canceled, and the security being held to secure payment of the same original debt.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action in interpleader by T. Spellacy and another against C. S. Young, R. W. Kemp, the Kern Valley Bank, W. R. Williams, Superintendent of Banks of the State of California, S. Wright Jewett, and E. L. Foster, in which defendant Young cross-complained against defendants Jewett, Kemp, and Foster, and in which defendant Williams cross-complained against defendant Young. Separate judgments for defendants Jewett, Kemp, and Foster against defendant Young, and for defendant Williams as against defendant Young, and defendant Young appeals. Affirmed.

Jos. J. Bullock, of Redwood City, and Jas. Donovan, of Los Angeles, for appellant.

Davis, Kemp & Post, of Los Angeles, for respondents Kemp and others.

A. A. De Ligne, of San Francisco, for respondents Kern Valley Bank and others.

NOURSE, J. This is an appeal in an action in interpleader instituted by the plaintiffs, Spellacy and Mascot Oil Company, a corporation, against various defendants, to determine the title to certain shares of stock of said corporation. The defendant C. S. Young answered, and cross-complained against S. Wright Jewett, R. W. Kemp, and E. L. Foster, attacking their title to 19,400 shares of said stock upon the ground that the sheriff's sale through which they obtained title was illegal and void. The defendant W. R. Williams, superintendent of banks of the state of California, answered, and cross-complained against the said C. S. Young, attacking his title to 2,500 shares of the stock of said corporation as having been deposited with the Kern Valley Bank, a defunct banking corporation, by E. L. Foster, as security for the note of said Foster to the bank. An assignment, absolute in form, from Young to Foster, was turned over to the bank when the note was made. Separate judgments, supported by separate findings, were entered in favor of the defendants Jewett, Kemp, and Foster against C. S. Young, and in favor of the defendant W. R. Williams, as successor in interest to the Kern Valley Bank, against the same party. The case is before this court upon appeals taken from both of said judgments and presented on the same record.

The material facts out of which the interpleader suit originated are these:

In an action between Young and Spellacy, judgment was given in favor of Young to the effect that Spellacy held certain shares of stock in the Mascot Oil Company in trust for Young. In that proceeding Young was represented by E. L. Foster, an attorney at law, and upon the termination of the proceeding suit was instituted by said Foster against Young to recover the sum of $35,000 for professional services in connection with the litigation. At the time of the institution of the latter suit an attachment was attempted to be levied upon the interest of Young in the stock which in the previous litigation had been held to be his. Thereafter judgment was rendered in favor of Foster and against Young for something less than $8,000, execution was immediately issued, and 19,400 shares of the stock of the corporation were sold to Kemp, one of the attorneys for Foster in that proceeding, for $1,940. Immediately thereafter a stay of execution was procured and an appeal filed; judgment being affirmed by the Supreme Court on March 14, 1916. Foster v. Young, 172 Cal. 317, 156 Pac. 476. About the time the notice of appeal was filed, Young, through his attorney, made a motion in the superior court to set aside the execution and sale, upon the ground that neither the defendant nor his attorney had been given notice of the presentation of the findings or of the entry of the judgment. This motion being denied, an appeal was taken from the order upon a bill of exceptions and heard with the appeal from the judgment. Upon this phase of that case the Supreme Court said (172 Cal. 322, 156 Pac. 478):

"The motion as made to vacate and set aside this sale was not based upon any claim of invalidity as to the acts of the sheriff in selling the stock, but upon the sole ground that notice of the making of said findings of fact, and the rendition and entry of the judgment upon which said execution issued, was never at any time served upon defendant, and that he had no notice thereof."

Upon the grounds then urged the Supreme Court affirmed the order denying the motion to set aside the sale. This interpleader suit was instituted in August, 1912, the sale complained of was made in April of that year, and the motion above referred to was made immediately thereafter. In September, 1912, the appellant herein filed an answer setting up the alleged irregularities in the attachment and execution proceedings. However, after the opinion in Foster v. Young was rendered, Young filed an amended and supplemental cross-complaint in the pending action, wherein the sale was attacked upon the grounds that neither Young nor his attorney had any notice that any execution had issued, and that the cross-defendants Foster and Kemp had so arranged said sale that neither Young nor his attorney should know of the same until it had been completed. This amended and supplemental cross-complaint was filed May 23, 1916, more than four years after the sale was conducted. In the amended and supplemental cross-complaint it is alleged that the cross-complainant Young and his attorney learned of this sale upon April 3, 1912, two days after the sale had taken place. No reasons were given for the long delay in seeking relief.

On the trial of the pending action the court refused to admit any testimony in support of this amended and supplemental cross-complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action and that the relief was barred by the statute of limitations. If the court was correct upon these rulings, other points raised by appellant upon this appeal do not require consideration.

[1] The amended cross-complaint sets forth the institution of the action in which the attachment was issued, service of the attachment, the entry of judgment, the sale by the sheriff, the offer to redeem the stock surreptitiously bid in by Kemp, and the offer to pay the entire judgment after it became final, following the opinion of the Supreme Court. The only facts alleged upon which might be predicated any claim for equitable relief are those relating to want of notice of the execution and sale on the part of Young and his attorney. It is not alleged that the notice required by the statute was not in fact given, but merely that Young and his attorney, being far removed from the city of Los Angeles at the time, did not actually know that said judgment had been entered or that the execution had issued or the sale noticed. It is too clear for argument that these allegations, standing alone, do not support a claim for equitable relief, if, as was to be implied from the want of attack, the execution was properly issued and the sale legally and fairly conducted.

[2] The amended cross-complaint attempts to set up a plea for relief from fraud. Such relief is barred within three years from the discovery of the fraud under the provisions of subdivision 4, section 338, Code of Civil Procedure. The amended cross-complaint was not filed until after the expiration of four years from the date of the discovery of the fraud. The original cross-complaint filed by Young against the same parties set up facts relating to this sale in support of a claim that the action taken by the sheriff did not comply with the requirements of the statute relating to attachments and executions. This claim, however, was abandoned upon the filing of the amended and supplemental cross-complaint, and an entirely new cause of action was therein attempted to be stated, to wit, one based upon fraud. This cause of action being barred by the statute, the trial court properly refused to admit evidence in support of it.

The judgment in favor of Jewett, Kemp, and Foster, therefore, must be affirmed.

The appeal from the judgment in favor of the superintendent of banks presents a case similar to the one just discussed, in that the appellant has so delayed seeking a remedy that the court is without power to give him any relief. The court, however, does not on either appeal approve the methods of those lawyers who are responsible for appellant's predicament.

The facts material to the opinion are that on the day the judgment was rendered in favor of Young and against Spellacy, decreeing that Young was the owner of 21,900 shares of the capital stock of the Mascot Oil Company, E. L. Foster, the attorney for Young in that litigation, procured from his client a written assignment to himself of 2,500 shares of the stock of said company in the following terms:

"Los Angeles, Cal., Sept. 5, 1910. I hereby sell, assign and transfer unto E. L. Foster 2,500 shares of the capital stock of the Mascot Oil Company. [Signed] C. S. Young. Witness: G. B. Howell."

This assignment was made out in duplicate; Young retaining one and giving the other to Foster. Foster took his assignment to the secretary of the Oil Company, who indorsed thereon the following:

"I hereby acknowledge receipt of a copy of this transfer."

The secretary signed this with the name of the Mascot Oil Company, by himself as secretary, and affixed the impression of the seal of the company. Thereafter Foster returned to Young and indorsed upon the duplicate copy in Young's possession the following:

"This is to be redeemed at any time. Stock is to be used as collateral security for the loan at the Kern Valley Bank."

This was signed by Foster and witnessed by a disinterested party. Foster then presented to the Kern Valley Bank the copy which he retained in his possession, without, however, indorsing thereon the statement re-

lating to the right of redemption which he had indorsed upon the copy left with Young. Using his assignment as security, he executed a note to the Kern Valley Bank for the principal sum of $2,250, and transferred in writing and delivered to the bank the assignment which he had received from Young. Two days thereafter Young wrote to the president of the bank that the assignment given by him to Foster was for the purpose of obtaining a loan of $1,500, and no greater amount, and that Young reserved the right to redeem, as shown by the inclosed copy of the assignment which Foster had left with him. On the same day Young wrote to the secretary of the Mascot Oil Company, notifying him that the stock was not to be issued without written authorization from himself. A few days thereafter the secretary wrote to Young, notifying him that the assignment left with him by Foster did not contain the notation signed by Foster upon the copy retained by Young. The following day Young notified the president of the bank of his revocation and cancellation of the assignment and forbade any loan to Foster thereon.

This all occurred between the 5th and 12th days of September, 1910. Foster's note was not paid when, on August 6, 1914, which was just prior to the running of the statute of limitations upon the note, he executed and delivered a new note, together with a written agreement to Williams, as successor in interest to the bank, which had failed in the meantime, extending and renewing the indebtedness for the purpose of barring the running of the statute of limitations and continuing the security of the collateral given on the execution of the original note. This action was instituted in the latter part of August, 1912. The cross-complaint of Williams was filed January 10, 1913. It was alleged that the stock was being held by Williams, as superintendent of banks, as collateral security for the payment of $1,750, the balance then due upon the original note.

[3] No legal steps were taken by appellant to cancel the original assignment, and no offer was made to redeem the stock; but appellant relied upon his claim, based upon the oral agreement between Foster and himself, that the stock was to be used solely for the loan of $1,500, $500 of which was to be given to Young and the remainder to Foster. Upon the trial the court found against Young upon this defense. The testimony was directly in conflict and the finding cannot be disturbed.

[4] Appellant cites as error the ruling of the court in admitting in evidence the assignment of Foster to the bank, on the ground that it had no binding effect upon appellant, because the original paper was given to Foster to be used as collateral for a loan of $1,500 and afterwards canceled, and that the use of the stock to secure the extension of the loan was not authorized by Young. This objection went to the weight of the evidence, and not to its admissibility. The assignment was admissible as evidence of what the parties acted upon. What subsequently occurred could be shown by other evidence. The same may be said as to the objection to the admission of the new note on the ground that no consideration was given. The writing imported a consideration, and if none was given that fact must be shown by other evidence.

[5] Other assignments of error are made, covering rulings of the court and findings of fact and conclusions of law; but the assignments are merely noted, without any citation of authority or argument beyond the bare statement that error was made. This court is not required to consider points so presented. Scott v. Times-Mirror Co., 184 Pac. 672. It is argued that, as a certificate of stock is not a negotiable instrument, the assignment given to Foster by Young is not negotiable, and hence the bank took no better title than Foster had.

[6-8] When a party clothes another with the indicia of ownership of shares of stock, he cannot claim as against the bona fide purchaser that the apparent owner has a limited title only, when knowledge of the limitation had not been conveyed to the purchaser. Fowles v. National Bank of California, 167 Cal. 653, 140 Pac. 271. Thus, when the assignment was taken as security for the original loan, the bank was not charged with knowledge of the limitation placed upon it by Young, or of any secret agreements made between Young and Foster relating to the use which might be made of such assignment. When the new note was given in August, 1914, the old debt was not canceled; but the new note was merely evidence of the old and was taken to avoid the bar of the statute of limitations. The security was not then devoted to a new or different purpose, but was held to secure payment of the same original debt.

For the reasons given the judgment in favor of Williams, as superintendent of banks is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 318

SANTA BARBARA COUNTY v. JANSSENS et al. (Civ 2950.)

(District Court of Appeal, Second District, Division 1, California. Nov. 17, 1919.)

1. APPEAL AND ERROR ⊜919—ORDER WITHIN COURT'S JURISDICTION PRESUMABLY CORRECT.

There being nothing in the record upon which to predicate error in an order striking an amended cross-complaint from the files, such order, being within the court's jurisdiction, was presumably correct.

2. SET-OFF AND COUNTERCLAIM ⊜29(1) — CAUSE OF ACTION FOR COMPENSATION NOT PROPER CROSS-ACTION AGAINST SHERIFF FOR STATUTORY LIABILITY.

In statutory action by county for money illegally paid out of treasury, defendant was not entitled to maintain a cross-action for services performed as a matron at the special instance and request of the sheriff of the county; the relief demanded by defendant not being relief "relating to or depending upon the contract or transaction upon which the action is brought or affecting the property to which the action relates," under Code Civ. Proc. § 442.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by the County of Santa Barbara against Domenica L. Janssens and others. From an adverse judgment, certain defendants appeal. Affirmed.

Thompson & Robertson, of Santa Barbara, for appellants.

Wm. G. Griffith, of Santa Barbara, for respondent.

CONREY, P. J. This is an action wherein the plaintiff sought to obtain judgment against the sheriff of the county of Santa Barbara and the surety on his official bond, and the defendant Domenica L. Janssens (her husband being also a party defendant), to recover money alleged to have been paid by the county to Mrs. Janssens, pursuant to an order made by the board of supervisors without authority of law. Judgment having been entered in favor of all of the defendants, and the plaintiff having appealed therefrom, that judgment was affirmed as to the sheriff and his surety, and was reversed as to the other defendants. County of Santa Barbara v. Janssens, 177 Cal. 114, 169 Pac. 1025, L. R. A. 1918C, 558. Thereafter, Stewart having died and an executrix of his will having been duly appointed and qualified, the superior court, pursuant to an ex parte motion of defendant Domenica L. Janssens, made an order that the executrix be substituted in place of Stewart as defendant in this action. We need not now question the propriety of that order, which was made after the judgment in favor of Stewart had become final. Thereupon Mrs. Janssens filed a cross-complaint against the executrix and said surety, which did not allege the presentation of any claim against the estate, to said executrix. Thereafter, Mrs. Janssens presented her claim to the executrix, which was rejected. Thereafter, Mrs. Janssens filed an amended cross-complaint, wherein the presentation and rejection of the claim was alleged. The nature of the cause of action relied upon is shown by the allegation that Stewart "as sheriff of said county of Santa Barbara was indebted to the said cross-complainant in the sum of $1,249.49 for services performed as matron at the special instance and request of the said Nat Stewart as sheriff of the said county of Santa Barbara as provided by law, which services were of the reasonable and agreed value of $1,249.49." Prior to the filing of this amended cross-complaint, judgment was entered in favor of the plaintiff, county of Santa Barbara, against Mrs. Janssens for the amount of plaintiff's demand.

The court having first sustained an amended demurrer to the amended cross-complaint, "without leave to amend," entered judgment that cross-complainant take nothing on her said amended cross-complaint. From this last-named judgment she has taken this appeal. By the recitals in the judgment it further appears that together with their demurrer the defendants to the cross-complaint presented a motion to strike said amended cross-complaint from the files; that this motion was regularly heard and granted. The grounds upon which this motion was based are not shown by the record.

[1] 1. There being nothing in the record upon which to predicate error in the order striking the amended cross-complaint from the files, that order, being within the court's jurisdiction, was presumably correct. This alone is sufficient to prevent a reversal of the judgment, which judgment, in this aspect of the case, amounts to a dismissal of cross-complainant's action.

[2] 2. Cross-complainant's alleged cause of action was not one which entitled her to maintain a cross-action against her codefendants. The relief demanded by her was not relief "relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates." Code Civ. Proc. § 442. The plaintiff's cause of action was one given to the county by statute, to recover money illegally paid out of the county treasury to Mrs. Janssens. The action by her, directed against the estate of Stewart and against the surety on his official bond, is one to recover compensation for services rendered to Stewart, for which it is sought to hold them responsible. That liability, assuming it to have existed, was wholly unrelated to the cause of action of the plaintiff against defendant Mrs. Janssens. She has no more right to maintain

this cross-action than she would have had if Stewart and his surety (who never were liable to the county) never had been named as defendants in the action as presented by the county.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 249

RONCELLI v. FUGAZI et al. (Civ. 2959.)

(District Court of Appeal, First District, Division 1, California. Nov. 12, 1919.)

1. WITNESSES ⟸133 — ADMINISTRATOR INCOMPETENT TO TESTIFY IN ACTION TO ESTABLISH CLAIM AGAINST ANOTHER ESTATE.

An action by an administrator of one decedent against representatives of another deceased person *held* to be one to establish a claim against the estate, and not one to procure relief appertaining to a trust fund, so that the plaintiff administrator, under Code Civ. Proc. § 1880, subd. 3, was not entitled to testify as to any matter or fact occurring before the death of such deceased person.

2. WITNESSES ⟸133 — PARTIES COMPETENT TO TESTIFY TO MATTERS OCCURRING BEFORE DEATH OF DEBTOR WHERE CLAIM IS TO RECOVER TRUST FUND.

Code Civ. Proc. § 1880, subd. 3, prohibiting parties to an action upon a claim against the estate of a deceased person from testifying as to any matter occurring before the death of such deceased, person, does no apply, if the money sued for constituted a trust fund to the possession of which plaintiff in his representative capacity is entitled.

3. TRUSTS ⟸371(1)—COMPLAINT TO RECOVER PROPERTY MUST TRACE TRUST FUND.

An action against the administrator of a deceased person for the recovery of money could not be regarded as a suit to recover a specific trust fund, where the complaint contained no allegation that the trust property, either in its original or changed form, was traceable into the estate of the decedent and into the possession of his administrators.

4. TRUSTS ⟸358(1) — BENEFICIARY MERE CREDITOR WHEN UNABLE TO TRACE FUND.

Where a beneficiary is unable to identify a trust fund or to follow it in its changed form, he is placed in the position of a general creditor.

5. WITNESSES ⟸133—PARTIES INCOMPETENT TO TESTIFY AS TO MATTERS OCCURRING BEFORE DEATH OF DEBTOR.

In an action by administratrix to recover money claimed to be due her decedent from debtor's estate as a trust fund, she was incompetent, under Code Civ. Proc. § 1880, subd. 3, to testify as to matters occurring before death of such debtor, whether the action be regarded as one to establish a claim based on debt, or one growing out of a trust relationship, where she was unable to trace the trust fund in its identical or changed form into the hands of defendants.

6. WITNESSES ⟸139(10) — EXECUTORS AND ADMINISTRATORS ARE "PARTIES" INCOMPETENT TO TESTIFY TO MATTERS OCCURRING PRIOR TO DEATH OF DECEASED.

Executors or administrators are "parties," under Code Civ. Proc. § 1880, subd. 3, prohibiting parties in actions upon a claim against the estate of a deceased person from testifying as to any matter or fact occurring before the death of such deceased person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Party.]

7. EVIDENCE ⟸98 — FINDING FOR DEFENDANT PROPER WHERE BURDEN IS NOT SUSTAINED BY PLAINTIFF.

Where the burden of proof rests on plaintiff and is supported only by desultory and unsatisfactory evidence, objections to findings for defendant are without merit.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Josephine Roncelli, administratrix c. t. a. of the estate of Frank Roncelli, against James Fugazi and others, administrators of the estate of John Fugazi, deceased, to establish a claim against the estate of the latter. Judgment for defendants, and plaintiff appeals. Affirmed.

W. C. Cavitt, of San Francisco, for appellant.

James A. Bacigalupi and John O'Gara, both of San Francisco, for respondents.

BARDIN, Judge pro tem. The appeal is from the judgment rendered in favor of the defendants as administrators of the estate of John F. Fugazi, deceased. It is claimed by the appellant, who is the administratrix with the will annexed of the estate of Frank Roncelli, deceased, that the judgment should be reversed and the cause remanded for a new trial for two reasons: (1) That the trial court erred in refusing to allow the said administratrix to testify as to matters of fact occurring during the lifetime of John F. Fugazi, deceased; and (2) that the evidence is insufficient to sustain certain of the findings of the trial court.

The allegations of the complaint, briefly stated, are to the effect that on or about the 1st day of July, 1903, Frank Roncelli, since deceased, placed in the hands of John F. Fugazi, also now deceased, the sum of $18,000, to be held in trust by the said Fugazi for the use and benefit of said Roncelli, and that said Fugazi promised and agreed to hold the said money so deposited with him in trust and to pay the said Roncelli not less than 4 per cent. per annum interest on the said money, and to hold the said interest and the said principal in trust for the use and

benefit of said Roncelli and to repay the said sum of $18,000 together with the accumulated interest thereon, on demand.

It is further alleged in the complaint that said Roncelli died on or about January 17, 1906, and that on or about the 3d day of January, 1908, letters of administration with the will annexed upon the estate of said Roncelli were, after due proceedings, issued to Josephine Roncelli, the plaintiff herein, who thereupon entered upon the discharge of her duties as such administratrix; that said plaintiff demanded of said Fugazi the repayment of said sum of $18,000, together with accrued interest thereon, but that said Fugazi failed, refused and neglected to pay the said sum or any part thereof; and that the whole thereof is now due, owing, and unpaid.

The complaint contains the further allegations that said Fugazi died about June 4, 1916; that letters of administration of his estate were duly issued to the administrators, named herein; that notice was given by said administrators to the creditors of said deceased to present their claims against the said estate; and that within the period prescribed by law the plaintiff presented her verified claim on behalf of the estate of Roncelli for the said sum of $18,000 and interest for approval and allowance.

The further recitations of the complaint are to the effect that the administrators failed and neglected and for a period of exceeding ten days after the presentation of the verified claim of the plaintiff to either allow said claim or pass upon it, and have since refused and neglected so to do, and that the plaintiff elects to consider the claim refused.

A copy of the claim referred to is attached to the complaint and is of the usual form and recites that plaintiff makes a claim against the estate of Fugazi for "moneys had and received and held in trust by said John F. Fugazi for the use and benefit of and belonging to Frank Roncelli" in the sum of $18,000, together with interest at the rate already referred to. The claim has affixed to it the usual creditor's affidavit.

The prayer of the complaint is for the sum of $18,000, together with interest at the rate of 4 per cent. from the 1st day of July, 1903, and for general relief.

[1] At the trial Josephine Roncelli took the stand as a witness in her own behalf as plaintiff, whereupon her counsel sought to show by her testimony certain relevant facts relating to the claim against the estate of Fugazi, but which solicited testimony related to facts and matters occurring before the death of said Fugazi. Counsel for the defendants urged the inhibition of subdivision 3 of section 1880, Code of Civil Procedure, and the court sustained the objection. The section referred to, so far as applicable to this case is as follows:

"The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

It seems clear to us from the averments of the complaint, and in view of the theory upon which the cause was actually tried, that it was intended by plaintiff to prosecute an action to establish a claim or demand against the estate of a deceased person, and not one where the aid of a court of equity was sought to procure appropriate relief appertaining to a trust fund. Such being the situation as we view it, the testimony of Josephine Roncelli was inadmissible.

Since the trial of the action the plaintiff has changed counsel, and now raises the point, not suggestive in the court below, that the action is one to recover a trust fund, and that therefore the ruling of the court as to the competency of the witness referred to should be reviewed in the light of the rule laid down in Myers v. Reinstein, 67 Cal. 89, 7 Pac. 192, and in Tyler v. Mayre, 95 Cal. 160, 27 Pac. 160, 30 Pac. 196, where it is held that in actions against a decedent's representative to enforce a trust the inhibition of the section does not apply.

[2, 3] If the moneys sued for constituted a trust fund, to the possession of which plaintiff, in her representative capacity, was entitled, then the doctrine of those cases, of course, would apply. But we do not regard the present action as being one to recover a specific trust fund, or the fruits of such fund. In order that the suit might be regarded as one in equity to recover a specific trust fund, it was necessary for the plaintiff to have alleged that the identical trust property, or its substituted new form, was traceable into the estate of Fugazi, and thus into the possession of his representatives. McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141. The complaint fails to meet this requirement. As stated in Orcutt v. Gould, 117 Cal. 315, 49 Pac. 188:

"To justify a recovery a beneficiary must be able to follow and identify the property, either in its original or substituted form."

And in the case of Lathrop v. Bampton, supra, in speaking of a money trust fund, the court said:

"The identity of a trust fund consisting of money may be preserved so long as it can be followed and distinguished from all other funds not by identifying the individual pieces or coins but by showing a separate and independent fund or value, readily distinguishable from all other funds."

[4] Where a beneficiary is unable to identify a trust fund, or to follow it through its

mutations, he is placed in the position of a general creditor. Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536; Orcutt v. Gould, supra. The rule is concisely stated in McGrath v. Carroll, 110 Cal. 79, 42 Pac. 466, in the following words:

"Lathrop v. Bampton, supra, 31 Cal. 17 [89 Am. Dec. 141], holds that equity will enforce a trust against the personal representatives of a deceased trustee, and without the presentation of a claim against the estate, when the identical trust property or its product in a new form can be traced into the estate and so into the possession of the representatives. But a beneficiary who is unable to do this must rely on the personal liability of the trustee, and, so relying, has only a claim against the estate which must be duly presented for allowance.

"But such a claim is still based upon the trust, whatever that may have been. It has its origin in the trust, and depends for its validity upon the legality and sufficiency of the trust. The fact that the beneficiary is obliged to present his claim and look like a general creditor to the assets of the estate for payment does not change the nature of his demand, which is still one for property due under a trust accounting; it merely has changed his remedy."

[5] Thus it is that, whether the instant action be regarded as one to establish a claim based on a debt, or one growing out of a trust relationship, the inhibition of the statute must prevail. From a review of the colloquy between the court and council for the respective parties, which arose at the time the plaintiff was presented as a witness, it appears that the disqualification of the witness was made to rest, by the ruling of the court, upon the fact that she was a party to the record, and thus came within the restraint of the section under discussion. We think this view of the trial court was correct.

At common law no person was permitted to become a witness in an action or proceeding in which he was a party, or in which he was interested. 40 Cyc. 2244. This disability has been abrogated by various enabling acts in the different jurisdictions of the United States, containing, however, as a general rule, exceptions similar in import to those contained in our own statutes. Sections 1879, 1880, Code Civ. Proc.

[6] While section 1880 of the Code of Civil Procedure has often received the consideration of the appellate courts of this state, the reports do not show it to have been previously involved in an inquiry to determine whether the word "parties," as therein used, is broad enough in meaning to apply to a party to the record suing only in his representative capacity. This question is purely one of interpretation. We can neither abridge nor extend the scope of the terms of the section, nor should we concern ourselves with the philosophy of the rule established by the section, or speculate as to the motives which impelled the Legislature to enact it, except it be in aid of the discovery of the real meaning of its items. The very words of the statute must control. Moore v. Schofield, 96 Cal. 486, 31 Pac. 532. Its inhibitions have been held to apply to the testimony of a person who is merely a nominal party to an action. As stated in Blood v. Fairbanks, 50 Cal. 420:

"* * * The statute does not merely exclude parties who have or are supposed to have an interest adverse to the estate of the decedent, but, by its terms renders all the nominal parties to the action incompetent."

In Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180, it was held that a stockholder and director of a corporation was not excluded from testifying; the disqualifications proper to apply being only such as the statute imposed.

In framing the exceptions provided by section 1880 to the general enabling act (section 1879, Code Civ. Proc.), the Legislature must have intended to use the word "parties" in its usual and appropriate meaning in law (section 16, Code Civ. Proc.). If it had been intended to render the testimony of a party to the record, suing in his representative capacity, admissible under the circumstances stated in the statute, it would have been a very simple matter to have so declared in the statute itself, as was done in the Washington statute, where it is provided that the exclusion of the testimony of a party to the record "shall not apply to parties of record who sue or defend in a representative or fiduciary capacity and who have no further interest in the action." Since our statute of exclusion uses the word "parties" in its broad generic sense, we do not deem it proper to restrict its meaning to smaller compass, thus confining its application to parties to the record suing in their individual capacities.

Under an Ohio statute providing that "a party shall not testify where the adverse party is * * * an executor of a deceased person," etc. (Rev. St. § 5242), the Supreme Court of that state held that the inhibition of the statute applied to an executor prosecuting an action in his representative capacity against the defendant as executrix. Farley v. Lisey, 55 Ohio St. 627, 45 N. E. 1103. In that case the court said:

"True, the plaintiff was prosecuting the action in his representative character as executor of the lessor; but the issues in the action were joined between him as such and the defendant; and he was interested in maintaining the issues in his behalf, not only in his representative capacity, but individually also to the extent, at least, that his compensation was affected by the amount recovered in the action. The statute has reference to the adverse character which the parties sustain toward each other as parties in the action at the time of the trial, and not necessarily to their relation as parties to the transaction which is the subject of the action

or defense; and, unless these parties were adverse, there were none in the action, for they were the only parties. It is said the plaintiff might have resigned as executor, and then he would have been competent to testify as desired; but then he would no longer be a party to the action, and therefore not within the inhibition of the statute. But, being a party to the action when his testimony was offered, it was properly excluded."

[7] The objection that findings 1, 2, and 3 of the court below do not find sufficient support in the evidence is without merit. At the trial of the action the defendant rested on the evidence produced by the plaintiff, which was of a desultory and unsatisfactory nature. The burden of proof rested upon the plaintiff. It was proper and necessary that the court find on all the material issues framed by the pleadings. If sufficient evidence to satisfy the mind of the court was not produced by the plaintiff in support of her complaint, the findings should have been against the party upon whom the burden of proof rested. Speegle v. Leese, 51 Cal. 415; Leviston v. Ryan, 75 Cal. 293, 17 Pac. 239.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 245

FERGER v. GEARHART et al. (Civ. 2955.)

(District Court of Appeal, First District, Division 1, California. Nov. 12, 1919. Hearing Denied by Supreme Court Jan. 8, 1920.)

1. MECHANICS' LIENS ⟸132(13)—CLAIM MUST BE FILED WITHIN 30 DAYS WHERE MATERIAL FURNISHED OR LABOR PERFORMED FOR OWNER.

Lien claimants who furnished material and performed labor at the instance of the owner, and not under contract with a contractor, were required to file claims, within 30 days after ceasing to furnish material or perform labor, under Code Civ. Proc. § 1187, as it existed prior to amendment of 1919.

2. CONSTITUTIONAL LAW ⟸33 — CONSTITUTIONAL PROVISION GIVING LIEN NOT SELF-EXECUTING.

Const. art. 20, § 15, providing that mechanics, materialmen, artisans, and laborers shall have a lien for value of labor done or material furnished, is not paramount to the statute prescribing time within which claim must be filed, since the constitutional provision is not self-executing and is inoperative except as supplemented by legislation.

3. MECHANICS' LIENS ⟸279—CLAIMANT HAS BURDEN OF PROVING IT WAS CONTRACTOR, AND NOT MATERIALMAN.

Lien claimant claiming as an original contractor under Code Civ. Proc. §§ 1183, 1187, instead of as a materialman, has burden of proving that it was a contractor, and not a materialman.

4. MECHANICS' LIENS ⟸83, 89—TEST AS TO WHETHER CLAIMANT WAS CONTRACTOR OR "MATERIALMAN" STATED.

The test of whether lien claimant was a contractor or materialman is the relative value of the material and the labor supplied; the claimant being a "materialman" if the value of the labor is small in comparison with that of the material.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Materialman.]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by J. C. Ferger against Bertram W. Gearhart, trustee of the People's Ice Company of Fresno, and others. From portions of the judgment rendered, the named defendant appeals. Affirmed as modified.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

Everts & Ewing, of Fresno, for respondent.

BARDIN, Judge pro tem. During the early part of the year of 1916 the People's Ice Company, a corporation, was engaged in the construction, alteration, and repair of certain of its buildings upon its property in the city of Fresno, Cal. This work was undertaken by the corporation itself, as owner, under the superintendence of one of its employés. The corporation, falling into financial difficulties, was adjudicated a bankrupt in May, 1916. Among its creditors were several who had furnished materials for, and who had performed labor upon, the buildings referred to. Eleven claims of lien were filed under the provisions of the Mechanic's Lien Law (Code Civ. Proc. § 1183 et seq.), and assignments were thereafter made to the plaintiff of the specific amounts due each claimant, and also of the rights of the lien claimants under their respective claims of lien.

The appeal is taken from the portions of the judgment which are founded upon the claims of Swastika Lumber Company for materials, Kielelguhr Company of America for materials, Lewis Electric Company for labor and materials, and Valley Roofing Company for labor and materials. It is admitted in the brief of respondent that "no one of these four claims were filed within thirty (30) days after the claimant had ceased to furnish materials or labor for the buildings in question." Such claims were, however, all filed within 60 days after each respective lien claimant had ceased to furnish materials or perform labor upon said buildings. No notice of completion of the work referred to or cessation of labor thereon was ever filed by the People's Ice Com-

pany, but on March 21, 1916, the said owner notified all of said lien claimants that it had abandoned all further work on its said property. Judgment went for the plaintiff as such assignee, for the unpaid balance, which judgment also directed the sale of the property to satisfy the aggregate amount found to be owing and unpaid.

[1] The fundamental question presented for decision on this appeal is whether the claims of lien of the four lien claimants named were filed within the time limited by section 1187 of the Code of Civil Procedure as it existed prior to the amendment of 1919. This question is, so far as it relates to the claims of lien, in principle identical with that which was before the court in Irwin v. Silva, 180 Pac. 361 (hearing in Supreme Court denied). We shall therefore rest our decision upon the principal point of the present controversy upon the authority of that case, and for the reasons therein expressed hold that the portion of the judgment conferring upon the plaintiff a lien against the property referred to is without foundation.

[2] The suggestion of counsel for respondent that the provisions of the state Constitution touching the subject of the liens of materialmen, laborers, and others, upon property upon which they have bestowed labor or furnished materials (section 15, art. 20, State Constitution), is paramount to the statute which prescribes a time within which a claim of lien must be filed to be effective, is without merit. The section of the Constitution referred to is not self-executing, and is inoperative except as supplemented by legislation. Spinney v. Griffith, 98 Cal. 149, 32 Pac. 974; Morse v. De Ardo, 107 Cal. 622, 40 Pac. 1018. The case of Miltimore v. Nofziger Bros. Lumber Co., 150 Cal. 790, 90 Pac. 114, merely holds the section of the Constitution referred to to be self-executing to the extent that it confers upon the classes of persons included within its provisions a lien making "them equal in point of rank with regard to each other." It does not purport to go to the extent of contravening the doctrine of the case of Spinney v. Griffith, supra, where the court says of the section of the Constitution referred to:

"This declaration of a right, like many others in our Constitution, is inoperative except as supplemented by legislative action.

"So far as substantial benefits are concerned, the naked right without the interposition of the Legislature is like the earth before the creation, 'without form and void,' or to put it in the usual form, the Constitution in this respect is not self-executing."

[3, 4] It is contended by respondent that the Valley Roofing Company was an original contractor within the meaning of sections 1183 and 1187 of the Code of Civil Procedure, and that its claim was filed within the statutory period. It was alleged by plaintiff that this particular assignor furnished and laid a certain quantity of roofing for the agreed price of $175. Neither the evidence nor the findings disclose the relative value of material and labor supplied, and the pleadings and findings are silent as to whether the Valley Roofing Company occupied the status of a materialman or contractor. In order to enjoy the benefits attaching to the relation of contractor with respect to the work at hand, and to be placed in a position more advantageous than that occupied by a materialman, we believe it was essential for the plaintiff to have adduced proof showing that the status of the Valley Roofing Company was that of a contractor rather than of a materialman, and that, failing so to do, no superior rights may thereby accrue to the plaintiff. As stated in Pugh v. Moxley, 164 Cal. 374, 128 Pac. 1037:

"The test of the character of the contract is the relative value of the material and the labor supplied. If the value of the labor is small in comparison with that of the material, the claimant is a materialman."

No effort was made to apply this principle to the determination of the status of the Valley Roofing Company with respect to said work, either in the proof or findings.

The portions of the judgment appealed from which relate to plaintiff's first, third, fourth, and sixth causes of action are modified (1) by striking therefrom the amounts stated therein to have been paid for verifying and filing the claims of lien, and (2) wherein it is ordered, adjudged, and decreed that the plaintiff have a lien upon a property referred to therein; and, as thus modified, the judgment shall stand affirmed, the appellant to recover costs of this appeal.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 271

MILLOTT et al. v. ASSOCIATION OF MARE ISLAND EMPLOYÉS. (Civ. 2094.)

(District Court of Appeal, Third District, California. Nov. 13, 1919.)

MANDAMUS ⊂⊃4(1) — WRIT NOT GRANTED WHERE ADEQUATE REMEDY BY APPEAL.

Mandamus will not be granted by Court of Appeal in original proceeding therefor, where another proceeding is pending in the superior court by same petitioners for similar writ involving the same subject-matter; the petitioners having an adequate remedy by appeal from the decision of the superior court in action therein pending.

Original application for mandamus by J. B. Millott and others against the Association of Mare Island Employés, a corporation. Writ discharged and proceeding dismissed.

L. G. Harrier, of Vallejo, for petitioners.

W. H. Morrissey, of San Francisco, for respondent.

BURNETT, J. This is an original application to this court for a writ of mandate requiring respondent to repurchase certain stock of said corporation. An alternative writ was issued, and on the return day respondent filed a general demurrer and also an answer to the application. The contention of petitioners is grounded upon the provision in the by-laws of the association providing that—

"No stock shall be sold or certificates issued for less than ten shares. All stock of the corporation is to be sold subject to the right of the corporation to repurchase the same at any time upon paying one dollar ($1.00) per share and interest; and is to be sold subject to such other conditions as the board of directors may deem advisable and for the best interests of the corporation, except that no compulsory action shall be taken by the corporation that will reduce the ownership of stock to less than ten shares for each member. The corporation shall repurchase (the financial condition of the corporation permitting), first, such shares of stock owned and held by any stockholder in excess of ten shares, thereby limiting the ownership of stock to ten shares for each stockholder, and giving to each equal rights and privileges."

It is the theory of the petitioners that a large number of shares of said stock was sold to different stockholders in excess of ten shares for each stockholder, that it is for the interests of the corporation that said excess shares be purchased for the benefit of the association, and that the directors thereof refused to purchase said excess stock as required by said provision of the by-laws. But regardless of the merits of the controversy, it appears by the answer of respondent and it is conceded by petitioners, that—

"In the month of May of this year, plaintiffs herein, J. P. Millott, W. C. Ellis, D. E. Schofield, and J. C. Peterson, filed a petition for a writ of mandate against the defendants herein and its board of directors in the superior court of the state of California, in and for the county of Solano.

"That said petition and each and all of its allegations was and is substantially the same as the petition in this action and prayed for the same relief, as will be seen from the copy of said petition served on the defendant, which copy is made a part of this answer and will be handed to the court at the hearing and marked 'Exhibit A.'

"That while the plaintiff, W. G. Luper, in this action, was not named as a party plaintiff in that action, said action was prosecuted and commenced for and on his behalf as well as the other plaintiffs herein and he was in truth and fact one of the real parties in interest therein.

"That such proceedings were had and taken thereafter in that action resulting in the trial court making and entering an order therein sustaining the general demurrer interposed by the defendants to said petition therein.

"That the plaintiffs therein declined to amend their complaint and thereafter judgment was made and entered on the 26th day of September, 1919, in favor of the defendants in that action, dismissing the petition of the plaintiffs therein.

"Thereafter and on the 20th day of October, 1919, the plaintiffs therein appealed from said judgment to this honorable court.

"That said appeal is still pending and undisposed of.

"On the 4th day of September, 1919, the plaintiffs herein, J. P. Millott, W. C. Ellis, D. E. Schofield, and J. C. Peterson, commenced another action in the superior court of the state of California, against the defendant herein and its board of directors, which said complaint was substantially in the same language and contained the same allegations as the petition herein, as will be seen from the copy of said petition served on the defendant, which copy is made a part of this answer and will be handed to the court at the hearing and marked 'Exhibit B.'

"That while the plaintiff, W. G. Luper, was not named as a party plaintiff in that action, that action, nevertheless, was prosecuted on his behalf as well as on the behalf of the other plaintiffs therein and he was in truth and in fact one of the real party plaintiffs.

"That in that action the defendant herein together with its board of directors appeared and filed a general demurrer.

"That said demurrer duly came on to be heard in the superior court of Solano county of October 20, 1919, and was on said day by order of said court duly made, entered sustained. That thereafter the plaintiffs filed an amended complaint.

"That this last action is still pending."

It therefore clearly appears that petitioners have a plain, speedy, and adequate remedy by appeal from the decision of said superior court in said cause and that this application must be denied upon that ground. The very question was involved in Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468, and Beaumont

v. Sampson, 4 Cal. App. 701, 89 Pac. 137, and other decisions. The Knowles Case was an application to the Supreme Court for a writ of mandate, directed to the county clerk of San Mateo county, to compel execution of a judgment of the superior court of said county. It appeared in that case that an application had been made to said superior court for a similar writ and was denied therein, and the Supreme Court said:

"An appeal lies from the judgment of the superior court denying a writ of mandate. Code Civ. Proc. § 939; Palache v. Hunt, 64 Cal. 474, 2 Pac. 245; People v. Perry, 79 Cal. 109, 21 Pac. 423; Heinlen v. Phillips, 88 Cal. 559, 26 Pac. 366. This furnishes a plain, speedy, and adequate remedy to the petitioner in the ordinary course of law. Santa Cruz, etc., Co. v. Supervisors, 62 Cal. 40. The demurrer to the petition must be sustained, and it is so ordered."

The Beaumont Case, supra, was an application for a writ of review. It appeared that a similar application had been made to the superior court and it was held that "the remedy of the petitioner is by appeal from the judgment of the superior court." The petition in this court was therefore denied upon that ground. The same principle applies in an application for a writ of review as in that for mandate. It is of no consequence that herein one party is made petitioner who does not expressly appear in the court below, since the application is made for the same purpose and involves exactly the same remedy; the subject-matter in all these actions being essentially the same. Under the law as thus declared, we are precluded from deciding, in this proceeding, the question upon its merits. It is to be presumed that the appeal from the lower court will be prosecuted diligently and that the opportunity will soon be afforded to the appellate tribunal for a final determination of the question whether the board of directors can be compelled to repurchase said stock.

But for the reason stated the alternative writ is discharged, and the proceeding is dismissed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

44 Cal. App. 315

BRYANT et al. v. HOBERT et al. (Civ. 3110.)

(District Court of Appeal, First District, Division 1, California. Nov. 17, 1919.)

1. HOMESTEAD ⊂=121 — TRUSTEE'S DEED UNDER POWER OF SALE EXECUTED BY HUSBAND AND WIFE CONVEYS TITLE AS AGAINST HOMESTEAD.

A deed made by a trustee in pursuance of the power of sale contained in a deed of trust executed by both husband and wife operates to convey the absolute title to the property as against a homestead declared upon the property by the wife prior to the execution of the deed of trust.

2. MORTGAGES ⊂=138—TRUST DEED CONVEYS LEGAL TITLE TO TRUSTEE.

A deed of trust conveys the legal title to the trustee so far as necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustors, or any one claiming under or through them.

3. APPEAL AND ERROR ⊂=959(2)—PLEADING ⊂=276 — COURT HAS DISCRETION TO OPEN CASE TO PERMIT SUPPLEMENTAL ANSWER AFTER ORDERING JUDGMENT FOR DEFENDANT.

The trial court has a legal discretion, which will not be disturbed except for abuse, to reopen a case to permit defendants to file a supplemental answer after the court has ordered judgment for defendants; the entry of the minute order by the clerk not being the decision of the court.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action to quiet title by Addie D. Bryant and husband against Jennie A. Hobert, trustee, and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Johnston & Jones, of Fresno, and B. P. Welch and John S. Bryant, both of Los Angeles, for appellants.

Gilbert F. Wyvell, of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from a judgment in an action to quiet title, and is taken by the plaintiffs from the judgment entered in favor of the defendants.

The first question presented for determination is: Does a deed made by a trustee in pursuance of the power of sale contained in a deed of trust executed by both husband and wife convey the absolute title to the property as against a homestead declared upon the property by the wife prior to the execution of the deed of trust?

[1, 2] We think the point has been put at rest by the cases of Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706, McLeod v. Moran, 153 Cal. 97, 94 Pac. 604, and Athearn v. Ryan, 154 Cal. 554, 98 Pac. 390. The effect of such a deed, says the court in the first of those cases, is to convey the legal title to the trustee, who is thereby vested with the absolute legal title to the premises so far as is necessary to enable him to convey it to the purchaser at the trustee's sale free of all right, title, interest, or estate of the trustors, or any one claiming under or through them. Under these authorities we have no doubt that such a deed of trust transfers for the purpose of the trust all possible claims of the trustors in the property conveyed, including a claim of homestead, and vests in the trustee

the absolute legal title to the entire estate held by the trustors at the time of the execution of the trust deed, and that the title must remain in the trustee for that purpose until the trust is either executed through a sale upon default in the payment of the debt secured by the deed of trust, or is terminated by the payment of such debt or other method provided by law. The declaration of homestead in the case at bar was made prior to the execution of the trust deed, but it is immaterial whether it was declared prior or subsequent thereto. Athearn v. Ryan, supra.

[3] The next question presented is as to the right of the court to allow the case to be reopened in order to permit the defendants to file a supplemental answer after the court had ordered judgment for the defendants. The entry of the minute order by the clerk was not the decision of the court (Delger v. Jacobs, 19 Cal. App. 207, 125 Pac. 258), and the court in making the order complained of was exercising a legal discretion. It not appearing that there has been an abuse of such discretion, the order will not be disturbed. Cal. Farm Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593; Young v. Mathews-Turner Co., 168 Cal. 671, 675, 143 Pac. 1029; Lee v. Murphy, 119 Cal. 367, 51 Pac. 549, 955.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 275

COMSTOCK v. DAVIS et al., Board of Fire Pension Fund Com'rs. (Civ. 2914.)

(District Court of Appeal, First District, Division 2, California. Nov. 13, 1919.)

1. CONSTITUTIONAL LAW ⊂⊃48 — CONSTRUCTION OF MUNICIPAL CHARTER IN FAVOR OF CONSTITUTIONALITY.

If a city charter is subject to two constructions, one which would make it valid, and one which would render it unconstitutional, the former should be adopted.

2. MUNICIPAL CORPORATIONS ⊂⊃200—DENIAL OF PENSION PROVISIONS OF CHARTER TO FAMILIES AS WELL AS TO EMPLOYÉS IN AUXILIARY FIRE SYSTEM.

By the charter of the city and county of San Francisco (article 9, c. 1, § 6, and chapter 7, § 5), relative to the relief fund of the fire department, as amended November 15, 1910, an amendment approved by the Legislature February 17, 1911, the provision that all employés and appointees in the auxiliary fire system are denied the benefits of the pension provisions of the charter is applicable to their families as well as themselves.

3. STATUTES ⊂⊃22—CONCURRENT RESOLUTION APPROVING AMENDMENT OF CHARTER GOOD DESPITE DEFECT IN TITLE IN SENATE RESOLUTION.

The amendment of November 15, 1910, to article 9, c. 1, § 6, and chapter 7, § 5, of the charter of the city and county of San Francisco, as to the firemen's relief fund, *held* properly approved by the Legislature, though the title to the Senate concurrent resolution of approval did not contain a statement of the subject-matter of the amendment, in violation of Const. art. 4, § 24, as to the title of statutes; there being a distinction between a concurrent resolution of the Legislature and an act which becomes a law of the state.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Anna E. Comstock against John F. Davis and others, as the Board of Fire Pension Fund Commissioners of the City and County of San Francisco, State of California. From judgment for defendants, plaintiff appeals. Affirmed.

Harry G. McKannay, of San Francisco, for appellant.

George Lull, City Atty., and Chas. S. Peery, Asst. City Atty., both of San Francisco, for respondents.

NOURSE, J. Appellant is the widow of a member of the San Francisco fire department, who died as the result of an injury received while on duty as chief engineer of a pumping station of the auxiliary fire system of the department. Respondents, as commissioners of the fire pension fund of that department, denied her application for a pension on the ground that provisions of the San Francisco charter relating to pensions did not apply to members employed in the auxiliary fire system. The trial court sustained the action of the commissioners and gave judgment against the petitioner, from which this appeal is taken.

Appellant urges two grounds for reversal: (1) That the family of any member of the fire department who is killed in the performance of his duty is entitled to a pension; and (2) that the charter amendment of 1910 is unconstitutional because the title to the Senate concurrent resolution by which the amendment received legislative approval did not express the subject-matter of the amendment.

1. Section 5, chapter 7, article 9, of the San Francisco charter, provides in part as follows:

"The commissioners shall, out of the firemen's relief fund, provide as follows for the family of any officer, member or employé of the fire department who may be killed or injured while in the performance of his duty."

Section 6 of chapter 1 of the same article provides that—

"All persons appointed to positions in the department must at the time of their appointment be citizens of the United States, not less than

twenty-one nor more than thirty-five years of age."

By an amendment adopted by the electors of San Francisco on November 15, 1910, and approved by the Legislature on February 17, 1911, a proviso was added to this section raising to 55 years the age limit of "engineers, mechanics and employés of the auxiliary fire system." A further proviso was added at the same time, reading that "employés and appointees in this proviso named shall not be subject to nor derive any benefit from the provisions of chapter 7 of this article relating to firemen's relief fund."

It is argued that as the proviso merely excepts employés and appointees, it does not relate to their families, and hence the provisions of section 5, chapter 7, article 9, granting a pension to the family of any employé of the department killed, while in the performance of his duty, apply to the families of those employed in the auxiliary fire system as well.

In answer respondents urge that the purpose of the amendment was to permit the employment of men of advanced age in the auxiliary fire system, and that by reason thereof the entire auxiliary system was removed from the provisions of the charter relating to the pension fund, and that this was done irrespective of the age at which the person was employed.

[1, 2] There can be little doubt that this was the purpose and effect of the amendment. The pension is an award or bounty made to the employé by way of compensation for services he renders the municipality. In the event of his death resulting from injuries received in the performance of his duty, the pension may properly go to his family. But a mere gift to his family, where no obligation exists, is prohibited by section 31, article 4, of the state Constitution. The right to the pension becomes vested by reason of the employment. If there is no obligation there can be no legal right to the pension. Taylor v. Mott, 123 Cal. 497, 56 Pac. 256. Certainly a husband and father is benefited by an obligation on the part of the government to care for his family after his death. Hence, if a person is denied the benefits of the pension provisions of the charter, an award to his family is a mere gift. The deceased accepted his employment with the city after the approval of the amendment of 1911, and must be deemed bound by its terms. If the charter is subject to two constructions, one which would make it valid and one which would render it unconstitutional, the former construction should be adopted. Applying that rule here, the proper interpretation of the charter amendment is that the provision that all employés and appointees in the auxiliary fire system are denied the benefits of the pension provisions of the charter is applicable to their families as well as to themselves.

[3] 2. Appellant urges that this charter amendment is unconstitutional because the title to the Senate concurrent resolution by which it received legislative approval does not contain a statement of the subject-matter of the charter amendment, and that this is in violation of section 24, article 4, of the Constitution. This resolution is given the following title:

"Senate Concurrent Resolution No. 9, approving eighteen certain amendments to the charter of the city and county of San Francisco, state of California, voted for and ratified by the electors of said city and county of San Francisco, at a special municipal election held therein on the fifteenth day of November, 1910." Stats. 1911, p. 1661.

Section 24 of article 4 of the Constitution reads as follows:

"Every act shall embrace but one subject, which subject shall be expressed in its title."

The method for the adoption and approval of amendments to the municipal charters is found in section 8, article 11, of the Constitution. Therein it is provided that such amendments when ratified by the electors shall be submitted to the Legislature to be approved or rejected in the same manner provided in that section for the approval or rejection of a charter. The manner thus prescribed is:

"The Legislature shall by concurrent resolution approve or reject such charter as a whole, without power of alteration or amendment; and if approved by a majority of the members elected to each house it shall become the organic law of such city."

Section 24 of article 4 is a general section relating to the laws or acts of the lawmaking body of the state. Section 8 of article 11 is a special section providing for the manner and method of adopting municipal charters. There is a well-recognized distinction between a concurrent resolution of the Legislature and an act which becomes a law of the state. Section 8 of article 11 specifically provides that its approval shall be evidenced by concurrent resolution approved by a majority of the members elected to each house. A legislative act must be presented to the Governor for his approval or rejection. This distinction has been recognized by the Legislature for many years past during which time the charters of the various municipalities, together with the amendments have been approved in the manner complained of in this proceeding. There is thus a contemporaneous legislative construction to the effect that these charters and amendments may be approved by concurrent resolution without reference to the provisions of section 24 of article 4. Practice and acquiescence in this construction for more than 20 years have result-

ed in the acquisition of large property interests and the determination of personal rights and obligations. Such practice and acquiescence have fixed the construction which should not be disturbed at this late day. Stuart v. Laird, 1 Cranch, 299, 2 L. Ed. 115; Railroad Comm. v. Market St. Ry. Co., 132 Cal. 677, 680, 64 Pac. 1065.

In addition to this it might be said that if appellant's position were tenable, she would have no rights to assert, because the original charter, which was adopted in 1899, and the amendments to section 5, upon which she bases her right of action, would fall in the same way.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 433

TIEFEL v. CHANT.

GATTWINKEL v. SAME.

(Civ. 2448, 2524.)

(District Court of Appeal, Second District, Division 1, California. Nov. 24, 1919. Hearing Denied by Supreme Court Jan. 22, 1920.)

1. APPEAL AND ERROR ⊂=1051(1)—ADMISSION OF ACCOUNT BOOK HELD IMMATERIAL IN VIEW OF OTHER COMPETENT EVIDENCE.

Error, if any, in the admission of an account book kept by the claimant against a decedent's estate, is immaterial, where there were disinterested witnesses who testified that claimant rendered services of a stated value sufficient to support the judgment which was for less than the claim.

2. EXECUTORS AND ADMINISTRATORS ⊂=221(5)—EVIDENCE OF SERVICES RENDERED DECEASED SUFFICIENT.

Testimony of physician and others that they saw services rendered by claimant to deceased, and giving the value of the services, and evidence of money advanced to deceased, *held* sufficient to support the judgment against the estate.

3. EXECUTORS AND ADMINISTRATORS ⊂=221(5)—EVIDENCE AS TO NURSE'S SERVICES SUFFICIENT.

Evidence as to services as nurse rendered to deceased *held* sufficient to support the judgment against the estate.

Appeals from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Separate actions by C. W. Tiefel, and by Daniel Gattwinkel, against Minnie Chant, as administratrix of the estate of Louisa Stuckless, deceased. Judgments for the plaintiff in each action, and defendant appeals. Affirmed.

J. H. Ryckman, of Los Angeles, for appellant.

Edward G. Kuster, Guy E. Maurice, and Rolland S. Haskell, all of Los Angeles, for respondents.

CONREY, P. J. These actions were tried together in the superior court. Separate judgments were entered, from each of which the defendant appeals. The cases have been briefed together. The transcripts were prepared in accordance with section 953a of the Code of Civil Procedure. The reporter's transcripts in the two cases are identical with each other, and there is a separate clerk's transcript for each case.

We will first consider the Gattwinkel case. The complaint states a claim of indebtedness upon an account for services rendered and cash advanced to Louisa Stuckless, and alleges that the reasonable value of the services rendered was the sum of $1,902.89. A claim covering this demand was first presented to the administratrix of the estate of Louisa Stuckless and rejected.

[1, 2] Appellant claims that the court erred in receiving in evidence an account book kept by Gattwinkel, and that there was no other competent evidence introduced upon which the demand of the plaintiff can be sustained. Following the decision of this court in Colburn v. Parrett, 27 Cal. App. 541, 150 Pac. 786, the court permitted Gattwinkel to testify that he kept the memorandum book. This book contained items relating to plaintiff's demand, and also certain items of account between Gattwinkel and other persons. Some evidence was introduced wherein a witness testified to his acquaintance with the memorandum book and with transactions between Gattwinkel and other persons mentioned in the memorandum book, and that he found the memorandum to be correct as between Gattwinkel and the other persons. We do not deem it necessary to determine whether or not the court erred in admitting this book in evidence. The judgment in favor of Gattwinkel was for only the sum of $750, and there is evidence, exclusive of the memorandum book, which we consider sufficient to support the judgment. A physician who attended Mrs. Stuckless during her illness testified to the services which he saw rendered by Gattwinkel, and that the value of such services was from $15 to $20 per week. There is testimony of certain other witnesses who saw these services being rendered by Gattwinkel and it shows that he was rendering such services for a period of nearly two years. At $15 per week, this would be amply sufficient to support a judgment of $750. There was also evidence that certain sums of money were advanced by Gattwinkel for the benefit of Mrs. Stuckless, and that Mrs. Stuckless stated that she had no money and

that she intended to provide repayment to Gattwinkel for services and for moneys advanced.

[3] The claim of Mrs. Tiefel, as stated in her complaint and in her claim presented to the administratrix, is for the sum of $569.73; the judgment rendered in her favor is for the sum of $150 and costs. The claim of Mrs. Tiefel as presented is for treatment rendered by her as a nurse, charged for at the rate of $2 per treatment for a certain period of time, and at the rate of $15 per month for a further period of time. That she rendered some such services is shown by the testimony of the physician to whom we have referred, and by other testimony. The physician stated that in his opinion the value of such treatments was $2.50 per treatment. We are satisfied that there is sufficient evidence to support the findings and judgment for the amount awarded by the court.

The judgments are affirmed.

We concur: SHAW, J.; JAMES, J.

(44 Cal. App. 279)

PEOPLE v. YOUNG. (Cr. 867.)

(District Court of Appeal, First District, Division 1, California. Nov. 13, 1919.)

1. CRIMINAL LAW ⟸1159(4)—JURY'S VERDICT CONCLUSIVE.

In prosecution for contributing to the delinquency of a female minor, the jury, having seen the prosecuting witness and heard her story, should be the best judges of the credibility of her statements, and, having believed her and rendered their verdict accordingly, the appellate court should not disturb that verdict.

2. INFANTS ⟸20—INSTRUCTION ON CRIME OF CONTRIBUTING TO JUVENILE DELINQUENCY PROPER.

In a prosecution for contributing to delinquency of a female minor, under Juvenile Court Law, §§ 1, 21, where the court charged the substance of the first section, and quoted all of the twenty-first and subdivision 11 of the first, providing that the law should apply to any person under 21 years of age, leading, or in danger of leading, an idle, dissolute, or immoral life, and the jury was informed that if they found the defendant had sexual intercourse with prosecutrix as charged he should be found guilty, the jury could not be misled; the statutes being neither vague nor indefinite.

3. INFANTS ⟸12—JUVENILE COURT LAW IS CONSTITUTIONAL.

The Juvenile Court Law is constitutional.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

William Young was convicted of violation of Juvenile Court Law, § 21, by contributing to the delinquency of a minor, and he appeals. Judgment affirmed.

I. M. Peckham and Harry I. Stafford, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from a judgment which followed the conviction of the defendant of a misdemeanor consisting in the violation of section 21 of the Juvenile Court Law (St. 1915, pp. 1225, 1246). The charging part of the information alleged as follows:

"The said William Young, on or about the 26th day of March, A. D. 1918, at the city and county of San Francisco, state of California, did then and there willfully and unlawfully commit an act which did then and there tend to cause and encourage one Beatrice McGuire, a female person under the age of 21 years, to wit, of the age of 18 years, to come within the provisions of subdivision 11 of section 1 of said Juvenile Court Law, as follows: Said William Young did then and there willfully and unlawfully then and there have and accomplish an act of sexual intercourse with and upon the said Beatrice McGuire, said defendant William Young not being then or there the husband of the said Beatrice McGuire, all of which willful and unlawful acts and course of conduct as aforesaid did thereby then and there manifestly tend to and did encourage, cause and contribute to the said Beatrice McGuire becoming and remaining such a person as is described in section 1, subdivision 11, of the Juvenile Court Law of the state of California, to wit, a person under the age of 21 years, who is leading, or from any cause is in danger of leading an idle, dissolute, lewd, and immoral life, contrary," etc.

[1] The first contention of the appellant is that the evidence was insufficient to warrant his conviction, the basis of this contention being that the story of the complaining witness was utterly improbable. We have examined the record with a view to determining the merit of this contention; and upon such examination we are entirely satisfied that the testimony of the complaining witness, while such as might be expected to have been given by a person of immature and feeble intellect, was not so inherently improbable as to justify the reversal of this case upon that ground; but that, on the other hand, the jury having seen the prosecuting witness and heard her story, would be the best judges of the credibility of her statements; and, having believed her and rendered their verdict accordingly, we should not undertake to disturb that verdict.

[2] The next and final contention of the appellant is that the court failed to instruct the jury as to what crime the defendant was charged to have committed, and failed to give to the jury an intelligible instruction by which they would be advised as to what

would constitute an offense under the sections of the Juvenile Court Law which the defendant was charged with having violated, and particularly under section 21 thereof.

In the case of People v. De Leon, 35 Cal. App. 467, 170 Pac. 173, this court had occasion to consider the language of section 21 of the Juvenile Court Law; and it was there held that the said section of said law was neither too vague nor too indefinite for enforcement, and that, when read in view of the other sections of said law having especial reference to the delinquency and dependency of minors, it was sufficiently precise and definite to form the basis of prosecutions under its terms. In the instant case the information against the defendant charged him with the doing of specific acts which would manifestly tend to cause the minor against whom they were committed to come within the provisions of subdivision 11 of section 1 of said Juvenile Court Law as being a person who would thereby be brought to lead or be in danger of leading an idle, dissolute, or immoral life. The information during the course of the trial was read to the jury, and thereafter the complaining witness was examined in detail with respect to its specific charge. The jury had thus before it the particular acts with which the defendant stood charged. The court instructed the jury as follows:

"The defendant is charged with the crime of misdemeanor, to wit, a violation of section 21 of the Juvenile Court Law of this state.

"Section 1 of the Juvenile Court Law provides that the law shall apply to any person under the age of 21 years (subdivision 11) 'who is leading, or from any cause is in danger of leading, an idle, dissolute or immoral life.'

"Section 21 of the Juvenile Court Law provides: 'Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions 1 to 13 inclusive of section one of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 inclusive of section one of this act, shall be guilty of a misdemeanor.'"

It will be seen that this instruction quotes section 21 of the Juvenile Court Law in full, and that it also quotes that portion of section 1 of the Juvenile Court Law contained in subdivision 11 thereof, which provides that the law shall be given application to any person under the age of 21 years "who is leading or from any cause is in danger of leading an idle, dissolute, or immoral life." We are satisfied that the jury was by these instructions informed that if they found that the defendant had committed the acts with which he stood charged in the information he should be found guilty of a violation of these provisions of the Juvenile Court Law. And since, as we have seen, we have held in the case of People v. De Leon, supra, that these provisions of the Juvenile Court Law are neither vague nor indefinite in their terms, we cannot here say that the charge of the court which embodies those terms is so vague and indefinite that the jury would be either insufficiently instructed or be misled thereby.

[3] As to the contention of the appellant that the Juvenile Court Law is unconstitutional, that contention is sufficiently answered in the case of People v. De Leon, supra.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 430

JEWELL v. GOMES et al. (Civ. 3049.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1919.)

1. CONTRACTS ⊂⊃277(1)—INSTALLMENT CONTRACT PROVISION FOR FULL PAYMENT ON RESALE NOT WAIVED BY SELLER'S FAILURE TO DECLARE INTENT TO HOLD RESELLING BUYERS TO THEIR CONTRACT.

Where a contract for the sale of a business, for a price payable out of a percentage of the sales, provided for the immediate payment of the entire balance due on resale of the business, it is no defense to an action for such balance that the plaintiff knew of the proposed resale and did not notify defendants that he would require payment of the balance.

2. ESTOPPEL ⊂⊃110—MUST BE PLEADED.

The trial court's finding for defendant cannot be sustained on the ground of estoppel, where defendant did not plead estoppel.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by C. O. Jewell against J. J. Gomes and others. Judgment for defendants Costello and Henderson, and plaintiff appeals. Reversed.

Fry & Jenkins, of San Jose, for appellant.

Hugh J. Dougherty and Owen D. Richardson, both of San Jose, for respondent Henderson.

Geo. C. W. Egan, of San Jose, for respondent Costello.

BRITTAIN, J. The plaintiff appeals from a judgment against him in a suit against J. J. Gomes, A. J. Martin, Thomas W. Costello,

and Thomas J. Henderson to recover on a contract for the balance of the purchase price of his interest in a business carried on in the name of the Gomes-Jewell Tire Company. The defendants Costello and Henderson were awarded a judgment for costs, and are the respondents. No brief has been filed in their behalf.

Under an agreement with the Aero Cushion Tire Company, a corporation, George A. Le Doux, C. O. Jewell, and J. J. Gomes acquired an agency for the sale of automobile tires. Shortly after this contract was made Jewell, as party of the first part, entered into a contract with the defendants, reciting the sale of his interest in the business for $1,635.15, of which $500 was represented by a promissory note payable in 90 days, and the balance, $1,135.15, was to be paid from 5 per cent. portions of the gross sales of the aero cushion inner tire under the first contract mentioned, the partial payments to be made at stipulated times. The contract then provided:

"In case the parties of the second part should, through their own fault, cease to make sales of said tires, or should sell their said business of selling and handling the same, then, in either of said events, all of said sum of $1,135.15 then unpaid shall become and be immediately due and payable, and the parties of the second part hereby agree that they are jointly and severally bound and obligated to pay the said balance of said sum of $1,135.15 on demand."

Henderson and Costello answered, admitting the allegation that the defendants had sold the business. The court made findings in accordance with the allegations of the complaint, and further found:

"That at the time of the sale by said defendants, J. J. Gomes, A. J. Martin, Thomas W. Costello, and Thomas J. Henderson, of their business of selling and handling the said tires of the Aero Cushion Tire Company, a corporation, the plaintiff, Jewell, was advised of the intentions of said defendants to sell said business to the said Porous Rubber Tire Company, and did not at said time, or any other time, make any objection to the sale or transfer by said defendants of their said business and of their rights under said Exhibit B to the said Porous Rubber Tire Company, and did not at said time inform the defendants, or any or either of them, that if they did so that he would require of the defendants that they pay the whole of said sum of $1,135.15 provided to be paid by Exhibit B in the event that said business should be sold; that it is not true that the Porous Rubber Tire Company ever assumed the obligations of the defendants Gomes, Martin, Costello, and Henderson, or either of them, under said contract with plaintiff, and plaintiff did not waive all or any of his rights against said Gomes, Martin, Costello, and Henderson, otherwise than by his failure to notify the defendants that if they transferred their business to the Porous Rubber Tire Company that he, plaintiff, would require the payment of the said sum of $1,135.15 by Exhibit B to be paid in the event that defendants sold or transferred their said business."

[1, 2] The appeal is on the judgment roll alone. Despite the rule that every inference will be indulged in to support a judgment, the finding above quoted shows the decision was based solely on the ground that the plaintiff did not inform the defendants that he would hold them bound to the terms of their contract. Such notice was not necessary and would have added nothing to the obligations of the contract itself. 10 R. C. L., p. 692, sec. 21; Deane v. Gray Bros., 109 Cal. 433, 42 Pac. 443. As well might the maker of a promissory note be relieved of liability because its holder did not notify him that he would be held to the terms of the note. The defendants did not plead estoppel, and the finding cannot be sustained upon that ground. Burk v. City of Santa Cruz, 163 Cal. 807, 127 Pac. 154; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

44 Cal. App. 283

KNAPP v. LYMAN. (Civ. 2389.)

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1919.)

SALES ⊂=234(5)—PURCHASER OF AUTOMOBILE PROCURED FROM OWNER BY FRAUD NOT PROTECTED.

Where possession of automobile was fraudulently obtained from owner, and it was sold by fraudulent possessors to a purchaser who relied wholly on representations, and not on bill of sale signed by owner, purchaser was not protected as against owner; delivery of possession of personalty not implying transfer of title, particularly where transfer is procured by fraud.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by W. M. Knapp against R. F. Lyman. From a judgment for defendant, plaintiff appeals. Affirmed.

Carlyle Wynn, of Los Angeles, for appellant.

Arthur Keetch, of Los Angeles, for respondent.

JAMES, J. In this action plaintiff sought to recover possession of an automobile alleged to have been wrongfully taken and detained by the defendant. The judgment was adverse to the claim, and plaintiff appealed.

The defendant, as the facts appear in the

evidence, was the owner of the automobile in question. He desired to sell it, and placed an advertisement in a newspaper. A person appeared in answer to the advertisement, and pretended that he had a bona fide purchaser for the automobile. This person arranged a meeting between the owner of the machine and the alleged purchaser, and the parties met; there being present still another individual, who posed as a mechanic. To abbreviate the story, suffice it to say that the evidence established that these individuals entered upon a scheme to defraud defendant of his automobile, and they succeeded in getting possession of it by giving a worthless draft. In the course of the transaction, however, they obtained from Lyman, the owner, a bill of sale of the machine. That they acquired no title to the automobile, which they obtained either by committing larceny or the crime of obtaining property by false pretenses (it is immaterial here to determine which), is not disputed on the part of appellant.

Appellant claims only that the respondent invested the men who defrauded him of his automobile with such indicia of title as to estop him from asserting ownership of the machine as against the plaintiff, a claimed innocent purchaser. A few days after the alleged transaction, the respondent found his machine standing on the street, and took possession of it. Plaintiff appeared, and contended that he had purchased it from one of the trio hereinbefore referred to. According to the testimony of appellant, he gave some money and some jewelry in payment for the machine. The bill of sale given by respondent to the men was not exhibited to him, and, by the testimony of appellant, the men told a tale entirely different from the truth as to how they had obtained possession of the machine. The person who sold the machine to plaintiff claimed that it had been brought from the East by a tourist and purchased by the then possessor, who, on account of trouble with his wife, desired to dispose of it. It is quite clear that appellant, in purchasing the machine, relied wholly upon the representations of the persons with whom he was dealing. Hence the existence of the bill of sale signed by the respondent is immaterial to the case.

The only act, then, which was committed on the part of respondent, which would give any color of ownership to the automobile in the hands of the fraudulent procurers thereof, was the act in delivering possession to the latter. It has long been held that mere delivery of possession does not imply a transfer of title, where personal property is concerned. At most, it is only prima facie evidence of such transfer. Williston on Sales, vol. 1, § 313. To the same effect respondent cites 35 Cyc. p. 360, particularly the case of Globe Milling Co. v. Minneapolis, etc., Co., 44 Minn. 153, 46 N. W. 306. Conditional sales are often made, under which title is effectually reserved in the vendor, who rests secure against any claim of alleged innocent purchasers. Van Allen v. Francis, 123 Cal. 474, 56 Pac. 339. The case here, if anything, is a stronger one, because the possession of the property was caused to be delivered up by reason of criminal fraud, perpetrated by the persons who obtained the property from respondent.

We find no error which requires that the judgment be disturbed.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

(44 Cal. App. 371)

WHITING-MEAD COMMERCIAL CO. OF SAN DIEGO v. BROWN. (Civ. 3129.)

(District Court of Appeal, First District, Division 2, California. Nov. 20, 1919.)

1. APPEAL AND ERROR ⟸843(2) — WHETHER VERIFICATION OF A LIEN CLAIM, OTHERWISE INVALID, IS DEFECTIVE IS AN UNNECESSARY QUESTION.

Whether the verification of a lien claim is defective need not be decided, where the claim is defective for another reason and is invalid.

2. APPEAL AND ERROR ⟸704(2)—FINDING OF VARIANCE BETWEEN LIEN CLAIMS AND EVIDENCE, NEITHER OF WHICH ARE PRESENTED ON APPEAL, CONCLUSIVE.

The trial court's finding of fatal variance between the statements of mechanics' lien claims sought to be foreclosed and the proof is conclusive, where neither the claim nor the evidence are before the appellate court.

3. MECHANICS' LIENS ⟸277(6) — VARIANCE BETWEEN LIEN STATEMENT OF CONTRACT AND EVIDENCE THEREON FATAL TO LIEN.

A variance between the notice of mechanics or materialman's lien claim and the proof, showing that the statement of the contract set forth in the lien notice is untrue, is fatal to the lien.

4. MECHANICS' LIENS ⟸78—OWNER'S POSTING NOTICE OF NONRESPONSIBILITY WITHIN TEN DAYS AFTER ACTUAL KNOWLEDGE SUFFICIENT.

The striking by amendment of the words "or intended construction," etc., from Code Civ. Proc. § 1192, providing that the owner should file notice, that he would not be responsible for materials used in improvements upon his land by another, within 10 days "after he shall have obtained knowledge of such construction, alteration or repair," permits the owner to escape liability by posting notice within 10 days after knowledge of actual improvements, although he previously knew of intended improvements.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Suit by the Whiting-Mead Commercial Company of San Diego against Charles W. Brown. Judgment for defendant, and plaintiff appeals. Affirmed.

Jefferson Davis, of Sante Fé, N. M., and Charles B. De Long and G. F. Hoff, both of San Diego, for appellant.

J. T. Reed, of San Diego, and Chas. E. Dow, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal from a judgment in favor of the defendant in an action to foreclose liens upon certain real property. The record contains only the findings of fact and conclusions of law, it being contended that the plaintiff is entitled to judgment upon the findings. The court found that on or about April 28, 1916, the defendant was the owner of certain lots described in the complaint; that on said day he entered into an agreement with one Alex Brown, by the terms of which the said Alex Brown was to go into immediate possession of said property, and it was further agreed that if within 90 days the said Alex Brown caused certain repairs and improvements to be made to the building upon said premises, and performed certain other conditions, the said defendant agreed to convey said property to Alex Brown for the consideration of $1,000. To effectuate the agreement, the defendant placed a deed to the property in favor of Alex Brown in escrow with a bank, and Alex Brown placed in escrow his promissory note for $1,000 to cover the purchase price of the property. Directions were left with the bank that upon proof of compliance with the conditions imposed upon said Alex Brown the deed was to be delivered to him and the note to the defendant. In pursuance of said agreement, Alex Brown went into possession of the property. Thereafter one F. H. Brown, a real estate broker, who had negotiated the transaction just described, ordered certain plumbing fixtures, material, and labor from the plaintiff to be used in the repair and improvement of said dwelling house. Such material and labor were furnished by the plaintiff and used upon the said building. The court expressly found that all said materials, etc., were furnished to F. H. Brown, who was not acting as the agent of the owner, the defendant, and that the defendant never authorized any one to order materials or labor on his behalf, and that the plaintiff did not, until about the time of filing its lien, have any knowledge that Charles W. Brown was the owner of the property, and the repairs and materials were furnished by it at the request of F. H. Brown, and were charged on the books of the plaintiff company to said F. H. Brown.

The plaintiff, seeking to charge the said premises with mechanics' liens for said labor and material, on the 10th day of July, 1916, filed two notices of claim of lien. To each of said claims of lien was attached a verification as follows:

"C. J. Gibbs, being first duly sworn, deposes and says: That he is the cashier of the Whiting-Mead Commercial Company, of San Diego, a corporation, the claimant mentioned in the foregoing claim of lien, and that he has read the same and knows the contents thereof, and that it contains, among other things, a correct statement of the demands of the corporation, after deducting all just credits and offsets. C. J. Gibbs. Subscribed and sworn to before me," etc.

The court also found that within ten days from the time the said Charles W. Brown first had knowledge or notice of the furnishing of said material and labor for the making of said repairs, or of the making thereof, he caused to be given notice that he would not be responsible for the same by posting a notice in writing to that effect in a conspicuous place upon said premises, and did thereafter, within ten days, file for record a verified copy of said notice within the office of the county recorder of San Diego county, in which county the property is situated, and said notice contained a description of the property, together with the name of the defendant, Charles W. Brown, and the nature of his title to said property, and said copy so recorded was verified on behalf of said defendant by Hazel M. Brown, a person having knowledge of the facts set forth in said notice.

The court concluded that the verification attached to the liens and herein set out was fatally defective, in that only one of the five essential statements required by section 1187, Code of Civil Procedure, for a valid claim of lien, was verified, and the other four essentials of said claims, and each of them, were unverified; that, therefore, no lien attached by virtue of the filing for record of such claims. The trial court also found that there is a fatal variance between the statements in each of the claims of liens and the proof offered, in this, that the statement in each of the claims of lien is to the effect that said materials and labor were furnished to the defendant, Charles W Brown, whereas the proof shows that such materials and labor were furnished to F. H. Brown. The trial court also concluded that the notice of nonresponsibility, posted and filed by the defendant herein under and in pursuance of section 1192, Code of Civil Procedure, exempts defendant from personal liability.

[1-3] The first point made by appellant is that, as the statute does not prescribe any particular form of verification of claims, a claim signed by the claimant and verified by his oath is sufficient, and that, therefore, though the affidavit itself be insufficient to apply to all the essentials of a valid claim of lien, the verification by oath applies to the entire claim. We need not discuss here whether or not this verification was a sub-

stantial compliance with the statute, because, under the findings, the claim is defective for another reason. The court has found that there is a fatal variance between the statements in the claims and the proof. The claims themselves are not before us, and none of the evidence offered in support thereof. Under such circumstances, the finding of the trial court on this point is conclusive. A variance between the notice of lien and the proof, showing that the statement of the contract set forth in the notice is untrue, is fatal to the lien. Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. 555; Wilson v. Nugent, 125 Cal. 280, 57 Pac. 1008.

[4] This leaves for our consideration the question of the personal responsibility of the defendant. The only point made by the appellant in its attack upon this portion of the judgment is that, because the defendant had notice at the time of the contract with Alex Brown for the sale of the premises that the said Alex Brown intended to make certain improvements to the premises, the defendant was charged with notice of the making of said improvements irrespective of whether he had actual knowledge or not, at the time he entered into said agreement with said Alex Brown. As pointed out by the respondent, prior to 1911, it was provided by section 1192, Code of Civil Procedure, that the owner should file such notice within 10 days "after he shall have obtained knowledge of such construction, alteration or repair *or intended construction*," etc. But that section has been amended by elimination of the italicized words. Such definite change indicates an intention that the owner should be relieved of responsibility by filing said notice within the time limited after knowledge of the actual improvements.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

44 Cal. App. 345

PEOPLE v. KANGIESSER. (Cr. 865.)

(District Court of Appeal, First District, Division 1, California. Nov. 18, 1919.)

1. CRIMINAL LAW ⟨⟩507(7) — INTELLIGENT CONSENT NECESSARY TO CONSTITUTE BOY "ACCOMPLICE" TO INDECENT ASSAULT.

If a young boy consented to an act of sodomy, in violation of Pen. Code, § 286, by defendant, he was an "accomplice" within the meaning of section 1111, requiring corroboration of his testimony to support conviction, but consent in such connection means voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another, and mere passivity or submission does not include consent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. CRIMINAL LAW ⟨⟩742(2)—BOY AS ACCOMPLICE IN SODOMY A JURY QUESTION.

In a prosecution for sodomy upon a boy in violation of Pen. Code, § 286, whether the boy was an accomplice of defendant, or, the same thing, consented to commission of the act, was a question of fact for the jury.

3. WITNESSES ⟨⟩351—FOUNDATION MUST BE LAID FOR IMPEACHING QUESTION.

Evidence that the brother of prosecuting witness in a sodomy case had committed the act was inadmissible to impeach prosecuting witness, where no proper foundation was laid.

4. CRIMINAL LAW ⟨⟩1169(11) — TESTIMONY NOT PREJUDICIAL AS SUGGESTING GUILT OF OTHER CRIMES.

In a prosecution for sodomy in violation of Pen. Code, § 286, testimony of several witnesses examined by the district attorney identifying a certain bottle of vaseline, and to the effect that in camping or automobile trips they had slept with defendant, *held* not prejudicial to defendant as intimating that he had been guilty of offenses with the witnesses.

5. CRIMINAL LAW ⟨⟩1037(1)—OBJECTION BELOW TO MISCONDUCT OF DISTRICT ATTORNEY NECESSARY.

In the absence of assignment of misconduct by the district attorney in argument, made with reference thereto at the time, the objection cannot be raised for the first time on appeal.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

E. J. Kangiesser was convicted of a violation of Pen. Code, § 286, and from the judgment and an order denying motion for new trial he appeals. Judgment and order affirmed.

John L. McVey, of Oakland, for appellant.
U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the violation of section 286 of the Penal Code. He was tried by jury, convicted, and given an indeterminate sentence. He appeals from the judgment and from the order denying his motion for a new trial.

The first contention made for a reversal of the judgment and order is that the evidence is insufficient to support the verdict in that the story of the prosecuting witness, John Smith, as detailed to the jury, was not corroborated. The theory of the prosecution is that such corroboration was unnecessary for the reason that John Smith was not an accomplice, he being at the time of the commission of the offense a boy nine years of age

who did not know the wrongfulness of the act in which the defendant engaged (Pen. Code, § 26, subd. 1); that consequently he could not give the necessary consent to the commission of the act to constitute him an accomplice.

[1] Whether or not under the evidence the boy was an accomplice was submitted to the jury by the following portion of the court's charge:

"Section 1111 of the Penal Code provides as follows: 'A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense.' * * *

"If you find from the evidence in this case that John Smith was at the time of the alleged commission of said offense of the age of less than fourteen years, and that it is clearly proved in this case that at the time of the alleged commission of the offense he, the said John Smith, consented to the commission of the said offense, then and in that event the said John Smith is an accomplice within the meaning of the section of the Code I have just read to you, and the testimony of John Smith must be corroborated by such other evidence in this case as shall tend to connect the defendant with the commission of the offense. * * *

"Consent in law means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another. Consent differs very materially from assent. The former implies some positive action and always involves submission. The latter means mere passivity or submission which does not include consent. In cases of this character the age and mentality of the subject of an indecent assault is important and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years to an attempted outrage of his person should not in and of itself be construed to be such consent as would in point of law justify or excuse the assault."

It thus appears that the jury were clearly advised as to what constitutes an accomplice, the distinction between the consent necessary to constitute one an accomplice and mere assent and submission without consent.

The charge finds support in the case of People v. Dong Pok Yip, 164 Cal. 143, 127 Pac. 1031, in which the court said:

"The alleged victim of the assault was a boy nine years of age. * * * It may be admitted that the evidence shows that the boy was ignorantly indifferent and passive in the hands of the defendant, even to the point of submission; but there is a decided difference in law between mere submission and actual consent. 'Consent,' in law, means a voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice, to do something proposed by another. 'Consent' differs very materially from 'assent.' The former implies some positive action and always involves submission. The latter means mere passivity or submission, which does not include consent. * * * In cases of the character under discussion, the age and mentality of the subject of an indecent assault is important, and should always be considered in determining the presence or absence of consent. The mere submission of a child of tender years or retarded mental development to an attempted outrage of its person should not, in and of itself, be construed to be such consent as would, in point of law, justify or excuse the assault. * * * It is neither unreasonable nor unnatural to assume that such a child, in the hands of a strong man, might be easily overawed into submitting without actually consenting."

[2] There is evidence in the record that the boy did not know the wrongfulness of the act committed upon him, but whether under the evidence he was an accomplice, or, what is the same thing, consented to the commission of such act, was a question of fact to be determined by the jury. As was said by the Supreme Court in the case of People v. Tom Woo et al., 184 Pac. 389, at page 393:

"In passing upon this question, we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below."

[3] The defendant also complains that the court refused to permit him to show that the boy's brother had committed the act of sodomy upon him, and he argues that this testimony was admissible to impeach the prosecuting witness, and to show perhaps a motive on the part of such witness for charging the defendant with the commission of the offense.

The question was improper for the purpose of impeaching the witness, for the reason that the proper foundation for it was not laid, but aside from this objection the record shows that the defendant was permitted without objection to answer this very question.

[4] From the evidence it appears that the prosecuting witness testified that the defendant had used vaseline upon the private parts of the boy while consummating the act charged, and a bottle containing this substance was identified by another witness. Several witnesses examined by the district attorney identified the bottle of vaseline, and they testified that in camping or upon automobile trips they had slept with the defendant. The defendant insists that the purpose of this evidence was to intimate that the defendant had been guilty of other similar offenses. Regarding the jurors as reasonable men, we do not agree with the defendant

that they may have drawn the inference from either or both of these circumstances that these witnesses had themselves been guilty of the offense of sodomy with the defendant, and we are of the opinion that the defendant was not prejudiced by such testimony.

[5] With reference to the defendant's further contention that the district attorney was guilty of misconduct during his argument to the jury in his reference to a certain witness and his relations with the defendant, it is sufficient to say that there was no assignment of misconduct made with reference thereto at the time, and such objection cannot be raised for the first time upon appeal. People v. Shears, 133 Cal. 154, 65 Pac. 295.

During the impanelment of the jury, there was some discussion as to whether or not the jury should consist wholly of men; but, notwithstanding the assertion of the defendant to the contrary, nothing then said by the district attorney or by the court had any tendency to injure or prejudice the defendant, whose rights throughout the entire trial were carefully guarded by the court.

The judgment and order are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

(44 Cal. App. 285)

STEARNS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 3113.)

(District Court of Appeal, Second District, Division 1, California. Nov. 14, 1919.)

1. EXECUTION ⇐425 — ISSUANCE AGAINST PERSON GUILTY OF FRAUDULENT CONVERSION.

On a judgment that defendant was guilty of fraudulent conversion, under Code Civ. Proc. § 479, execution might issue against the person of defendant so adjudged guilty of fraud.

2. MANDAMUS ⇐4(1)—WRIT DOES NOT LIE TO COMPEL INSERTION OF PROVISION IN JUDGMENT FOR COMMITMENT TO JAIL.

In action for fraudulent conversion, complaint praying that on failure of defendant to pay over certain sums he be imprisoned until he did so, as required by Const. art. 1, § 15, where court found case was proper for judgment committing defendant to jail, but nevertheless refused to enter such judgment on a ground assigned, plaintiff's only remedy was by appeal, and she cannot sue out mandate to require insertion of provision for imprisonment; judgment and discretion of court as to facts and law in matter within jurisdiction not being controllable by writ of mandate, where party has adequate remedy at law.

Petition for writ of mandate by Madeline E. Stearns against the Superior Court of the State of California in and for the County of Los Angeles and Charles Wellborn, Judge thereof. Alternative writ discharged, and proceeding dismissed.

Collier, Schlegel & Labarere, Frank C. Collier, and Walter H. Sprague, both of Los Angeles, for petitioner.

John S. Cooper, of Los Angeles, for respondents.

SHAW, J. Respondent has interposed a general demurrer to a petition upon which this court issued an alternative writ of mandate addressed to the superior court of Los Angeles county commanding it, in the absence of cause to the contrary being shown, to incorporate in a judgment, which the court is about to render in favor of plaintiff upon findings made in an action wherein Madeline E. Stearns is plaintiff and Howard E. Reach is defendant, a clause to the effect that said defendant be committed to the county jail until he pays to plaintiff the sum of $1,052.39, so found by the court to be due to her.

The complaint, a copy of which is attached to the petition, alleges that defendant, while acting in a fiduciary capacity for plaintiff, fraudulently converted and appropriated to his own use certain funds and property which she intrusted to him; and the prayer thereof, in addition to judgment for $2,343.59 asked, is "that upon the failure of said defendant to pay said sums and all of them he be imprisoned in the county jail in the county of Los Angeles until such time as he does pay the same, as required by article 1, section 15, of the Constitution of the state of California." The petition also contains a copy of the findings upon which the court, as a conclusion of law, found that plaintiff was entitled to judgment against defendant for $1,052.39, and "that this is a proper case for a judgment committing defendant to and confining him in the county jail of said county of Los Angeles, and such a judgment would be ordered but for the reason that the provisions of article 1, section 15, of the Constitution of the state of California and section 478 of the Code of Civil Procedure of said state, construed together, seem to this court to preclude such a judgment as there was no preliminary arrest as allowed and provided for in section 479 et seq., of said Code of Civil Procedure. Therefore no judgment committing said defendant to and confining him in said county jail will be entered herein."

Petitioner claims that the findings bring the acts of defendant within the provisions of subdivision 2, section 479, Code of Civil Procedure, and show, as alleged in the complaint, that while acting in a fiduciary capacity for plaintiff he was guilty of acts for which, in the absence of his paying the amount found by the court to be due, he should be imprisoned in the county jail.

[1] Clearly, the judgment which plaintiff sought in the action was not only one for the recovery of money, to be enforced by execution against property, but one adjudging the defendant guilty of fraudulent conversion, upon which latter an execution might issue against the person of the defendant so adjudged guilty of fraud. Stewart v. Levy, 36 Cal. 159. The court, as to the indebtedness, found that plaintiff was entitled to judgment therefor, but the effect of the finding which we have quoted is that as a matter of law, notwithstanding the findings made as to defendant's fraudulent acts, plaintiff was not entitled to a judgment committing defendant to jail. Other than this simple finding, the so-called conclusion of law above set out is a mere statement of the trial judge of his reasons for holding that plaintiff is not entitled upon the findings to a judgment of imprisonment against defendant. That the argument or reasons given by a trial judge in support of a ruling or decision are no part of the record upon which this court is called upon to act is too well settled to require citation of authority. It thus appears, conceding the findings, as claimed by petitioner, warranted the judgment for which she contends, that the trial court, as it was within its jurisdiction entitled to do, took a contrary view of the law, and held as a matter of law that plaintiff was not entitled to judgment that defendant be committed to jail.

[2] Whether the trial court be right or wrong in so deciding is not involved in this proceeding, since if the court erroneously denies plaintiff a judgment warranted by the findings, her remedy, as in other cases, is by an appeal. No principle is better settled than that the judgment and discretion of the trial court, both as to the facts and as to the law applicable thereto, in a matter within its jurisdiction, cannot, where the aggrieved party has a plain, speedy, and adequate remedy in the ordinary course of law, be controlled by writ of mandate. Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467. That the petitioner has a remedy by appeal admits of no controversy, and that the higher court on such appeal, if the findings warrant it, will order judgment thereon in favor of the plaintiff in the action is equally true.

There is no difference between this proceeding, wherein petitioner claims that upon the findings she is entitled to a judgment other than that which the court proposes to render, and the ordinary case where the court is about to enter a judgment which the aggrieved party claims is unwarranted by the findings. If the writ in the instant case lies for such purpose, then, in lieu of an appeal from the judgment, it is applicable to all cases to compel the court to render a proper judgment based upon findings, thus applying a new and, perhaps, better method of review and correction thereof.

Petitioner's counsel seem to recognize the fact that she is not entitled to the writ, provided she has a plain, speedy, and adequate remedy in the ordinary course of law, and hence, to overcome this obstacle, alleges in her petition that the appeal will not be decided in a long time; that meanwhile petitioner will have no security for the payment of her judgment, at which time Reach will probably be beyond the reach of any process of the court. This argument would apply with equal force to all cases where the court has erroneously rendered judgment upon findings in favor of a defendant when it should have been for the plaintiff.

The alternative writ is discharged and the proceeding dismissed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 340

HYDE v. STOCKWELL et al. (Civ. 3105.)

(District Court of Appeal, First District, Division 1, California. Nov. 18, 1919. Rehearing Denied Dec. 18, 1919. Hearing Denied by Supreme Court Jan. 17, 1920.)

1. APPEAL AND ERROR ⊂=194(1), 236(2)—OBJECTION THAT DEFENDANT HAS NOT SEPARATELY STATED SEVERAL DEFENSES MUST BE MADE BELOW.

An objection on appeal that defendant has not separately stated his several defenses will not be considered in the absence of objection either by demurrer or motion.

2. FRAUDULENT CONVEYANCES ⊂=228—ATTACHMENT LIEN SUPERIOR TO PRIOR TRANSFER TO AVOID PAYMENT OF CLAIM.

Where apparent owners of a clear title to realty upon such apparent ownership as a matter of record, and upon express and repeated assertions that they are the owners, made to induce another rendering services to them to extend credit, obtain credit, and thereafter seek to avoid liability by conveying away the property to an absentee, an attachment lien by the creditor takes precedence of the conveyance, although subsequent thereto in point of time, in view of Civ. Code, § 3439, avoiding transfers fraudulent as to creditors.

3. APPEAL AND ERROR ⊂=187(1)—OBJECTION TO DEFECT OF PARTIES MUST BE MADE BELOW.

Where no objection below is made as to defect of parties, such objection cannot be considered for the first time on appeal.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action to quiet title by Lulu Bates Hyde against Ida B. Stockwell and others. From a judgment for defendants, plaintiff appeals. Affirmed.

G. Roy Pendell, of Los Angeles, for appellant.

E. D. Kennedy and A. A. Sturges, both of Los Angeles, for respondents.

RICHARDS, J. This is an action to quiet title to certain real estate. The complaint alleges the plaintiff to have been at all the times mentioned therein the owner of the property, and avers that defendants assert some claim or interest therein adverse to the plaintiff, but that they and each of them have no estate, right, title, or interest therein or in any part thereof. The plaintiff then proceeds to allege that the defendant Ida B. Stockwell has caused the defendant Charles R. Thomas, who is alleged to be a constable, to levy an attachment upon said property and thereby to cloud plaintiff's title thereto; wherefore the plaintiff prays that the defendants be required to set forth their claims to said property, and that they be decreed to be without right. The defendant Ida B. Stockwell, after several abortive efforts to present a pleading which would stand the assaults of the plaintiff by demurrers and motions to strike out, finally succeeded in doing so in the form of her fourth amended answer. The plaintiff demurred to said answer upon the general ground, and also upon numerous specified grounds of uncertainty, and also moved to strike out specific paragraphs in said answer upon the grounds of surplusage, sham, redundant, and irrelevant matter. The court overruled said demurrer and denied said motion to strike out, whereupon the cause proceeded to trial, as a result of which the court made its findings and rendered its judgment in favor of said Ida B. Stockwell, sustaining in the main the affirmative averments of her answer, holding the attachment lien imposed by said defendant upon said property to be superior to the plaintiff's claim of title in fee simple thereto.

The main contentions of the plaintiff upon this appeal are that the court erred in overruling her demurrer to the defendant's fourth amended answer, and in denying her motion to strike out specific portions thereof. The appellant also contends that the findings of the court in said defendant's favor are not supported by the evidence in the case.

[1] When the answer of the defendant is examined with a view to determining the merit of the first of these contentions, it is found to be very inartificially drawn, but on the whole we think that it is sufficient to stand the test of a general demurrer, and also to have enough affirmative matter therein to be able to pass safely through the rather technical criticisms which the plaintiff urged against it in her special demurrer. To the appellant's objection that said defendant has not separately stated her several defenses we find that no objection was made upon this ground in either the demurrer or the motion of the plaintiff; and as to her contention that the said defendant has not embodied the affirmative allegations of her answer in a cross-complaint we are of the opinion that the case of Klumpke v. Henley, 24 Cal. App. 35, 140 Pac. 289, 313, furnishes an answer to this particular objection.

This brings us to the main contention of the appellant herein, which is that upon the facts alleged in her answer the defendant was not entitled to the relief awarded her, and that the findings and judgment of the court awarding her such relief are not supported by the evidence in the case. As to the latter point, a careful examination of the record convinces us that the said defendant succeeded in proving the main facts set forth in the affirmative part of her answer, and hence that both the averments of said answer and the findings of the court were supported by the proofs in the case.

The facts upon which the said defendant relied in her pleading, and in the proofs which supported it for the judgment she succeeded in obtaining were substantially these: That prior to the 27th day of September, 1912, the plaintiff in the case was the owner in fee simple of the premises in question, and that on said date she made a grant deed thereof to one Hazel Hofer, her daughter, and to Albert R. Hofer, the latter's husband, of said premises, reserving to herself, a life estate therein. The Hofers immediately entered into possession of said premises and occupied and used the same thereafter and up to about the 12th day of February, 1916. Between the above dates the Hofers became indebted to the defendant Ida B. Stockwell for personal services in the way of medical advice and attendance rendered to them by her, in order to obtain which and the necessary credit therefor they represented themselves to be the owners of said property and that the same was free and clear of all incumbrances. When, however, the defendant Ida B. Stockwell finally demanded payment for the services rendered by her to the Hofers, and when, such payment having been delayed or refused, she threatened to bring suit upon her claim, the said Hazel and Albert Hofer, for the purpose of hindering and delaying their said creditor in the event of such suit, and of cheating and defrauding her out of the sum justly due her, caused a deed to be made and recorded purporting to convey said premises back to the plaintiff herein. At the time of the making of said deed to said plaintiff she was absent from the state of California, and no delivery of the same was actually made to her, but without such delivery said deed was attempted to be put upon record a day or two before the institution of the action by said defendant against the Hofers to recover upon their alleged indebtedness to her and the issuance of an attachment in said action upon said premises. In said action said defendant recovered judgment, upon which there was issued an execution which was duly levied upon the property in question. It was to avoid the threat of

such execution and of a threatened sale thereunder that the plaintiff commenced the present action.

[2] We are of the opinion that the foregoing facts as found by the trial court were sufficient to justify the relief to which the court found said defendant entitled. They present a case wherein persons apparently the owners of a clear title to real estate procure credit upon such apparent ownership as a matter of record and also upon their express and repeated assertions that they are the owners of the property in question, which assertions are made for the purpose of inducing another rendering services to them to extend to them such credit, and that, having obtained a full measure of such credit, they then seek to avoid liability therefor by conveying away the property to an absentee with the apparent purpose of preventing the successful assertion of their creditor's right to recourse to said property for the payment of her just claim. Transfers of property for such fraudulent purpose have been uniformly set aside by the courts of this state. Bull v. Ford, 66 Cal. 176, 4 Pac. 1175; First Nat. Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 Pac. 980, 69 Am. St. Rep. 64; Bekins v. Deterle, 5 Cal. App. 690, 91 Pac. 105. Section 3439 of the Civil Code seems to fully cover the case when it provides that—

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

[3] The appellant makes the final contention that the court should not have granted the defendant the relief which she sought, for the reason that the Hofers were not made parties to this action. A sufficient answer to this contention is that no objection was urged by the plaintiff either by demurrer or at the trial to the defect in parties to the action which is now urged for the first time upon appeal, and for that reason will not be considered by this court.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 289

In re MEYER'S ESTATE. (Civ. 3078.)

(District Court of Appeal, First District, Division 1, California. Nov. 14, 1919.)

WILLS ⇐191—REVOCATION BY SUBSEQUENT MARRIAGE AND BIRTH OF ISSUE.

Under Civ. Code, § 1298, providing that a will is revoked by testator's subsequent marriage and the birth of issue, either the wife or the issue surviving him, unless provision has been made for the issue by settlement or the will, or it has been mentioned so as not to show an intention of revocation, testator's will made in contemplation of marriage was revoked by such marriage, followed by the birth of issue, both the wife and issue surviving testator; there being no state of facts to which section 1306 could apply.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Benno Meyer deceased. From an order refusing probate to decedent's will, when offered by Jacob Macowsky and others, as executors, and contested by Camille Doris Meyer, Macowsky and others appeal. Order and judgment affirmed.

Cullinan & Hickey, of San Francisco, for appellants.

Louis H. Brownstone, of San Francisco, for respondent.

WASTE, P. J. This is an appeal from an order refusing probate to the last will of Benno Meyer, deceased, which was executed on the 5th day of March, 1917. Three-fourths of the entire estate of the decedent is, by the will, bequeathed and devised to the mother and brothers of the deceased. The remaining one-fourth is disposed of as follows:

"As I am about to be married to Camille Lasky, of the city and county of San Francisco, state of California, and desire to make some provision for her in case of said marriage, I do hereby give, bequeath, and devise unto her an undivided one-fourth (¼) of each and all my said estate."

Three days after the will was made, the deceased married said Camille Lasky, and subsequently a child, Marjorie Catherine Meyer, was born. Both wife and child survive the deceased, who died on or about the 16th day of January, 1919. The child, Marjorie, is not mentioned in the will, nor provided for by any settlement. When the testament was offered for probate, the surviving wife filed her opposition thereto, claiming the will to have been revoked by the birth of the child to the marriage. This contention was upheld by the lower court.

The sole question presented for determination in the lower court, and on this appeal, has to do with the construction to be placed on section 1298 of the Civil Code, and its application to the facts at bar. That section reads as follows:

"If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are

provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received."

The rule that a will is revoked by the subsequent marriage of the testator, and birth of issue, was borrowed from the civil law, and by degrees rather reluctantly incorporated into, and is now firmly established as part of, the common law. Swan v. Hammond, 138 Mass. 45, 52 Am. Rep. 255; Warner et ux. v. Beach, 70 Mass. (4 Gray) 162. The reason for the rule has been said to rest upon a presumed alteration of intention, on the part of the testator, arising from changed circumstances, new relations, and duties; that is, it is considered that on the birth of a child the situation is so changed that, if the will had been made under the altered conditions, it would not have been made as it was. Gay v. Gay, 84 Ala. 38, 4 South. 42; Warner v. Beach, supra. Other courts have held that the true view, apart from statutory enactments, is that a tacit condition is annexed to the will, to wit, that subsequent marriage and the birth of a child should revoke it. Wheeler v. Wheeler, 1 R. I. 364; Baldwin v. Spriggs, 65 Md. 373, 5 Atl. 295.

By appropriate legislation the provision for revocation from change of circumstances of the testator has now become an integral part of the statutory law of many states. In some jurisdictions, as, for instance, in Massachusetts, the statute, after setting forth the manner in which a will may be revoked, provides that nothing contained in the statute "shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." Construing that section, the Supreme Court of that state said:

"The commissioners in their note to this section say: 'The clause as to implied revocations recognizes and adopts the existing law, as established and understood among us.' And their further discussion of this subject shows clearly that they had in mind the rule of the common law that, in case of a man, marriage and the birth of a child, and, in case of a woman, marriage alone, revoked a will previously made. We are of opinion that this provision as to implied revocations, from its language, and the reasons given for its introduction, has substantially the force of an express enactment of the rules of the common law, which we are not at liberty to change." Swan v. Hammond, supra.

In other jurisdictions, California among them, the statute, by positive enactment, provides the only way in which a will may be revoked. The effect of these provisions is to do away with the doctrine of implied revocation. In re Comassi, 107 Cal. 1, 5, 40 Pac. 15, 28 L. R. A. 414. Section 1292 of the Civil Code declares:

"Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

"1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or

"2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction."

Section 1298, supra, deals with one of "the cases in this chapter mentioned," and section 1299 relates to another. In considering section 1298 and section 1299 of the same Code relating to the effect of the marriage of a testator after making a will, our Supreme Court said:

"It is the policy of the law that wife and children must be provided for. Therefore the Civil Code declares that where an unmarried person has made a will, and afterwards marries, the marriage, whether followed by the birth of issue or not, operates, in case of the survival of wife or children, if any, as a revocation of the will, unless some specific provision has been made by the will itself or by a marriage contract for the surviving wife, or by some settlement or provision for any surviving children of the marriage. Sections 1298, 1299, supra. The law presumes that the subsequent marriage of a testator has wrought such a change in his condition in life as to cause him to destroy or cancel a previous will, and does not admit of evidence to the contrary unless provision has been made according to law for wife and children who have survived him. Sections 1298, 1299, supra." Sanders v. Simcich, 65 Cal. 50, 52, 2 Pac. 741, 742.

In considering a similar law of the state of Georgia (Code of 1863, § 2445), the Supreme Court of that state said:

"The object of the provision is to secure a specific moral influence upon the testamentary act—the moral influence of having before the mind a contingent event so momentous as marriage or the birth of a child, and so deserving of consideration in framing a testamentary scheme." Ellis v. Darden, 86 Ga. 372, 12 S. E. 653, 11 L. R. A. 51.

The same court at a later period had the same statute under consideration, and said:

"When, therefore, a person has made a will in this state, and thereafter marries or has a child born to him, the will stands revoked upon the happening of either contingency, unless it appears that when the will was executed the testator had in contemplation the event of marriage or the birth of a child. And the evidence that the testator did have the event in contemplation must be in the will itself, taken in connection with the circumstances which existed at the time the will was executed; and this can be shown only by means of a provision in the will which appears to have been made in contemplation of the event. There can be no question that this is the plain meaning of the statute." Sutton v. Hancock, 115 Ga. 857, 859, 42 S. E. 214, 216.

We have, perhaps, dwelt more at length in the foregoing discussion upon a rule of law so well established than the exigencies of the case required. We have done so in order that the force of appellants' contention may be better understood. It is stated by them as follows:

"Since section 1298 of the Civil Code codifies a general rule of the chancery and civil law, that rule, so codified, is subject to the exceptions recognized by the English and civil law. One of those exceptions is that, when the pretermitted child would not gain an advantage by the revocation of the will, under the rule, the will, in that event, is not revoked."

Appellants take the ground that, under section 1306 of the Civil Code, the pretermitted child of the decedent, Meyer, succeeded to the same portion of the testator's estate as she will be entitled to take, if it shall appear that her father died intestate, and that, therefore, she will not be benefited by the revocation of the will. That section is as follows:

"Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. But such succession does not impair or affect the validity of any sale of property made by authority of such will in accordance with the provisions of section 1561 of the Code of Civil Procedure."

That the common-law rule of implied revocation, in the event of a subsequent marriage and birth of issue, did not always apply where revocation would not result in any benefit to the wife and issue, appears to have been sometimes recognized, as an exception to its general scope and application. Jarman on Wills (Bigelow's 6th Ed.) § 111; Page on Wills, p. 322, § 283. The English authorities cited by these text-book writers, however, so far as we have been able to find them, were dealing with cases in which there had not been a testamentary disposition of the entire estate, and there remained property out of which the issue could be provided for.

Appellant cites with confidence Hoitt v. Hoitt, 63 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530, where the court said:

"Inasmuch as the widow and children of a testator not provided for in the will are, under our statutes, entitled to the same share of the estate as if he had died intestate, the sole reason upon which the rule was grounded no longer exists; and so the rule itself has become inoperative and obsolete in this jurisdiction."

This case, however, may be distinguished, as we will presently point out. We find from an examination of this and appellants' other authorities on this point, that the courts were there dealing with the doctrine of implied revocation, something that has been done away with by the enactment of the statutory provisions of our Code. In re Comassi, supra. In one of the cases chiefly relied upon by appellants that distinction is clearly pointed out. Giving Hoitt v. Hoitt, supra, as its authority, the Supreme Court of New Hampshire said:

"In this state, many of the conditions upon which the doctrine of implied revocation was formerly based in England no longer exist. Now, by statute, the widow and children of a testator, not named or provided for in his will, receive the same share of his estate as if he had died intestate; and there is no longer any necessity for the application of the old rule of implied revocation by subsequent marriage and the birth of a child."

Continuing, the court said:

"The statutory provisions for the widow and children not named or provided for are grounded upon the assumption that the will is not revoked by the failure of the testator to make testamentary provision for them. If the omission to provide for the widow and children operated to revoke the will, the statute would be inoperative."

In this last statement, we think, is a complete answer to appellants' contention. When Meyer died, leaving a child surviving him, no provision being made for her by some settlement, or in the will, the contingency provided for by the Legislature became operative, and thereby the will of the decedent was rendered "dead, as completely as if he had destroyed it by burning or by any other means known to the law." Sutton v. Hancock, supra. It was revoked, not by implication, but by positive statutory enactment, and thereafter there was no state of facts to which the provision of section 1306, supra, could be applied. We are not now dealing with a common-law rule, but with a statutory enactment relating to the revocation of wills under certain circumstances. We cannot read into section 1298 any exception which the Legislature did not incorporate therein. Therefore we cannot agree with appellants that section 1306 of the Civil Code makes any such provision for the pretermitted child of the decedent, Meyer, as to take this case out of the application of the statutory enactment found in section 1298, supra. It amounts only to a rule of succession, applicable in those cases in which no conjunction of events has served to revoke the will of the testator of such surviving issue.

The order and judgment of the lower court are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

44 Cal. App. 362

LA FETRA v. RICHARDSON et al.

(Civ. 3109.)

(District Court of Appeal, First District, Division 1, California. Nov. 15, 1919. Hearing Denied by Supreme Court Jan. 12, 1920.)

1. APPEAL AND ERROR ⊜907(3) — FINDINGS PRESUMED SUSTAINED BY EVIDENCE IN ABSENCE OF BILL OF EXCEPTIONS.

In the absence of any bill of exceptions, it must be assumed that the evidence presented in support of the findings was competent to establish the facts alleged, and was received without objection, and was sufficient to sustain each of the facts found.

2. WATERS AND WATER COURSES ⊜116 — LANDOWNER HAS EASEMENT TO FLOW SURFACE WATER OVER LOWER LAND.

Where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of the upper tract has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude.

3. WATERS AND WATER COURSES ⊜119(1) — RIGHTS OF UPPER LANDOWNER AS TO CONTROL AND USE OF SURFACE WATER.

An owner of higher lands may not divert surface or storm waters from his lands onto the lands of another, over which they would not naturally have flowed, nor has he the right by accumulating surface waters upon his own lands in ditches or other like artificial channels to precipitate them upon his neighbor's land in larger quantities or in a different form from that from which they would have taken in the course of the nature, but, however, the owner of the upper tract, in a reasonable manner and for the purpose of cultivation and improvement of his own land, may confine the surface or flood waters flowing down upon his tract through natural courses into one channel and carry the same in substantially the same channel in which the water flowed naturally across his land, without increasing the volume.

4. WATERS AND WATER COURSES ⊜164 — RIGHT TO CONSTRUCT FLUME ACQUIRED BY PRESCRIPTION.

Where one acquired right by prescription to discharge water upon the land of another, he could construct a concrete flume along the same course, as long as it did not impose an additional burden on the lower landowner.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by T. W. La Fetra against C. W. Richardson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellant.

Porter, Morgan & Parrot, of Los Angeles, and R. B. Bidwell, of Glendora, for respondents.

WASTE, P. J. Plaintiff claims that the defendants have greatly injured his orange orchard by wrongfully diverting thereon large quantities of storm water. He seeks an injunction, and prays for damages. Defendants had judgment, and plaintiff appeals on the judgment roll alone.

Plaintiff is the owner of an orange orchard on the southerly slope of the Sierra Madre mountains. Just north of the land of plaintiff, and separated therefrom by Ledora avenue, are the lands of defendants. Located in these mountains is a deep ravine, known as Shorey canyon, which, with its many branches, constitutes the natural drainage way of waters falling in said locality. In the year 1914 defendants constructed in this ravine, on their land, a concrete flume about 5½ feet in width and about 3½ feet in depth, with a fall of about 90 feet in a distance of 1320 feet. Plaintiff seeks to have this flume declared a nuisance, and removed, and the ditch in which it is constructed filled to its natural level and grade.

The complaint alleges that prior to the construction of the flume the waters falling from the slopes of the mountains, and naturally draining into Shorey canyon, flowed therein down to a point of discharge on defendants' land, and from thence spread out and were widely diffused over the surface of the ground, falling in no definite channels, in a southeasterly direction over the lands of the defendants and other lands, without in any wise injuring or damaging the lands of plaintiff; but that, since the construction of the flume by the defendants, these storm waters have accumulated therein, and have been prevented thereby from becoming spread out, or diffused over the surface of the land, and from flowing, as they naturally would have done, without injuring or damaging the lands of plaintiff, but have been cast in a single volume, and in greatly increased quantities upon, and across, the lands of the plaintiff. It is further alleged that during the months of January and February, 1916, heavy rains fell generally in this locality, and great volumes of water flowed out of Shorey canyon through the flume constructed by defendants, and were accumulated, and carried in a single volume, and diverted to, and across, the lands of the plaintiff, cutting a ravine therein to a depth varying from 3 to 12 feet, and to a width of 10 to 30 feet; and carrying away large quantities of the land, uprooting and carrying away many of the orchard trees located thereon, leaving more than two acres of the land unfit for cultivation; and greatly injuring and damaging other portions of the orchard by depositing large quantities of rock and débris thereon.

The lower court found that plaintiff's

orchard suffered the injury alleged. It further found that for many years prior to the commencement of the action, and before the cultivation of plaintiff's land, and at a time, and during a period, when all of the land thereabout was in a state of nature, there had been, and was, a natural course, or channel, leading out of Shorey canyon and continuing across the lands of the defendants, over Ledora avenue and across the land of the plaintiff, which channel carried the natural flow of storm water, flowing from said canyon over defendants' land, across Ledora avenue, and thence over the land of plaintiff; that plaintiff had at all times accepted said water, and made provision for the disposal thereof, by the erection of bulkheads and dams across the north line of his property, and on Ledora avenue, for the purpose of turning and diverting said water from his land and causing it to flow along that highway. It further found that the flume constructed by the defendants, and complained of by plaintiff, was laid in and followed the identical course of this natural channel and did not accumulate any water other than that naturally flowing therein, and did not divert or change in any way the natural flow of the water over and across plaintiff's land. There was a further finding to the effect that the concrete ditch, or flume, constructed by the defendants, was constructed for the purpose of taking the place, and supplanting, an artificial ditch or flume of smaller dimensions, that had been previously constructed and maintained in identically the same place for many years; that the new flume, although larger in size than the old one, did not accumulate, or gather, storm water, flood water, or water from any source, on defendants' land, or elsewhere, in any larger amount than was gathered by the former ditch and did not augment or increase the amount, or volume, of storm water previously carried in the flume, and in the natural channel, to and across the lands of plaintiff; but that the water was discharged on the highway of Ledora avenue, as at all times prior thereto, and thence flowed to plaintiff's premises.

[1] In the absence of any bill of exceptions, it must be assumed that the evidence presented in support of the foregoing findings was competent to establish the facts alleged, and was received without objection, and was sufficient to sustain each of the facts found. Cutting Parking Co. v. Canty, 141 Cal. 692, 695, 75 Pac. 564; Damon v. Quinn, 143 Cal. 75, 77, 76 Pac. 818.

[2, 3] Where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude. Ogburn v. Connor, 46 Cal. 346, 352, 13 Am. Rep. 213; Los Angeles Cemetery Association v. Los Angeles, 103 Cal. 461, 467, 37 Pac. 375. Every landowner must bear the burden of receiving on his land the surface water naturally falling upon land above it, and naturally flowing to it therefrom. Heier v. Krull, 160 Cal. 441, 444, 117 Pac. 530. It is equally well settled that the owner of the higher lands has no right, for his own relief, either to divert surface or storm waters from his lands onto the lands of another, over which they would not naturally have flowed, nor has he the right by accumulating the surface waters upon his own lands, in ditches, or other like artificial channels, to precipitate them upon his neighbor's land in larger quantities, or in a different form from that which they would have taken in the course of nature. When, however, the owners of the upper tract, in a reasonable manner, and for the purpose of cultivation and improvement of their own land, confine the surface, or flood waters, flowing down upon their tract, through natural courses, into one channel, and carry the same in substantially the same channel in which the water flowed naturally across their land, without increasing the volume of water therein, they work no invasion of the rights of the lower owner. The burden of his property is not increased thereby. Wood v. Moulton, 146 Cal. 317, 319, 80 Pac. 92. The lower court's findings bring the case at bar squarely within the law of these decisions and support the judgment entered herein.

[4] The trial court also found that the respondents had acquired a right by prescription to discharge the water upon the land of plaintiff. Appellant contends that, if such right existed, it was a right only to maintain the first ditch, and was abandoned by the construction and maintenance of the larger concrete flume. We are not impressed with the contention. The right which the respondents had arose from the easement to discharge the storm waters naturally flowing through their land onto the highway adjacent to and lower than their land, and thence over plaintiff's land if necessary, a right which plaintiff could neither interrupt nor prevent. Los Angeles Cemetery Ass'n v. Los Angeles, supra. It had nothing to do with the particular method employed by respondents in discharging this water, so long as it in no way imposed an additional burden on plaintiff.

The judgment of the lower court is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

44 Cal. App. 332

ALAMEDA COUNTY et al. v. TIESLAU et al.

(Civ. 2884.)

(District Court of Appeal, First District, Division 2, California. Nov. 18, 1919.)

1. NEGLIGENCE ⟸136(9)—DETERMINATION OF QUESTION AS MATTER OF LAW.

Only where reasonable men can draw but a single conclusion from the facts may the court determine the question of the negligence of either party as a matter of law.

2. HIGHWAYS ⟸197(3)—RECKLESS USE OF DEFECTIVE HIGHWAY WITH KNOWLEDGE DEFEATS RECOVERY.

Where a traveler uses a defective highway with knowledge of defects and in reckless disregard of them, he may not recover for injuries sustained, even though the persons charged with the duty to maintain the road or warning signs or lights have been negligent.

3. HIGHWAYS ⟸197(1)—NO NEGLIGENCE IN ERROR IN JUDGMENT THROUGH ATTEMPT TO ESCAPE DANGER.

Where one riding a motorcycle along the highway was confronted with sudden peril in the approach of a buggy, the fact that he erred in judgment, miscalculated the space in which he might move, or momentarily forgot, and encountered another danger in turning to one side, does not necessarily warrant the conclusion of contributory negligence, though it subsequently appeared that he might have avoided both perils by choosing a different course.

4. HIGHWAYS ⟸213(4)—CONTRIBUTORY NEGLIGENCE OF OFFICER RIDING MOTORCYCLE A JURY QUESTION.

In an action against road contractors for death of a traffic officer while riding his motorcycle along the highway when he turned aside into gravel piles left by defendants in order to avoid a buggy, question of the deceased officer's contributory negligence *held* for the jury under the evidence.

5. HIGHWAYS ⟸194, 196 — CONTRACTORS' FAILURE TO LIGHT ROCK PILE WAS NEGLIGENCE AND PROXIMATE CAUSE OF INJURY.

The failure of road contractors to place lights as required by their contract on a continuous pile of rock along the side of the highway, partly open for traffic, the work having been stopped on order of the state engineer, constituted negligence, but, unless it was the proximate cause of death of a traffic officer riding a motorcycle, the contractors are not liable.

6. HIGHWAYS ⟸209—BURDEN TO PROVE NEGLIGENCE OF CONTRACTORS IN LEAVING ROCK WHICH CAUSED INJURY ON PLAINTIFF.

In an action against road contractors for death of a traffic officer killed when his motorcycle struck a pile of rock left by the contractors along the highway, the burden to prove the contractors' negligence, if not admitted, and that it was the proximate cause of the injury to the officer, was on plaintiffs.

7. HIGHWAYS ⟸211—EVIDENCE SHOWED CONTRACTORS' NEGLIGENCE CAUSED DEATH OF MOTORCYCLE RIDER.

In an action against highway contractors for injuries to and death of a traffic officer riding a motorcycle, who swerved to avoid a buggy in the nighttime, and ran into rock piles left along the road by the contractors, evidence *held* to justify finding of such facts, and that the death was proximately caused by defendant contractors' negligence.

8. APPEAL AND ERROR ⟸1047(3)—ERROR IN STRIKING TESTIMONY AS TO CONTRACT BEFORE COURT HARMLESS.

In an action against road contractors for death of a motorcycle rider caused by pile of cracked rock along side of road, striking on motion of questions and answers to and of a witness for the contractors as to what they were required to do under the contract *held* harmless to the contractors; the contract being before the court and construable by it.

9. HIGHWAYS ⟸210(3)—EXCLUSION OF EVIDENCE NOT EXCUSING NEGLIGENCE IN FAILING TO LIGHT OBSTRUCTION PROPER.

In an action against road contractors for death of a traffic officer who turned his motorcycle into a rock pile along the side of the road to avoid an approaching buggy, testimony of a witness for the contractors as to the use of lights on an adjoining section of the roadway *held* properly excluded, no custom regarding the use of warning lights having been shown, while a custom involving negligence could not excuse it.

10. EVIDENCE ⟸506—EXPERT OPINION ON PROPER CONDUCT OF MOTORCYCLE RIDER NOT INVADING PROVINCE OF JURY.

In an action against road contractors for death of a traffic officer who turned his motorcycle aside to avoid a buggy and ran into a pile of rock left along the road by the contractors, hypothetical question to an expert motorcycle rider as to what such a rider should do in running into such a pile of gravel *held* proper, and not to invade the province of the jury.

11. APPEAL AND ERROR ⟸1170(7)—ERROR IN ADMISSION OF EXPERT TESTIMONY NOT OF A CHARACTER TO WARRANT REVERSAL.

In an action against road contractors for death of a traffic officer who turned his motorcycle aside to avoid a buggy, and ran into a gravel pile along the road left by the contractors, any error in permitting an expert motorcycle rider to answer hypothetical question as to the proper conduct of a rider in such circumstances *held* not to warrant reversal, under Const. art. 6, § 4½, as not having resulted in miscarriage of justice.

12. APPEAL AND ERROR ⟸1026—HARMLESS ERROR DISREGARDED.

Harmless error must be disregarded.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by the County of Alameda and Fern E. Green, as administratrix of the estate of

Harry B. Green, deceased, against A. A. Tieslau and another, copartners doing business under the firm name and style of Tieslau Bros. From judgment for plaintiffs, defendants appeal. Affirmed.

Hartley F. Peart, of San Francisco (Gus. L. Baraby, of San Francisco, of counsel), for appellants.

Ezra W. Decoto, Dist. Atty., James M. Koford, Asst. Dist. Atty., Chas. Wade Snook, Deputy Dist. Atty., and Ostrander & Carey, all of Oakland, for respondents.

BRITTAIN, J. The defendants appeal from a judgment entered upon the verdict of a jury for $5,000 damages for the death of Harry B. Green, a traffic officer of the county of Alameda. His death occurred in December, 1914, while riding a motorcycle on a state highway then in course of construction by the defendants under a contract with the state. His widow received $3,900 under the provisions of the Workmen's Compensation Act (St. 1913, p. 279) for herself and her minor children from the county of Alameda. The county, joined by the widow as administratrix, commenced this action, alleging the death was caused by the negligence of the contractors in placing and leaving on the highway numerous piles of loose gravel, into one of which the motorcycle ran when its rider swerved to the right to prevent a collision with a horse-drawn vehicle approaching from the opposite direction. The accident occurred at night. It was also alleged that no lights or other means of warning were placed on or near the piles of gravel.

Under the contract with the state the concrete base of the roadway, 18 feet wide, had been laid, and, by direction of the state department of engineering, the road had been opened to partial traffic. The contractors were to construct shoulders at the sides of the roadway, by filling in crushed stone, which was supplied, but not hauled to the work, by the department of engineering. Rains had softened the earth at the sides of the roadway, and the state engineer had directed that the shoulders should not be constructed while the ground was in that condition. The contractors had received and hauled to the work the crushed rock and caused it to be dumped along the edges of and upon the concrete road surface, roughly in a continuous pile of varying width and depth on each side of the road. The depth of the piles of loose, crushed rock varied from 4 to 17 inches and averaged about a foot. The edges of the two piles were irregular, and the clear space between them formed a sinuous way varying from a little less than twenty to a little less than 15 feet wide.

There was evidence that after the accident the track of the motorcycle through the rock pile on the right-hand side of the road running from Hayward could be traced from a point where the roadway was about 12 feet wide for a distance of 100 feet, more or less, to the place where the machine lay, some feet beyond where the rider was found. Near the place where the machine had skidded or slipped in the gravel the foot plate and pedal from the left side of the motorcycle were found. Only one eyewitness of the accident was available, a boy aged 12 years at the time. His evidence was given at the trial two years later. He saw the headlight of the motorcycle approaching him. A buggy without lights traveling in the opposite direction had passed him. He said the buggy pulled out a little to the right when it got opposite Mr. Green, who fell off at that time. After the accident unavailing search was made for the buggy and its driver. There were no lanterns, guards, or signs either on the gravel piles or at the entrance to the new work at the limits of Hayward, from which it was six-tenths of a mile to the point where the accident occurred. There was an electric street light at the Hayward end of the road. There was evidence that Green was riding at the rate of about 25 miles an hour, and that he had ridden over the road before the accident and after the gravel had been dumped.

The theory of the plaintiffs is that, even though Green knew of the rock piles, in momentary forgetfulness of them, when he was suddenly confronted with danger of collision with the buggy, he swerved so far to the right that his machine ran into the loose rock and skidded so far to the side that the pedal and foot rest were broken off by coming in contact with the broken rock, the machine finally throwing him and falling itself; further, that if lights had been placed on the rock piles at intervals, he could not have forgotten their presence, and would not have swerved so far to the right. The appellants maintain that Green was guilty of contributory negligence; that there was no evidence of negligence on their part which proximately caused the death of Green; that the proximate cause of death was a collision between the motorcycle and another vehicle; that the court erred in matters of evidence; and that the court erred in matters of instructions.

[1-4] The theory of the appellants in regard to contributory negligence is that under the circumstances it was negligence as a matter of law for Green to ride over the road open for partial traffic only at the rate of speed at which he was going. It is only where reasonable men can draw but a single conclusion from the facts that courts may determine the question of negligence of either party as a matter of law. The appellants rely on the rule that, where a traveler uses a defective highway with knowledge of its defects, and in reckless disregard of them, he may not recover for injuries he may sustain, even though those charged with the duty of maintaining the road or warning signs or lights

have been negligent. Brett v. Frank & Co., 153 Cal. 267, 94 Pac. 1051; McGraw v. Friend, etc., Co., 120 Cal. 574, 52 Pac. 1004; Buckingham v. Commary-Peterson Co., 178 Pac. 318. The latest of these cases is claimed by the defendants to have been decided on facts identical with those in this case, but upon comparison it proves, like so many of the "all fours" cases of negligence, to have three or more of the fours missing. In that case the road was not open to traffic, and the evidence of the injured man and his companion was of such a character that the Court of Appeal of the Third District very properly determined that reasonable men could draw but the conclusion that he was recklessly negligent. In the present case the road was open to traffic: the defendants were charged with the duty of maintaining warning lights upon the obstructions they had placed on the roadway. They provided lanterns which were not placed. The traffic officer was properly upon the road. He was confronted with a sudden danger. If the lights had been there, he could not have forgotten, and he might have seen the crooked outline of the rock pile. Where one is confronted with sudden peril, the fact that he errs in judgment, miscalculates the space in which he may move, or momentarily forgets and encounters another danger, does not necessarily warrant the conclusion of contributory negligence, because afterwards it may appear he might have avoided both perils by choosing a different course. Harrington v. Los Angeles, etc., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Liverpool, etc., Co. v. Southern Pacific Co., 125 Cal. 434, 58 Pac. 55; Hontz v. San Pedro, etc., Co., 173 Cal. 750, 161 Pac. 971. It is argued that the evidence shows Green had ridden over the road after the rock was scattered on it, but it does not appear when this was, nor that he knew the rock had not been removed. There are cases to the effect that one cannot be excused from contributory negligence by momentary forgetfulness of danger of which they are aware. Brett v. Frank, 153 Cal. 267, 94 Pac. 1051; Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114. These cases, however, have no application where without fault the person charged with contributory negligence is faced with a sudden emergency of danger, in seeking to avoid which he may not act as he might have acted had time permitted calm deliberateness of choice and movement. In all such cases the rule of momentary forgetfulness may be applied under circumstances warranting it. From all the facts it cannot be said that reasonable men might not have drawn different conclusions regarding Green's negligence or lack of it. It cannot be said as a matter of law that he was guilty of contributory negligence.

[5-7] The evidence shows that the state engineer ordered the work of constructing the shoulders of the sides of the road to be stopped. There is no evidence concerning whether this order was given before or after the rock was distributed on the road. Neither is there evidence that the rock was placed on the road at the time it was placed there under the direction of the state engineer. In the absence of evidence on the subject, it cannot be assumed that the mere placing of the rock on the road was negligent. The contract required the obstructions to be guarded or warning lights to be placed. Warning lights were furnished by the defendants, but they were not placed on the continuous rock pile. The defendants, of course, knew the road was open for traffic. The failure to place the lights on the road was negligence, which is at least tacitly admitted by the argument on behalf of the appellants. Notwithstanding the negligence of the defendants, unless it was the proximate cause of the injury, they could not be held liable. Oakland Bank v. Murfey, 68 Cal. 455, 9 Pac. 843; Schwartz v. California Gas & Elec. Co., 163 Cal. 398, 125 Pac. 1044. The burden of proving the defendants' negligence, if it was not admitted, and that it was the proximate cause of the injury, was upon the plaintiffs. Diamond v. Weyerhaeuser (Sup.) 174 Pac. 38; Trice v. Southern Pacific, 174 Cal. 89, 161 Pac. 1144. By proving the defendants' negligence without in some way fastening that negligence to the injury, a case is not made out. Puckhaber v. Southern Pacific, 132 Cal. 363, 64 Pac. 480; Union, etc., Co. v. San Francisco Gas, etc., Co., 168 Cal. 58, 141 Pac. 807. These rules, however, do not require demonstration of the connection between the proved or admitted negligence and the resultant injury. It is not necessary that an eyewitness be produced to testify directly to the fact. The connection may be made by circumstantial evidence in the same way that any other fact can be so proved. In the present case the evidence shows that Green in riding along the road was suddenly confronted with a buggy being driven without lights. The buggy was near the middle of the road, and Green swerved to the right unquestionably to avoid a collision. The track of his motorcycle through the pile of broken rock was subsequently traced. Were these facts sufficient to permit the jury to draw an inference that the injury to Green was the result of the failure of the defendants to maintain lights on the rock pile? An inference is a deduction which the reason of the jury makes from the facts proved. Code Civ. Proc. § 1958. It must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. Code Civ. Proc. § 1960. In this case the facts proved were the existence

of the rock pile, the absence of lights, the necessity for Green to avoid the approaching buggy, the track of Green's machine through the rock pile, his broken machine, and the finding of his body at the end of the track through the rock pile. A consideration of the usual propensities of men would seem to warrant the inferences: First, that Green would have sought to avoid the collision; second, that he would not knowingly have run into a pile of loose rock from 4 to 17 inches high, with an average depth of 10 inches; third, that, if the lights had been there, Green would have had his attention directed to the rock pile; and, fourth, that the subsequent injury to Green was from the skidding of the machine in the rock pile. As against these inferences, which seem reasonable, no other inference based upon any fact proved finds support. The appellants contend that the foot plate and pedal of the motorcycle must have been broken off by a collision with the buggy. There is not the slightest evidence to indicate there was a collision with the buggy, and if there had been a collision of sufficient force to have broken the metal parts of the machine, it is not probable that the buggy would have been driven off so soon after the accident that all trace of it was lost. Other inferences suggested are that Green may have lost control of his machine by reason of the breaking of the pedal and foot plate, but a few minutes before the accident the machine had been inspected, and the evidence was that it was in perfect order. Green may have been stricken with sudden illness, mental or physical, but there is no fact in evidence upon which such inference could be rested. Even if other reasonable inferences based on proved facts might be drawn, they are such as must be drawn by the jury, and not by the appellate court.

"If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence. For a finding of fact based upon reasonable inference drawn from facts proved with legal sufficiency is as much and as completely as is any other finding of fact a finding based upon good and sufficient evidence. It is the peculiar and exclusive province of the trial court or trial jury in the first instance to make such finding of fact, and it is the especial right of every litigant to have all facts so determined by court or jury, this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence." Ryder v. Bamberger, 172 Cal. 799, 158 Pac. 756.

[8-11] A witness for the defendants was asked certain questions as to what the contractors were required to do under the contract. On motion the questions and answers were stricken out. It is contended that, in the absence of objection to the questions, the motion should have been denied. The defendants were not injured by the ruling. The contract was before the court. What it required was a question of law, not dependent upon the answers of the witness. The same witness was asked concerning the use of lights on the adjoining section of roadway also under construction. The question was improper because no custom regarding the use of warning lights was shown, and a custom involving negligence could not excuse it. An expert motorcycle rider was asked a hypothetical question concerning what such a rider should properly do on coming into sudden contact with a continuous pile of gravel such as that involved in this case. The objection was that it was not a question for expert testimony, that it did not include all the facts, and that it invaded the province of the jury. The question was proper, but, even though there were error in permitting it to be answered, it was not such as would warrant reversal, in that it does not appear that it resulted in a miscarriage of justice. Const. Cal. art. 6, § 4½.

[12] The exceptions to the instructions, even if well founded, are also within the rule requiring harmless error to be disregarded. The instructions as a whole were rather more favorable to the appellants than to the respondents, and they fully covered the law applicable to the case. It does not appear that any of the appellants' contentions in regard to the instructions are substantial.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

44 Cal. App. 296

J. W. WILLIAMS CO. v. LEONG SUE AH QUIN et al. (Civ. 2417.)

(District Court of Appeal, Second District, Division 1, California. Nov. 15, 1919.)

1. APPEAL AND ERROR ⊂=110, 870(6)—NO APPEAL FROM ORDER DENYING NEW TRIAL, BUT QUESTIONS SETTLED THEREON ARE REVIEWABLE ON APPEAL FROM JUDGMENT.

No separate appeal is allowed to be taken from an order refusing a new trial; the questions settled in such a motion in the trial court being reviewable on an appeal from the judgment.

2. CORPORATIONS ⊂=16—CORPORATION LEGALLY FORMED WITHOUT ISSUANCE OF STOCK.

Where incorporators executed articles of incorporation and filed the same with the secretary of the state and with the county clerk, and a certificate of incorporation was issued by the secretary of the state, and a board of directors was elected, the corporation was regularly and legally formed, although no certificates of stock were issued.

3. CORPORATIONS ⟸33—THIRD PERSON MUST TAKE NOTICE OF CONTENTS OF ARTICLES FILED.

Persons dealing with a corporation are bound to take notice of the contents of articles of incorporation regularly filed.

4. CORPORATIONS ⟸30(5) — INCORPORATORS NOT INDIVIDUALLY LIABLE FOR DEBTS IN ABSENCE OF FRAUD.

Where a corporation was regularly formed, and a board of directors was elected, and a third person dealing with the corporation obtained judgment against it and failed to discover assets, the incorporators were not personally and severally liable for the full amount of the debt in the absence of fraud, although no certificates of stock were ever issued, and the incorporators each subscribed for only one share of the stock.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the J. W. Williams Company against Leong Sue Ah Quin and others. From a judgment in favor of the plaintiff and from order denying their motion for a new trial, certain defendants appeal. Appeal from order dismissed. Judgment reversed.

J. S. Callen and E. L. Johnson, both of San Diego, for appellants.

Joseph S. Campbell, of San Diego, for respondent.

JAMES, J. [1] Three of the defendants in the above-entitled action have appealed from a judgment entered against them. There was a motion for a new trial and formal notice of appeal from the order denying said motion. Under the present practice, however, no separate appeal is allowed to be taken from an order refusing a new trial, although the questions settled on such a motion in the trial court are reviewable on the appeal from the judgment. The separate appeal taken from the order is therefore dismissed.

This action was brought against the defendants to recover from them severally an amount of money alleged to be due on account of merchandise sold. In the complaint it is set forth that in January, 1915, the individual defendants "pretended to organize a corporation"; that articles of incorporation were filed with the secretary of state and with the county clerk, but that nothing further was done toward completion of said corporation, and that no stock was issued to the incorporators or any one else; that no officers or directors were ever elected; that no meetings were held by the defendants, who pretended to organize the corporation; that the pretended corporation "never had any capital whatever" and no existence in fact. The complaint proceeds to narrate that the defendants claimed to have organized a corporation and operated under such pretention, and that they represented to plaintiff that they were such corporation; that the plaintiff sold goods to the pretended corporation amounting in value to several hundred dollars. Further allegations followed to the effect that the corporation was pretended to be organized fraudulently by the defendants for the purpose of avoiding personal liability. The court made findings negativing the allegation that any fraudulent intent existed on the part of the incorporators of the corporation. The court found further that before the commencement of this action plaintiff had brought an action against the corporation, secured judgment and had execution issued thereon, which was returned unsatisfied "for want of corporate assets." The holding of the court was, however, that the corporation had not been legally formed, and that by reason of that fact alone the individual incorporators incurred the personal liability which plaintiff sought to enforce against them. As to the manner of the organization of the corporation, the particular finding was as follows:

"That the defendants George Ah Quin, Tom Ah Quin, Chan Hong, Reuben Summers, and Robert Wurgraft, on or about the 15th day of January, 1915, undertook to organize a corporation under the name of the George Ah Quin Company, and that they executed articles of incorporation and filed the same with the secretary of state of California and with the county clerk of San Diego county; that a certificate of incorporation thereon was issued by the secretary of state, and said incorporators thereupon met and elected themselves a board of directors and proceeded to organize and do business as such corporation; that no capital stock was ever issued to any of the said defendants, and that no capital stock was ever issued to any one; that no officers or directors were ever elected for said corporation by stock representation; that nothing further than to execute and file articles of incorporation with the secretary of state and the clerk of the county court was ever done to complete the organization of the said George Ah Quin Company by any persons holding stock therein."

[2, 3] We think, from the facts as determined by the court in the finding quoted, it must be concluded that the corporation was regularly and legally formed. The mere fact that certificates of stock were not issued does not detract from this conclusion, for the incorporators became stockholders and were entitled to have issued to them the certificates for the number of shares which they had subscribed for. It may be added that a copy of the articles of incorporation was received in evidence, and these articles showed that each of the five incorporators subscribed for one share of stock each of the par value of $10. The directors selected for the first year were named, and it seems that all things

were done that are required to be done under section 290 of the Civil Code, which prescribes what shall be shown by the articles of incorporation. Persons dealing with the corporation were bound to take notice of the contents of the articles which were regularly filed. Perkins v. Fish, 121 Cal. 317, at page 325, 53 Pac. 901. As has been noted, the court found that the organization of the corporation was not conceived in fraud. The facts concerning the organization of the alleged corporation were fully disclosed to the plaintiff by the records and documents on file.

[4] The mere fact that, after obtaining judgment against the corporation, as it was found by the court, the plaintiff failed to discover assets sufficient to satisfy its claim, is not sufficient reason why a personal and several liability for the full amount of the debt should be enforced against the individual incorporators. We think that the judgment is not sustained by the findings.

The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 384

UNITED CASTING CO. v. DUNCAN.

(Civ. 3112.)

(District Court of Appeal, First District, Division 1, California. Nov. 21, 1919.)

1. APPEAL AND ERROR ⊜110—ORDER DENYING NEW TRIAL NOT APPEALABLE.

An order denying a motion for a new trial is not appealable under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, and appeal from such order must be dismissed.

2. COSTS ⊜199—FAILURE TO FILE ITEMS IN TIME PRECLUDES RECOVERY.

Under Code Civ. Proc. § 1033, requiring party claiming costs to deliver cost bill to clerk and to serve it on adverse party within five days, a cost bill served on the adverse party on the last day allowed, but not filed until the next day, must be stricken.

3. SET-OFF AND COUNTERCLAIM ⊜26—CONVERSION OF PROPERTY ATTACHED DOES NOT RELATE TO TRANSACTION IN SUIT.

Conversion by plaintiff, in a suit on a money demand, of the property attached in the suit, by conspiracy with a judgment creditor for unfair sale, does not relate to the transaction in suit, and damages for such conversion cannot be made the basis of a cross-complaint.

4. PLEADING ⊜428(3) — EVIDENCE TO SUPPORT IMPROPER CROSS-COMPLAINT IS INADMISSIBLE.

It is error to admit evidence to support facts which are improperly pleaded by way of cross-complaint.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by the United Casting Company against J. C. Duncan. Judgment for defendant, and plaintiff appeals from the judgment, and also from orders denying motion for new trial and denying motion to set aside order striking plaintiff's cost bill. Appeal from order denying motion for new trial dismissed, order relating to cost bill affirmed, and judgment reversed.

Wm. T. McNeely, of Los Angeles, for appellant.

Barstow, Rohe & Jeffers and John S. Steely, all of Los Angeles, for respondent.

WASTE, P. J. Plaintiff, the appellant here, brought this action, alleging the defendant to be indebted to it for steel, iron work, and materials, for which defendant agreed to pay the sum of $2,296.15, with interest. As a separate cause of action it pleaded an account stated for the same amount. Defendant, by his answer, admitted that plaintiff sold the goods, wares, and merchandise, alleging that they were sold, not to defendant, but to defendant and one C. L. Powell, who were at the time of such sales doing business as partners together in the building and completing of sewer contracts, and that all of the materials were used by the partnership in said work, and for their joint benefit, all of which was well known to the plaintiff at the time, and, further, that the entire claim of plaintiff, with interest and costs, was paid on or about the 18th day of February, 1916, which date was long after the suit brought, by receiving property of defendant more than sufficient to pay the same.

By way of cross-complaint, the gist of which is here given, defendant further alleged that, coincident with the commencement of this action, plaintiff, in order to secure the claim sued upon here, caused an attachment to be issued against him, and levied on a trenching machine, the property of the partnership; that later the Los Angeles Lime Company, a corporation, in another suit against him, caused to be levied a second attachment against said machine to secure to it the payment of a claim, amounting to $1,226.12, with interest and costs, which attachment was made subject to the attachment of the plaintiff in this action; that said machine was worth the sum of $7,500; that Harper & Reynolds Company, a corporation, holding a judgment against defendant in the sum of $272.31 and costs, caused an execution to be levied on the trenching machine, subject to the two prior attachments, and that the plaintiff purchased the same at the resulting execution sale on February 18, 1916 (the date on which it was alleged the claim herein sued upon, was paid), due notice of which sale was given by the sheriff, for the sum of $288.65.

and took possession thereof; that at the execution sale plaintiff and the Los Angeles Lime Company conspired together for the purpose of hindering and delaying defendant from purchasing the machine at said sale, and from securing other persons to bid thereon, all for the purpose of cheating and defrauding the partnership out of their property; that under said agreement the Los Angeles Lime Company and the plaintiff each released its attachment against the machine, and plaintiff secretly, and without giving defendant an opportunity to repay plaintiff the amount it paid therefor, sold it to parties unknown to defendant for the sum of $4,500, but did not satisfy the claim of the Los Angeles Lime Company, or its claim against defendant; that by reason of the purchase and sale of the trenching machine, plaintiff has ample funds in its hands, and more than sufficient to pay itself and the claim of the Los Angeles Lime Company; that because of the acts of plaintiff, as stated, defendant and his partner have been defrauded out of their property and damaged thereby in the amount of $7,500. Defendant's prayer is that plaintiff be given judgment for the amount sought in this action, less the amount of $223.37, alleged to have been paid thereon, and that defendant have judgment against plaintiff, for the difference between the claim of plaintiff and the amount for which it is alleged plaintiff sold the machine. After its general demurrer to this cross-complaint overruled, the plaintiff answered, specifically denying all its allegations.

When the case came on for trial, it was stipulated that all the allegations of plaintiff's amended complaint were true, and that the only issues before the court were those framed by the cross-complaint of defendant and the answer of plaintiff thereto. Thereupon plaintiff's counsel objected to the introduction of any evidence in support of the allegations of the cross-complaint, on various grounds, among them being that the matters set forth in the pleading do not relate to, or depend on, the contract or transaction upon which the action is brought; that the facts pleaded are not sufficient to entitle defendant to a cross-complaint against plaintiff in this action; that they do not amount to a statement of a cause of action amounting to a fraud or conspiracy, and generally do not constitute a cause of action against plaintiff. This objection was overruled, and the testimony received. The court found, in substance, that all the allegations of the cross-complaint were true, and that "plaintiff obtained possession of defendant's machine unlawfully, and without just compensation, and converted or appropriated the same to its own use without the knowledge or consent of defendant; that said conversion took place on the 18th day of February, 1916." It is therefore apparent that the trial court took the view that the acts of the plaintiff amounted to a conversion of the partnership property in the premises, and worked a payment of the claim sued upon. It expressly finds that—

"It is not true that defendant has not paid said sums, * * * and it is also true that the balance due to the plaintiff from the defendant on the claim set out in plaintiff's amended complaint was fully paid on the 18th day of February, 1916, as hereinafter stated."

Then follow specific findings in practically the language of the cross-complaint. Judgment was entered in favor of defendant and against plaintiff in the sum of $2,002.96, with interest and costs, that amount being the value of the machine found, less the amount of plaintiff's claim sued on here, plus an amount found to have been paid by defendant thereon. Plaintiff made a motion for a new trial, which was denied.

[1] There are three appeals, one from the judgment, one from the order of the lower court denying plaintiff's motion to set aside the order striking out plaintiff's cost bill, and the third from the order denying plaintiff's motion for a new trial. The amendment of 1915 to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209) does not allow an appeal from an order denying a motion for a new trial. Gray v. Cotton, 174 Cal. 256, 162 Pac. 1019; Anderson v. Adler, 184 Pac. 42. That appeal is unauthorized, and must be, and is, dismissed. On the appeal from the judgment, however, the order refusing the new trial may be reviewed.

[2] Appellant served upon defendant a memorandum of the items of its costs and necessary disbursements in the action on March 29, 1917, five days after notice of the decision of the court, but did not deliver it to the clerk until the next day. This was not a compliance with the requirement of section 1033 of the Code of Civil Procedure, which provides that the party claiming costs must both deliver the cost bill to the clerk, and serve the same upon the adverse party, within five days after notice of the decision of the court. The cost bill was therefore properly stricken from the files.

[3] Appellant contends that the cause of action set up in defendant's cross-complaint does not relate to, or depend upon, the transaction on which plaintiff brought its action. We think this contention is correct. Plaintiff's action was one for money due for goods, wares, and merchandise sold and delivered by it to defendant, and upon an account stated by and between the parties. Defendant's cross-complaint sounds in tort, to wit, a conversion worked by fraud, and attempts to allege a conspiracy on the part of plaintiff, the Los Angeles Lime Company, and their attorneys, to deprive defendant and his partner, Powell, of the trenching machine, the events pleaded not happening, and the cause of action not arising until seven months after

the commencement of this action. For the injury alleged by defendant to have been suffered by reason of this tort he seeks compensation in damages.

The right to file a cross-complaint in a pending action is found in the provision of section 442 of the Code of Civil Procedure which reads:

"Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court subsequently, a cross-complaint."

A cross-complaint can be maintained only when the defendant seeks affirmative relief relating to or depending upon the contract, or transaction upon which the action is brought, or affecting the property to which the action relates. Persons having independent claims against each other, the relief authorized in one having no relation to that which can be given in the other, nor in any manner affecting it, are not permitted to settle them all in one action upon the sole ground that, as they are in court contending against each other, with respect to one case or dispute, they should at that time and place settle all other matters of controversy existing between them. Meyer v. Quiggle, 140 Cal. 499, 74 Pac. 40; Clark v. Kelley, 163 Cal. 207, 209, 124 Pac. 846.

In an action brought to recover for services rendered, the court held that damages arising by reason of an excessive attachment levied on defendant's property in the same action could not be pleaded by way of cross-complaint. Jeffreys v. Hancock, 57 Cal. 646. In a suit to recover on promissory notes and for goods, wares, and merchandise, the defendant, by way of cross-complaint, claimed damages by reason of the plaintiff causing an attachment to be unjustifiably and illegally levied in the same case. The court held that it was an attempt on the part of defendant, in an action to recover a money judgment founded on contract, to set up as the foundation of the cross-complaint a trespass committed by the plaintiff on property of the defendant after the commencement of the action, and that the lower court erred in admitting evidence in support thereof. Waugenheim v. Graham, 39 Cal. 169. While there is language in the decision in apparent conflict with this holding, it was later pointed out by the Supreme Court that such "determination was not absolutely essential to the decision of the case." Clark v. Kelley, supra. In Glide v. Kayser, 142 Cal. 419, 76 Pac. 50, an action for claim and delivery of cattle, it was held that the defendant could not recover by way of cross-complaint for injury by plaintiff's cattle to his realty. The court in that case, in construing section 442, supra, said:

"The term 'transaction,' in a statute limiting counterclaims to demands arising out of the same transaction, intends some commercial or business negotiation, and not a wrong of violence or fraud."

Defendant's alleged cause of action does relate to, or depend upon, the sale, by plaintiff to defendant, of certain materials used by him, and for which he had not paid. That was the transaction upon which the action was brought. Some of the initial steps, asserted by defendant to be a part of the alleged conspiracy to defraud him, were taken in the proceeding instituted by plaintiff to recover on its cause of action, but plaintiff's cause of action must not be confused with the remedy pursued in its enforcement, or the means by which plaintiff sought to effectuate its obligation against defendant. Frost v. Witter, 132 Cal. 421, 426, 64 Pac. 705, 84 Am. St. Rep. 53.

[4] The facts alleged being improperly pleaded by way of cross-complaint, the trial court erred in admitting, over the timely objection of plaintiff, any testimony in support thereof. The judgment entered is unsupported, and a new trial should have been granted.

Consideration of the claim of the appellant that the court should have ascertained and included in its judgment, the amount of the costs plaintiff had incurred prior to February 18, 1916, is rendered unnecessary by the determination we have reached upon the major contention. The order striking the cost bill of appellant from the files is affirmed.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

(44 Cal. App. 120)

PEOPLE v. WEBBER. (Cr. 680.)

(District Court of Appeal, Second District, Division 1, California. Nov. 5, 1919. Hearing Denied by Supreme Court Jan. 2, 1920.)

1. INDICTMENT AND INFORMATION ⊂=159(2)—AMENDMENT OF INDICTMENT NOT STATING OFFENSE ERROR.

The granting of permission to amend indictment so as to state an offense would have been error under Pen. Code, § 1008, if the indictment before amendment did not charge an indictable offense.

2. FORGERY ⊂=26—INDICTMENT HELD SUFFICIENT.

Indictment charging forgery of "certificate of acknowledgment" *held* to charge a violation of Pen. Code, § 470, making one who "forges the seal or handwriting of another" guilty of forgery, since the only way by which the certificate of acknowledgment could have been forged was by forging the seal or handwriting of the notary.

3. INDICTMENT AND INFORMATION ⊂=159(2)—AMENDMENT SO AS TO CHARGE SAME OFFENSE MORE DIRECTLY NOT ERROR.

Action of court in permitting amendment of indictment charging forgery of "certificate of acknowledgment" so as to charge forgery of the "handwriting" of the notary *held* not error, under Pen. Code, § 1008; defendant not being prejudiced, since original indictment indirectly charged same offense.

4. CRIMINAL LAW ⊂=823(10) — INSTRUCTION NEED NOT COVER MATTER COVERED BY OTHER INSTRUCTION.

Instruction properly ignored rule concerning corroboration of testimony of accomplices, where an appropriate instruction on that subject was given elsewhere.

5. CRIMINAL LAW ⊂=763, 764(6) — INSTRUCTION NOT COMMENT ON THE WEIGHT OF EVIDENCE.

In prosecution for forgery and for procuring forged instrument to be recorded, in violation of Pen. Code, §§ 115, 470, instruction that ratification or confirmation was no defense, but could be considered in determining whether defendant had authority to sign signatures alleged to have been forged by her "if you find such forgeries were committed," *held* not a comment on the weight of the evidence.

6. CRIMINAL LAW ⊂=763, 764(6) — FORGERY ⊂=48—INSTRUCTION NOT COMMENT ON EVIDENCE OR MISLEADING.

In prosecution for forgery, instruction that the fact that no one suffered injury by reason of acts charged against defendant should not be considered on question of guilt *held* not a comment on the evidence, or contradictory and misleading.

7. FORGERY ⊂=14—THAT NO PERSON HAS SUFFERED IS NO DEFENSE.

That forgery or unlawful use of forged instrument has not resulted in loss to persons who might have been injured thereby does not render the wrongdoer any less guilty in the eyes of the law.

8. WITNESSES ⊂=414(1)—CORROBORATIVE EVIDENCE ADMISSIBLE.

In prosecution for forgery where witness had testified to certain writing done by defendant in S.'s office at which time defendant had borrowed ink and mucilage from S., testimony by S. that a lady had been in his office and had borrowed ink and mucilage *held* admissible in corroboration of testimony of the other witness.

9. CRIMINAL LAW ⊂=363, 491(1)—WITNESSES ⊂=414(1)—DUPLICATE OF RECORDED INSTRUMENT ADMISSIBLE IN PROSECUTION FOR CAUSING FORGED INSTRUMENT TO BE RECORDED.

In prosecution for procuring forged instrument to be recorded in violation of Pen. Code, § 115, a duplicate of the recorded instrument with exception that duplicate contained name of witness not contained on recorded instrument *held* admissible for use in examination of handwriting expert, as part of entire transaction and as tending to corroborate other evidence tending to prove forgery of the instrument defendant had caused to be recorded.

10. CRIMINAL LAW ⊂=730(3)—DEMAND BY STATE UPON DEFENDANT FOR FORGED INSTRUMENTS CURED BY INSTRUCTIONS TO DISREGARD.

In prosecution for forgery, where forged instruments were recorded, demand by state upon defendant to produce the instruments *held* not prejudicial to defendant where court instructed jury to disregard demand.

On Motion for Hearing before Supreme Court.

11. ACKNOWLEDGMENT ⊂=41 — CERTIFICATE INSUFFICIENT.

Certificate of acknowledgment which identified the persons who made the acknowledgment as being the persons whose names were subscribed to the instrument *held* not sufficient, under Civ. Code, § 1189, to entitle instrument to be recorded under section 1161.

12. FORGERY ⊂=12(1) — DEFECTIVE FORM OR CERTIFICATION OF FORGED INSTRUMENT OFFERED FOR FILING NO DEFENSE IF WITHIN CLASS ENTITLED TO BE RECORDED.

Pen. Code, § 115, making it a felony to procure or offer forged instrument to be filed, "which instrument, if genuine, might be filed or registered or recorded," *held* applicable to the filing of any instrument coming within the various classes of instruments entitled to be recorded, without regard as to whether the particular instrument is defective in form or certification.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Mabel Webber was convicted of forgery, and she appeals. Affirmed.

E. J. Emmons, T. F. Allen, and R. B. Lambert, all of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., and Joseph L. Lewinsohn, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was brought to trial on three indictments, the cases being consolidated and tried together.

Indictment No. 1726 contained three counts. The first count charged that the defendant offered and procured a certain false and forged instrument to be recorded in the office of the county recorder of Kern county. This instrument was set out in the indictment. It purported to be an agreement between Eugene Whitte and his wife, Elizabeth Whitte for the transfer by them of certain lands in Kern county to Charles A. Quinn and his wife, Musetta Culbertson Quinn, and purported to have been signed by Elizabeth Whitt and Eugene Whitt, as well as by the Quinns.

The second count of said indictment charged the defendant with offering and procuring a certain false and forged instrument to be filed and recorded in the office of the county recorder of Kern county, which instrument is set out in said indictment and purported to be a deed from Charles A. Quinn and wife to Mabel Webber, the grantee.

The third count of said indictment charged that the defendant offered and procured a certain false and forged instrument to be registered and recorded in the office of the county recorder of Kern county, which said instrument is set forth in the indictment and purports to be a deed from Eugene Whitte and Elizabeth Whitte to Mabel Webber, the grantee therein; all of which acts were in violation of section 115 of the Penal Code of the state of California.

Indictment No. 1734 charged the defendant with procuring a certain false and forged instrument to be filed and recorded in the office of the county recorder of Kern county, which said instrument is set forth in the indictment and purports to be a deed from Herman Creasy to Edith V. Creasy of certain real property in the county of Kern, which said act was likewise in violation of section 115 of the Penal Code.

Indictment No. 1735 contained two counts. The first count charged the defendant with forging the deed from Herman Creasy to Edith V. Creasy of certain real property in the county of Kern, state of California, in violation of section 470 of the Penal Code; the instrument alleged to have been forged is set forth in the first count of said indictment.

The second count of indictment No. 1735, as originally filed, charged the defendant with forging a certain certificate of acknowledgment purporting to have been issued by L. S. Harmon, a notary public, in and for the county of Kern, state of California, which said acknowledgment was placed on the deed described and set forth in the first count of indictment No. 1735. During the trial, this last-mentioned count was amended by inserting after the word "forge" the words, "the hand writing of one L. S. Harmon to and on," and by inserting after the word "by" the word "said."

The defendant was found guilty on each and every count as charged and has appealed from the judgment of conviction.

The first point of appellant is that the first count of indictment No. 1726 does not state a public offense, and for the following reason, to wit: Section 115 of the Penal Code provides:

"Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state or of the United States, is guilty of felony."

Under this section it is only an instrument which is entitled to be recorded, the recording of which constitutes a crime. People v. Harrold, 84 Cal. 567, 569, 24 Pac. 106. The certificate of acknowledgment on the contract is set forth in the following words in the first count of indictment No. 1726:

"State of California, County of Kern—ss.: On this 11th day of September in the year one thousand nine hundred and eighteen before me, L. S. Harmon, a notary public in and for the said county of Kern, personally appeared ———, known to me to be the persons whose names are subscribed to the within instrument, and who duly acknowledged to me that they executed the same.

"In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the said county of Kern, the day and year in this certificate first above written. [Seal] L. S. Harmon, Notary Public in and for the said County of Kern, State of California."

Section 1161 of the Civil Code provides that before an instrument can be recorded, unless it belongs to the class provided for in either section 1159, 1160, or 1203, its execution must be acknowledged by the person executing it, etc. Section 1189 of the Civil Code prescribes the form for a certificate of acknowledgment. The certificate must state that, before the officer, "appeared ———, known to me * * * to be the person whose name is subscribed to the within instrument and acknowledged that he (she or they) executed the same." In the certificate of acknowledgment placed on this instrument, it will be noted that it reads, "personally appeared ———, known to me," etc. Therefore, says appellant, it does not state who appeared, or that anybody appeared, and as, for that reason, the instrument was not entitled to be recorded, the act of offering it for record could not constitute a crime. This contention should not be sustained. The prescribed form need not be followed literally. Southwick v. Davis, 78 Cal. 504, 21 Pac. 121. The certificate identified the persons who made the acknowledgment as being the persons whose names were subscribed to the instrument. This, in the ordinary and reasonable meaning of the words, meant all of the names signed thereto.

The next matter to be considered is the amendment to the second count of indictment No. 1735. The charging part of this indictment, as originally filed, was in the following words and figures, except the words here given in parentheses:

"That the said Mabel Webber, on or about the 11th day of September, 1918, at the county of Kern, state of California, did then and there willfully, unlawfully and feloniously and fraudulently and with intent to prejudice, damage and defraud one Herman Creasy, make and forge (the handwriting of one L. S. Harmon to and on) a certain certificate of acknowledgment, purporting to have been issued by (said) L. S. Harmon, a notary public in and for the county of Kern, state of California, and an officer duly appointed, qualified and authorized by the laws of the state of California to take and certify to acknowledgments of grants and conveyances of real property in said state, of said Herman Creasy of the execution by him, said Herman Creasy of a certain purported conveyance to Edith V. Keyland of certain real property situated in the county of Kern, state of California, particularly described as follows."

At the trial (and before a jury was impaneled to try the case), the court, over the objection of defendant, permitted the district attorney to amend the second count of the said indictment by inserting the words, "the handwriting of one L. S. Harmon to and on," and after the word "by," the word "said."

[1-3] It is the contention of appellant that the indictment, as originally filed, did not state a public offense under section 470 of the Penal Code, or any other section of said Penal Code, and that it was error for the court to permit amendment of the indictment so as to state an offense under said section 470. The court may allow an indictment to be amended, "where it can be done without prejudice to the substantial rights of the defendant." Pen. Code, § 1008. It may be conceded that defendant's objection was good if the indictment, before amendment, did not charge an indictable offense. But it did charge an indictable offense. Under the terms of Penal Code, § 470, any person is guilty of forgery, who, with intent to defraud "forges the seal or handwriting of another." Assuming that the Code nowhere explicitly declares the forgery of a certificate of acknowledgment to be an indictable offense, it remains true that forgery of the seal or handwriting of the notary on such certificate is a crime, and is perhaps the only way in which such crime can be committed. If so, the charge that defendant forged the certificate was merely an incorrect method of charging that she forged the seal and handwriting. Where an information alleged the forgery of an entire instrument, and the proof was only that the pretended grantor's signature was forged, this was held sufficient to support the verdict. People v. Chretien, 137 Cal. 450, 454, 70 Pac. 305. Taking into consideration the law as stated, the amendment did not mislead the defendant and did not prejudice her in relation to any substantial right, or at all.

[4] Appellant next contends that the court erred in three of the instructions given to the jury. The first of these instructions properly ignored the rule concerning corroboration of testimony of accomplices. The appropriate instruction on that subject was given elsewhere.

The second of these instructions was as follows:

"Certain evidence has been introduced in this case from which you might infer that, if you find that the defendant is guilty of the forgeries charged against her, such forgeries have been ratified. You are instructed that ratification or confirmation of such forgeries, if you find they were committed, is no defense to the charges, but such ratification and confirmation may be considered by you as a circumstance in determining whether at the time of the alleged forgeries, if you find that such forgeries were committed, the defendant had the authority to sign the names of the persons whose signatures she is accused of forging."

[5] Appellant claims that this instruction was a comment on the weight of evidence and was misleading and confusing, in that it virtually told the jury that while certain evidence had been introduced which might show that the forgeries had been ratified, yet that before they considered this evidence it would be necessary for them to find that forgeries had been committed; whereas, if the defendant had the authority to sign, there could have been no forgery. It should be conceded that the insertion of the phrase, "if you find that such forgeries were committed," threw some confusion into the last clause of the instruction. The instruction contains no comment on the weight of the evidence, but the condition imposed by the quoted phrase, if taken literally by the jury, subjected the last sentence to contradictory interpretations.

The court further instructed the jury:

"You are instructed that the fact, if it be a fact, that no person suffered any injury by reason of any of the acts charged against defendant herein, is not to be considered by you in arriving at your verdict as to her guilt or innocence. If you believe to a moral certainty and beyond a reasonable doubt that the prosecution in this case has proven the truth of the allegations of the indictments, you should find the defendant guilty regardless of the question whether or not any injury resulted to any one as a consequence of her act. Therefore the question whether or not any third party suffered any pecuniary loss as a result of the defendant's conduct is a question which should not be considered by you in your deliberations in determining her guilt of innocence."

[6, 7] Appellant contends that this instruction is a comment on the weight of evidence and is also contradictory and misleading. It

does not appear to us that any of these objections have merit. The instruction merely states, with undue prolixity, the correct rule that the fact that a forgery, or the unlawful use of a forged instrument, has not resulted in loss to persons who might have been injured thereby, does not render the wrongdoer any less guilty in the eyes of the law.

[8, 9] Counsel for appellant claims that the court erred, in four stated instances, in overruling objections made by him to offered evidence. The first ruling was manifestly correct. Code Civ. Proc. § 1919. The second, admitting testimony of the witness Shackelford, was correct. Another witness, Mrs. Keyland, had testified to certain writing done by defendant at Shackelford's office, and the use by her of mucilage on a document; the ink and mucilage being borrowed from Shackelford. Shackelford's testimony was that, at the stated time and place, "a lady" had been there and had borrowed ink and mucilage from him, but he could not say that defendant was the lady in question. Nevertheless, the testimony was admissible, as to some extent corroborating the testimony of Mrs. Keyland, which did identify the defendant. The third and fourth rulings relate to the admission of a document in evidence, and the use thereof in the testimony of an expert witness on handwritings. This document was, with one exception, a duplicate of the contract set forth in the first count of the indictment in case No. 1726, of which document the record, as found in the county recorder's office, had been admitted in evidence. The exception was that on the unrecorded duplicate there appeared the name "Carrie L. Bridges," written on it, as a witness. From the testimony of Charles A. Quinn it appears that two copies of the contract, signed only by Quinn and wife, had been delivered to defendant, who was to have them signed by Witt and wife. A few days later the defendant returned this document to Quinn, bearing thereon the apparent signatures of Witt and wife, and the name of Carrie L. Bridges. In the meantime the other copy, bearing the apparent signatures of Witt and wife, had been recorded. The testimony of Quinn, at the trial, followed the testimony of the expert witness and the admission in evidence of the document in connection with that testimony. All of this was admissible as part of the entire transaction and as tending to corroborate other evidence tending to prove that the document described in the indictment as a document which defendant caused to be recorded was a forged instrument, and was in fact taken to the recorder's office, and recorded at her request.

[10] The district attorney at the trial made demand on counsel for defendant to produce the contract and two deeds, all of which were included in the indictments, and had been shown to be recorded instruments, and in so doing referred to the contract as having been apparently returned from the recorder's office to the defendant. Defendant's attorney objected to "the statement and demand" of the district attorney, and assigned it as prejudicial error on the part of the prosecution. The court ruled that "the defendant is not required to produce evidence against herself," and instructed the jury to disregard the demand, and not consider that circumstance at all against the defendant as a demand not complied with, or for any other purpose. Appellant contends that it was misconduct and prejudicial error for the district attorney to make the demand in the presence of the jury. Referring to a similar demand for a document which the defendant was not under obligation to produce, the Supreme Court said (People v. Royce, 106 Cal. 173, 184, 37 Pac. 630, 633):

"In the case at bar the demand was not pressed, and we do not see how the defendant was prejudiced, even if it be conceded that such demand constituted error. The exception was to the demand of the district attorney, and not to any action of the court. If the court had directed the defendant to produce the check, or if the district attorney had commented to the jury upon the defendant's failure to produce the check, a different question would have been presented."

The evidence in this case firmly establishes defendant's guilt. Assuming that there was error in one of the instructions, as hereinbefore stated, we consider it extremely improbable that the jury was misled thereby. There was a fair trial, and there has been no miscarriage of justice in the conviction of the defendant.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

Opinion of the Supreme Court Denying Hearing.

PER CURIAM. [11, 12] In denying the application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, we desire to say that we are not prepared to concur in the view of the District Court of Appeal to the effect that the certificate of acknowledgment set forth in the opinion is substantially sufficient as a certificate of acknowledgment. We are inclined to the view that such certificate is fatally defective as a certificate of acknowledgment. But we do not regard this matter of any importance in so far as this case is concerned. Section 115 of the Penal Code, in providing that every person knowingly procuring of offering any false or forged instrument to be filed, etc., "which instrument, if genuine, might be filed, or registered," etc., simply seeks to

cover as coming within its terms the various "classes" of instruments entitled, under our law, to be recorded, such as deeds, mortgages, etc., without any regard whatever whether the particular instrument is defective in form or certification.

The application for a hearing in this court is denied.

All concur, except SHAW, J., absent.

44 Cal. App. 299

MARTON v. JONES. (Civ. 2460.)

(District Court of Appeal, Second District, Division 1, California. Nov. 15, 1919.)

1. PARTIES ⊜95(4)—PERMITTING OF AMENDMENT OF COMPLAINT SO AS TO STATE TRUE NAME OF PLAINTIFF NO ABUSE OF DISCRETION.

There was no abuse of discretion on the part of the court in permitting plaintiff to amend complaint so as to state her true name, since in no event could defendant have suffered any prejudice thereby under Code Civ. Proc. § 475.

2. APPEAL AND ERROR ⊜1071(1) — FINDING THAT WIFE SUING FOR INJURIES WAS SEPARATED FROM HUSBAND, HARMLESS, THOUGH NOT WITHIN ISSUES.

In personal injury action, finding that plaintiff was not living with and had been deserted by husband, though not within the issues and though without support in the evidence, was harmless, since under Code Civ. Proc. § 370, the wife, though living with husband, may sue for personal injuries without joining husband as plaintiff.

3. FENCES ⊜24—CONSTRUCTION OF BARBED WIRE FENCE PROXIMATE CAUSE OF INJURY TO PEDESTRIAN FALLING AGAINST FENCE BECAUSE OF PEBBLE ON SIDEWALK.

Pedestrian, who fell because of pebble on sidewalk and was injured in throwing her hand against barbed wire fence, was entitled to recover against owner of fence, though the existence of pebble on sidewalk was an intervening contributing cause, since owner of fence should have anticipated that such an injury might have occurred as the result of his fence because of the many substances upon the walk tending to cause pedestrians to slip or fall.

4. NEGLIGENCE ⊜59—ORIGINAL WRONG PROXIMATE CAUSE OF INJURY NOTWITHSTANDING INTERVENING ACT OF ANOTHER.

The act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such act ought to have been foreseen.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Mary Marton against J. L. Jones. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph P. Sproul and Lewis D. Collings, both of Los Angeles, Charles E. Barrett, of Las Vegas, Nev., and Leonard G. Husar, of Los Angeles, for appellant.

Paul M. Nash, of Los Angeles, for respondent.

SHAW, J. At the times in question defendant maintained around his premises and adjoining the sidewalk a fence constructed in part of barbed wire, contrary to a city ordinance of the city of Los Angeles. Plaintiff, while in the exercise of due care, was walking along the sidewalk and stepped upon a pebble thereon, which caused her to fall, and, in falling, threw her hand out, striking a sharp-pointed projection of the barbed wire so maintained as a part of the fence, as a result of which she received injuries for which, in this action, judgment was rendered in her favor, and from which defendant has appealed on the judgment roll.

[1] There was no abuse of discretion on the part of the court in permitting plaintiff to file an amendment to her complaint, substituting for the name "Mary Neff," as plaintiff in the title of the original complaint, that of Mary Marton, which was her true name. McDonald v. Swett, 76 Cal. 257, 18 Pac. 324. In no event could defendant have suffered any prejudice by the ruling. Code Civ. Proc. § 475.

[2] While not alleged in the complaint, the court found that plaintiff was the wife of J. D. Marton, from whom, by reason of his deserting her, she was living separate and apart. Complaint is made that such finding is not within the issues and without support of evidence. Conceding this contention well founded, nevertheless the finding is immaterial and without prejudice, for the reason that, under the provisions of section 370, Code of Civil Procedure, plaintiff, though married and living with her husband, was entitled to sue for damages due to personal injuries sustained, without joining her husband as plaintiff.

Appellant's chief contention is that the conceded negligence of defendant in maintaining the barbed wire fence on his premises in proximity to the sidewalk in violation of the ordinance (Orcutt v. Pacific, etc., Ry. Co., 85 Cal. 291, 24 Pac. 661) was not the proximate cause of plaintiff's injury. This contention is based upon the assertion that she would not have come in contact with the barbed wire if she had not fallen, and she would not have fallen but for the pebble on the sidewalk upon which she stepped; therefore, it is argued, the pebble and not the defendant's negligent act was the proximate cause of her injury.

[3, 4] While the existence of the pebble on the sidewalk was an intervening contributing cause of the injury, nevertheless such fact should not exempt defendant from lia-

bility, if, according to the usual experience of mankind, the consequence ought to have been anticipated as a probable result of his negligent act. As said in Lane v. Atlantic Works, 111 Mass. 136:

"The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen."

To the same effect is Roots Co. v. Meeker, 165 Ind. 132, 73 N. E. 253.

Hence the negligence predicated upon the agency responsible for the existence of the pebble upon the sidewalk cannot relieve defendant from liability for the injury sustained by plaintiff, unless it appears so remote and disconnected in time and nature that it can be said the damage occasioned was in no way a natural or probable consequence of his wrongful act in maintaining the unlawful fence. Merrill v. Los Angeles Gas, etc., Co., 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. To find fruit peel, leaves, and twigs from overhanging trees, pebbles, and other foreign substances upon sidewalks, is a matter of common experience, and that such a condition might cause a pedestrian to slip or fall, in which event he probably would be injured by the barbed wire, was a consequence which defendant should have anticipated as likely to result from his negligent act.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 402

McLAIN v. MEADOWS. (Civ. 3018.)

(District Court of Appeal, Second District, Division 2, California. Nov. 21, 1919)

1. BASTARDS ⟸20—COMPELLING FATHER TO SUPPORT CHILD BORN BEFORE STATUTE IMPOSING DUTY DOES NOT GIVE IT RETROACTIVE EFFECT.

The father of an illegitimate child can be held liable to the mother for contribution to its support pursuant to Civ. Code, § 196a, without giving the statute a retroactive effect, though the child was conceived and born before enactment of the statute, which is in exercise of the state's police power to compel those responsible for the child's existence to bear attendant expense.

2. BASTARDS ⟸33—MOTHER CAN SUE IN OWN NAME TO COMPEL FATHER TO CONTRIBUTE TO SUPPORT.

Under Civ. Code, § 196a, the mother of an illegitimate child can sue the father in her own name on behalf of the child to compel him to contribute to its support as provided by the statute.

3. BASTARDS ⟸16—MINOR FATHER LIABLE FOR SUPPORT OF CHILD.

Under Civ. Code, § 196a, the father of an illegitimate child is liable to the mother to contribute to its support, though he himself is a minor, particularly where he has become emancipated from parental authority, under section 204, by marriage to another woman, since the birth of the child.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Esther McLain against Rush Meadows. From judgment for plaintiff, defendant appeals. Affirmed.

Davis & Rush and John S. Cooper, all of Los Angeles, for appellant.

W. C. Shelton, of Los Angeles, for respondent.

FINLAYSON, P. J. In this action, brought under section 196a of the Civil Code, the mother of an illegitimate child sues the father to compel him to contribute to the child's support. From a judgment for plaintiff defendant appeals.

Section 196a, added to the Code by the statute of May 22, 1913 (Stats. 1913, p. 218), reads:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

The child was born March 28, 1913. Defendant himself is a minor, though subsequent to the commencement of the action he took unto himself a wife and is now a married man.

[1] It is contended that, because the child was conceived and born before the Legislature enacted any legislation making the father of an illegitimate child liable for its support, defendant cannot be held liable without giving the statute a retroactive effect. This objection is based upon a misconception of the purpose and nature of the action and of the Code provision under which it is brought. By the great weight of authority—with which we agree—the proceeding is civil, not criminal, and its object is, not the imposition of a penalty for an immoral act, but merely to compel the father to provide for the support and education of his offspring, and thus keep it from being a charge upon the community. In the absence of any legislation creating a legal liability, there rests upon the parents of an illegitimate child a natural obligation to support it; and a statutory provision such as that contained in section 196a, adding legal sanction to the par-

ents' natural and moral obligation, is an enactment in the exercise of the state's police power to compel those who are responsible for the child's existence to bear the burden of the expense that its existence necessitates, State v. Addington, 143 N. C. 683, 57 S. E. 398, 11 Ann. Cas. 314, and note on page 316 et seq.; State v. Pickering, 29 S. D. 207, 136 N. W. 105, 40 L. R. A. (N. S.) 144; 7 C. J. 967. Such a statute does not attempt to punish the parent for his past conduct. It does not attempt to punish him for begetting the child, or for neglecting to support it before the enactment took effect. What it does do is to require the father, and the mother also, from the time the statute became a law, to contribute to the child's support and maintenance, thus relieving others upon whom otherwise the burden might chance to fall. This the Legislature may do, and it is entirely inconsequential that the child was conceived or born before the statute became a law. Regardless of when the child was conceived or born, the statute makes it the present legal duty of the father to support it. It is to enforce that present legal duty, and none other, that the action is brought. Libby v. State, 42 Okl. 603, 142 Pac. 406; Commonwealth v. Callaghan, 223 Mass. 150, 111 N. E. 773; Wamsley v. People, 173 Pac. 425. See, also, Gambetta v. Gambetta, 30 Cal. App. 261, 157 Pac. 1141; People v. Stanley, 33 Cal. App. 624, 166 Pac. 596; and Fernandez v. Aburrea, 183 Pac. 366, cases in which the child was born or conceived before the statute became operative.

[2] Equally without merit is the point urged that the action was not brought by the proper party plaintiff. The statute authorizes the mother to maintain the action in her name on behalf of the child. Gambetta v. Gambetta, supra; Fernandez v. Aburrea, supra.

[3] Appellant's next contention is that because he is a minor he is not liable for the support of his illegitimate child. At the time when the judgment was entered defendant had married. Thus he had become emancipated from parental authority. Civ. Code, § 204. From thence on neither of his parents was entitled to his services nor his earnings, all of which he was free to devote to the support of himself, his lawful wife, and his illegitimate child by this plaintiff. Section 196a contains no exemption in favor of parents who may be minors. If the father of an illegitimate child, though a minor, is able to pay for his child's support, there is no reason why he should not be compelled to do so, and the section makes no exception in his behalf. His liability is not contractual; it is imposed by statute, and we know of no law that purports to exempt him from the obligation imposed upon him by the salutary provisions of this Code section.

No other points are urged of sufficient merit to warrant discussion.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

44 Cal. App. 167

MOBLEY v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 2937; L. A. 8993.)

(District Court of Appeal, First District, Division 1, California. Nov. 6, 1919. Hearing Denied by Supreme Court in Bank. Jan. 5, 1920.)

1. STREET RAILROADS ⟸13 — AUTHORITY TO MAKE "EXTENSIONS AND IMPROVEMENTS" OF MUNICIPAL SYSTEM NOT AUTHORITY FOR PURCHASE OF INDEPENDENT SYSTEM.

The term "extensions and improvements" in San Francisco Charter, art. 12, § 16, providing that the earnings of the municipal railway system could be expended for extensions and improvements, cannot be so extended as to include the purchase of an entirely independent railway system, theretofore privately owned and operated upon other streets and thoroughfares and upon other sections of the municipality than that occupied by the municipal railway system.

On Hearing in Supreme Court.

2. STREET RAILROADS ⟸13 — AUTHORITY TO MAKE "EXTENSIONS AND IMPROVEMENTS" OF MUNICIPAL SYSTEM NOT AUTHORITY FOR INVESTIGATION.

The authority given to the city by San Francisco Charter, art. 12, § 16, to expend money for the "extensions or improvements" of the municipal railway system, out of the earnings thereof, did not authorize the expenditure of such moneys for the purpose of conducting an investigation by the board of public works as to the advisability and availability of the acquisition by purchase of a part or the whole of another street railway; an "investigation" not constituting an "extension" or "improvement" of the municipal system.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. M. Mobley against the Board of Public Works of the City and County of San Francisco and others. From an order granting a preliminary injunction against the defendants, they appealed. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

George Lull, Chas. S. Peery, and M. T. Dooling, Jr., all of San Francisco, for appellants.

Connick & Kehoe, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from an order of the superior court, made after a hearing thereon, granting a preliminary injunction against the defendants and appellants herein in an action instituted by the plaintiff, as a taxpayer of the city and county of San Francisco, to enjoin said defendants from incurring any expense or auditing or paying any moneys out of the municipal railway fund of the city treasury of said city and county of San Francisco under or by virtue of a certain ordinance of the board of supervisors of said municipality, entitled "Ordinance No. 4632, New Series," purporting to make an appropriation of $15,000 from said funds for the purposes specified in said ordinance.

The ordinance provides, in substance, that whereas, the city and county of San Francisco is the owner of a municipal street railway system, and is engaged in operating the same over and along certain streets of said municipality; and whereas, the United Railroads of San Francisco, a corporation, is the owner of another street railway system, which is also being operated upon certain streets of said municipality not occupied by said municipal railway system; and whereas, the acquisition by the city and county of San Francisco of the whole or a portion of said street railway system now owned by said private corporation would constitute a valuable extension and improvement of said existing municipal railway system, and that it is for the best interests of San Francisco that a thorough investigation be made by it as to the value of said privately owned street railway system in order to determine what portion, if any, thereof should be purchased by the said city and county as an extension and improvement of its existing street railway system; that, therefore, the sum of $15,000 is appropriated from the funds of the municipal railway system for the purpose of defraying the cost of an investigation as to the condition, availability, and value of said privately owned street railway system, with a view to its possible purchase by said municipality, which said investigation the board of public works of said city and county are by the terms of the ordinance authorized, empowered, and directed to make. The ordinance in question further proceeds to repeal a certain prior ordinance of said municipality, entitled "Ordinance No. 4538 thereof," declaring that the public interest demands the acquisition of the street railways operated by the United Railroads of San Francisco, and prescribing the method of ascertaining the value thereof, and directing the board of public works to make such valuation.

Under the provisions of the foregoing ordinance the board of public works, according to the amended complaint of the plaintiff herein, was about to proceed to expend the sum of money provided in said ordinance from the funds of the municipal railway system in making the investigation provided for in said ordinance, whereupon the said plaintiff commenced this action and applied for the preliminary injunction which, upon hearing, the trial court granted herein.

Two questions are presented upon this appeal, and, as stated by the briefs of the appellants herein, they are as follows:

First. Does the charter of the said city and county of San Francisco authorize the purchase out of the earnings of the municipal railway of a part or the whole of another street railway in the said city and county as an extension or improvement of the municipal railway system now operated?

Second. Does the express power to appropriate the receipts of the municipal railway for extensions and improvements of said railway imply the right to make expenditures out of said receipts for the purpose of investigating the condition and availability of a part or the whole of another street railway as a proposed extension or improvement?

The solution of each of these questions requires an examination of the terms of the charter of the city and county of San Francisco with relation to the "Acquisition of Public Utilities." Article 12 of the said charter under the above title is conceded to contain all that said charter provides with respect to that subject, and it embraces an elaborate and detailed scheme, whereby it is proposed to carry into effect what is therein declared to be the purpose and intention of the people of the city and county of San Francisco that its public utilities shall be gradually acquired and ultimately owned by the said city and county.

Section 1 of said article prescribes that when the board of supervisors by ordinance shall determine that the public interest or necessity demands the acquisition or completion of any public utility or utilities by the city and county, or whenever the electors shall petition the board of supervisors, as provided in section 3 of the article for the acquisition of any public utility or utilities, the board of supervisors must procure from the board of public works, through the city engineer, plans and estimates of the cost of original construction and completion by the city and county of such public utility or utilities.

Section 2 of said article provides that before submitting propositions to the electors for the acquisition by original construction or condemnation of public utilities, the board of supervisors must solicit and consider offers for the sale to the city and county of existing utilities, in order that the electors may have the benefit of securing the same at the lowest possible price thereof.

Section 3 of said article provides the pro-

cedure to be undertaken by the board of supervisors whenever a petition signed by the electors of the city and county of San Francisco equal to a certain per centum thereof shall be presented to the board of supervisors, favoring the acquisition of any designated public utility or utilities.

Section 4 of said article provides for the submission to electors of propositions for the acquisition of public utilities at a special election. The succeeding sections of said article, up to section 13 thereof, prescribe the method of calling such special elections and for the matters which must be determined thereat, including the question of the issuance of bonds for the acquisition of such public utilities, as may be favored by the vote of the electors at such election, and for the sale of such bonds, and for the method of payment of the same by the levy of municipal taxes.

Section 16 of said article provides as follows:

"1. Whenever any public utility shall be operated by the city and county, the receipts from such utility shall be paid daily into the city treasury, and maintained in a special fund set aside for such utility. The supervisors may, from time to time, make appropriations from such funds for the following purposes:

"(a) For the payment of the operating expenses of such utility;

"(b) For repairs and reconstruction;

"(c) For payment of interest and sinking fund on the bonds issued for the acquisition or construction of such utility;

"(d) For extensions and improvements;

"(e) For a reserve fund."

It is the contention of the respondent herein that the foregoing provisions of article 12 of the charter of the city and county of San Francisco, other than section 16 thereof, prescribe the mode for the exercise of whatever powers the board of supervisors, or other officials of said city and county, possess in the matter of the expenditure of its public funds for the acquisition of public utilities either by the original construction thereof by said municipality, or by the condemnation and purchase of already existing privately owned properties in the nature of public utilities; and that the mode therein prescribed is the measure of the powers of the said officials of the municipality; and that, this being so, the ordinance which is assailed in this proceeding must be held to be void as a departure from and at variance with the provisions of said article.

[1] We are of the opinion that this contention must be sustained. The ordinance in question, as will be seen by its terms, does not purport to authorize the expenditure of the sum of money provided therein from the funds of the municipal railway system for the acquisition of any public utility. It merely proposes that such funds shall be expended for the purpose of conducting an investigation by the board of public works as to the advisability and availability of the acquisition by purchase of the United Railways System. If the result of that investigation should be a determination by said board in favor of the advisability and availability of such purchase, and should thus be taken to be a step in the direction of making the same, then it is apparent that such step is unwarranted by the provisions of said article of the charter, for the reason that the preliminary ordinance, determining that the public interest or necessity demands the acquisition of such system, has not been adopted by the board of supervisors. On the other hand, if it is conceded that as the result of such expenditure and consequent investigation provided for in said ordinance the board of public works should determine against the advisability or availability of the purchase and acquisition of such privately owned railway system, then it follows of necessity that such expenditure would be one made outside of the provisions and limitations of the article of the charter in question.

The only escape from these conclusions suggested by the appellants herein is that such an expenditure of the funds of the municipal railway system as is sought to be authorized by the ordinance in question is permissible under section 16 of said article 12 of said charter. The section as above quoted provides that whenever any public utility shall be operated by said municipality the receipts derived therefrom shall be paid daily into the city treasury, and shall be maintained in a special fund set apart for such utility, and that the supervisors may from time to time make appropriations from such funds for certain specific purposes prescribed in said section. One of these is specified in subdivision (d) thereof to be "for extensions and improvements"; and it is the contention of the appellants herein that the acquisition of the privately owned utility above referred to would constitute an extension and improvement of the already existing municipal railway system. The answer to this contention is twofold: First, The expenditure provided for in said ordinance is not to be made in the acquisition of said privately owned railway system, and hence cannot be said to be an expenditure for the extension and improvement of the existing municipal railways system; and, second, that the term "extensions and improvements" contained in said section cannot be so extended as to include the purchase of an entirely independent street railway system, theretofore privately owned and operated upon other streets and thoroughfares and in other sections of said municipality than that

now occupied by the municipal railway system thereof. It is evident that it could not have been the intention of the framers of the charter, by section 16 of article 12 thereof, to so extend these terms, since the article itself in the preceding sections thereof had already provided the precise method by which privately owned railway systems might be converted into municipally owned public utilities upon the initiative either of the electorate of said municipality or of the board of supervisors thereof. The term "extensions and improvements" must have reference to such extensions of or improvements in the service or operation of such public utility as are the natural and necessary incidents of the operation of any public service agency in a growing city, but not to the taking over of privately owned systems, which, while these might have the effect of extending and improving the already owned and operated public utility, would involve in their acquisition expenditures far in excess of the receipts and revenues of such municipal system, and entail the creation of obligations on the part of such municipality exceeding even the original cost of its existing system.

It follows that the expenditure provided for in said ordinance was unathorized by the provisions of the charter, and hence that the preliminary injunction restraining the same was proper.

The order is affirmed.

We concur: BEASLY, Presiding Judge pro tem.; KERRIGAN, J.

Opinion of Supreme Court In Bank Denying Hearing.

PER CURIAM. [2] Without regard to any other question discussed in the opinion of the district court of appeal, we are satisfied that the charter of San Francisco, as now written, does not authorize the payment of money from the funds of the municipal railway system for the purpose of investigating the condition and availability of a part or the whole of another street railway with a view to its purchase. The purposes for which expenditures from such fund can be made are carefully specified in section 16, article 12, of the charter, which, we think, excludes any such expenditure as here proposed. Such an investigation may not fairly be held to constitute an "extension or improvement" of the municipal system. We express no opinion on the other matters involved.

The application for a hearing in this court is denied.

ANGELLOTTI, C. J., and SHAW, LAWLOR, WILBUR, and LENNON, JJ., concur.

(44 Cal. App. 185)

WOOD v. LONG et al. (Civ. 1946.)

(District Court of Appeal, Third District, California. Nov. 7, 1919. Hearing Denied by Supreme Court Jan. 5, 1920.)

1. EXECUTORS AND ADMINISTRATORS ⟸359—LEGATEE, INJURED BY FAILURE TO SELL LAND, CANNOT CLAIM TITLE.

If a pecuniary legatee, by reason of a conveyance of land by the residuary legatees, or his conduct in relation to the conveyance, has suffered loss of his legacy, owing to the failure of the administrator to sell such land at administration sale, he must seek redress against the administrator personally, or by action on his bond, and cannot claim any title to the land so conveyed.

2. EXECUTORS AND ADMINISTRATORS ⟸115—ADMINISTRATOR MAY PURCHASE PROPERTY IN WHICH THE ESTATE HAS NO INTEREST.

Where land was set apart as a probate homestead to the widow and children, the estate of the decedent had no further interest therein; and where the homestead tenants mortgaged the same, and the mortgage was foreclosed, it was not improper for the administrator, in his individual capacity, to purchase the property from the purchaser at the foreclosure sale.

3. EXECUTORS AND ADMINISTRATORS ⟸429—ACTION TO COMPEL RE-EXECUTION OF DEED LOST OR DESTROYED.

In view of Code Civ. Proc. § 1582, where land was purchased, but the deed was never recorded, being lost or destroyed, the purchaser could maintain action against administrator of the seller's estate to compel execution and delivery of a deed conveying title to the land.

4. QUIETING TITLE ⟸10(1) — RECOVERY ON STRENGTH OF TITLE ALONE.

Plaintiff, suing to quiet title, must prevail by the strength of her own title, and not by the weakness of defendant's.

5. HOMESTEAD ⟸146—RIGHT OF HUSBAND'S ADMINISTRATOR TO PURCHASE INTEREST OF HEIR OF WIFE.

The administrator of the estate of a deceased husband, in purchasing from a son an assignment of his interest as heir at law of the deceased wife, which covered a tract of land set apart to the wife and children as a probate homestead, was under no greater constraint morally or legally than a stranger, but could have accepted a gift of the son's interest, and, when sued by the administratrix of the son, had no burden to show adequacy of consideration for the son's deed to him.

Appeal from Superior Court, Lassen County; J. O. Moncur, Judge.

Action to quiet title by Amanda E. Wood, as administratrix of Allen J. Wood, deceased, against John T. Long, individually and as administrator of the estate of Allen Wood, together with others. From a judgment for defendants, plaintiff appeals. Affirmed.

Louis P. Boardman, of San Francisco, for appellant.

Pardee & Pardee, of Susanville, for respondents.

BURNETT, J. Allen Wood died testate August 1, 1890, devising and bequeathing his property as follows:

"Thirdly: I give and bequeath to my beloved son, Allen J. Wood, of Santa Ana, Orange county, California, the sum of five hundred (500.00) dollars.

"Fourthly: I give, bequeath and devise to my beloved wife, Mary Wood, all the rest and residue of my estate, both real and personal of any kind and kinds whatsoever, of which I may die possessed, to have and to hold the same during the term of her natural life, then at the death of my said wife all of the said real and personal property which I may now lawfully bequeath and devise shall go to my beloved daughter, Mary E. Long, the now wife of William B. Long, of the said town of Susanville. She, my said daughter, then to have and to hold the same during the term of her natural life and at her death all of the said real estate, and all of the said personal property remaining shall go to the heirs of her my said daughter's body, share and share alike."

This will was admitted to probate in the superior court of Lassen county on April 5, 1891, upon the petition of Mary Wood, the surviving widow, and on April 11, 1891, letters of administration with the will annexed were issued to her as administratrix. On September 27, 1892, an inventory and appraisement of the estate of the deceased was filed, showing that at the time of his death he was the owner of 437 acres of land valued, with the improvements thereon, at $6,000, and 160 acres appraised at $400, situated in said Lassen county. The lands were not specifically described in said inventory, but it is not disputed that the 437 acres were intended to include all the farming land upon which were located the buildings, and the residue of 160 acres was intended to cover the timber lands. On the 27th day of November, 1893, the superior court of the county of Lassen made and entered its decree in the matter of said estate, setting aside to Mary Wood, widow of said deceased, certain lands of said estate, together with a small additional tract, as a probate homestead. It is not disputed that by this decree the title of and to said lands of said estate vested in Mary Wood. Subsequent to this decree, Mary Wood and her daughter and son-in-law, Mary E. Long and W. B. Long, joined in making a mortgage to Anthony Otto on a portion of the land included in this decree and other lands. This mortgage was thereafter foreclosed and the property was purchased at the sale by said Otto; the commissioner's deed having been made October 6, 1899.

The said Mary Wood died on the 25th day of July, 1896, and thereafter, on the 15th day of February, 1900, said John T. Long was duly appointed by the superior court of said county as administrator of the estate of Allen Wood, in the place of said Mary Wood. March 24, 1900, Otto commenced an action against John T. Long, as administrator of the estate of Allen Wood, Mary E. Long, W. B. Long, and the heirs of said Mary E. Long and W. B. Long, to quiet his title to the land so purchased at the foreclosure sale. Judgment was thereafter entered in said action, quieting Otto's title to certain parcels and portions covered by said mortgage, and adjudging him to be the owner in fee thereof; in said judgment it was also determined that said Otto was the owner in fee of an undivided one-half of S. E. ¼ of N. E. ¼, section 30, and S. W. ¼ of S. E. ¼ of section 19, township 30 N., range 12 E., M. D. M. This judgment was affirmed by the Supreme Court July 16, 1904. Otto v. Long, 144 Cal. 144, 77 Pac. 885.

The estate of Allen Wood thereby lost all interest in and to the property mortgaged to Otto, except an undivided one-half interest in the above-described two 40's, which were not included in the probate homestead. The interest of said estate in said two 40's was subsequently sold at an administrator's sale, as appears by the transcript. This sale divested the estate of Allen Wood of all title to real estate, except the 160 acres of timber land, which was thereafter distributed by said court to Scott-Graff Lumber Company, the successors in interest to all the residuary devisees of said deceased. By the foregoing proceedings title to all the real estate belonging to said Allen Wood in his lifetime passed into the hands of third parties, except the title to 40 acres in section 19 and 80 acres in section 30, which vested in Mary Wood by reason of the probate homestead, and is still a part of her estate, and of which the estate of plaintiff's intestate would be the owner of the undivided one-half, unless the contention of respondent is sound that the title thereto passed to John T. Long, by deed, August 18, 1910, from Allen J. Wood, execution of which is admitted by the pleadings. As to said lands sold to said Otto the record shows that, subsequent to the entry of final judgment in the said case of Otto v. Long, the defendant John T. Long purchased from Otto said property. A part of the land included in said probate homestead was N. E. ¼ of S. W. ¼ of said section 19; the same being a portion of the land included in patent from the United States to James W. Bagwell. All of the lands included in the Bagwell patent were deeded by him to W. B. Long, father of said John T. Long, by deed dated February 20, 1898, and respondent claims title to this parcel by reason of a judgment rendered in the case of John T. Long v. W. W. Long, as administrator of the estate of said W. B. Long.

Amanda E. Wood, the appellant, is the surviving widow and the administratrix of the estate of Allen J. Wood, deceased, the son of said Allen Wood, and she brought this action against the defendant, John T. Long individually, and as administrator with the will annexed of the estate of Allen Wood, deceased, to recover and quiet title to these various tracts of land and especially the undivided one-half interest in the said 120 acres, comprising a part of the probate homestead belonging to the estate of Mary Wood, deceased, and to which she claims Allen J. Wood was entitled to succeed as her son and heir at law.

As we have seen, the entire interest of appellant's intestate in the estate of his father was limited to the specific legacy of $500, and of course, appellant can have no greater interest in that estate, but the principal ground of controversy grows out of the disposition that has been made of a portion of the said probate homestead. However, the conduct of respondent in the administration of the estate of his grandfather, the said Allen Wood, is severely criticized by appellant and specific instances are pointed out as constituting evidence of his neglect and want of good faith in discharging his trust as administrator. There was, indeed, long delay in settling the estate; in fact, it seems never to have been fully administered, but it is to be remembered that respondent was not appointed administrator until 10 years after the death of said Allen Wood, and we may add that we find in the record no evidence that the defendant Long intentionally delayed the final settlement, or that by his conduct the interest of appellant's intestate was prejudiced in the least. In this connection it may be stated that all the heirs and devisees, including said intestate, seem to have been satisfied with his management, as no complaint was apparently made, nor were any steps taken by any of them to expedite the settlement of the estate. Appellant, with much spirit, calls attention to the familiar principles of good faith and equity that should control the conduct of a trustee in relation to his trust; but we think that the discussion is largely foreign to the facts of this case. Indeed, if it should be thought that respondent was somewhat lacking in diligence as administrator of said estate, it must be remembered that this action is to quiet title to certain real property, and the manner in which he discharged said trust can only be important in this inquiry as it affects the ownership of said realty. With these considerations in view we may notice the contention of appellant as to all the lands embraced by the pleadings, and to simplify the consideration we may adopt the division into parcels, made by respondent as follows: Parcel 1—the timbered lands, consisting of 160 acres in section 3 in said township 30; parcel 2—the Otto lands, being all of the lands to which Otto acquired title under foreclosure proceedings, consisting of 240 acres in section 30 and an undivided one-half of 40 acres in said section 30 and of 40 acres in section 19; parcel 3—the Bagwell lands, consisting of 160 acres in section 19; parcel 4—said probate homestead lands, record title to which still is vested in the estate of Mary Wood, deceased, consisting of 40 acres in section 19 and 80 acres in section 30.

[1] 1. Plaintiff really claims no interest in the timbered lands. They comprise 160 acres, which were sold and conveyed by the heirs of Mary E. Long, as residuary legatees under the will of Allen Wood, deceased, to the Scott-Graff Lumber Company. There can be no doubt that under said will the grantors in said deed were vested with the fee to said land, subject, of course, to the incidents of the probate of said estate. It is equally clear that said heirs had the right to convey their interest to said grantee. The only concern that plaintiff's intestate could have in the matter grew out of his claim to the $500 legacy. But it could make no difference to him whether he received that legacy from the proceeds of the sale of said tract or from some other source. Complaint is made, however, because that tract was not sold by the administrator to pay said legacy and the expenses of administration. But for this respondent cannot be blamed, because he presented a petition to the court for said sale, but it was denied upon the ground that some of the residuary legatees had conveyed their interest in the land to said company, and that other real estate belonging to the estate should be first sold; it being an undivided one-half of said 40 acres in section 30 and of said 40 acres in section 19. This undivided one-half was afterward sold for said purpose upon an order made by the court in conformity with the prayer of the petition of respondent, of November 11, 1912. It may be repeated that we see nothing reprehensible in the conduct of the administrator as to this transaction; and as to the title to the land it was vested in said company by a decree of partial distribution by the court of the date of March 13, 1913. This decree was made in conformity with a petition therefor by the administrator, and after said company had given an undertaking as required by section 1661 of the Code of Civil Procedure. It is quite plain that there is no showing herein sufficient to affect in the slightest degree the validity of that decree, even if it could be questioned in a proceeding against the administrator without making the grantee of said conveyance a party to the suit. We may add that if by reason of said sale to the Scott-Graff Company, or the conduct of the administrator in relation thereto, plaintiff had suffered any loss as to said legacy of $500, she would have to seek redress against the administrator personally

or by action on his bond, or it may be that she could have availed herself of the provisions of said undertaking given by the company as aforesaid. At any rate, no showing has been made herein to justify any disturbance of the title of said company to said timber tract.

[2] 2. As to the so-called Otto lands the validity of the mortgage thereon executed by Mary Wood, W. B. Long, and Mary E. Long is not questioned. They had a mortgageable interest in the land, and, granting that the debt secured thereby was really a debt of the estate of said Allen Wood, deceased, that circumstance did not, of course, impair the efficiency of the security. The mortgage was not paid, and it was regularly foreclosed, and the property was sold to said Otto. He had the right to purchase it, and there is no claim that there was anything irregular in the sale. The time for redemption expired, and the purchaser received a deed therefor. Thereafter, as we have seen, he brought a suit against all the parties in interest and obtained a decree quieting his title to said tract. Thus was the absolute title vested in Otto. He thereafter had the right to sell the land to whomsoever he pleased. To this point there is no dispute, but appellant seems to base a claim to some interest in this land upon the fact that John T. Long was the purchaser from Otto. But, assuredly, Long was not precluded from purchasing property to which the estate had no title, and in which it had no interest. His trust extended only to the property of the estate of which he was the administrator. If we adhere to the position of appellant, we must hold that an administrator of an estate can make no purchases of real estate from any source on his own account while he continues as such administrator. Of course, the proposition is absurd, and in that respect we may not have fully understood the contention of appellant. We may add that, if Long had purchased the said property or any portion thereof with moneys of the estate, a different question would manifestly arise; but the evidence shows that the entire purchase was made with his own funds, and there is no claim or evidence of any fraud in connection with the transaction. Even if the lands had been bought with the money of the estate of Allen Wood, deceased, and an equitable title had thereby been created in favor of said estate, this would inure to the benefit of the residuary legatees, since under the will, as we have seen, plaintiff's intestate was only entitled to the legacy of $500, and this, as we shall see, was subsequently paid him according to his agreement with Long. We can see no room for any candid difference of opinion as to the Otto tract.

[3] 3. The Bagwell tract consisted of 160 acres, patented to James W. Bagwell by the United States December 19, 1885. It seems, however, that 40 acres of this were improperly included in the said homestead set apart to Mary Wood, and upon this circumstance appellant bases a claim to some interest therein. As a matter of fact, neither the estate of Allen Wood nor of Mary Wood ever had any interest in the Bagwell tract. On February 20, 1893, Bagwell conveyed these lands to W. B. Long, father of John T. Long, and the latter claims them by purchase from his father. The evidence shows that he did so purchase these lands; however, the deed was never recorded, but was either lost or destroyed. After the death of said W. B. Long, John T. Long brought an action against the administrator of his father's estate to compel the execution and delivery of a deed conveying to him the title to said lands. Issue was regularly joined, and, after trial, judgment was entered on January 27, 1911, in favor of the plaintiff therein as prayed for. It is the claim of appellant that such action would not lie against the administrator of an estate and that the judgment therein was and is without force and effect. As to this we think appellant is in error. Cummings v. Coe, 10 Cal. 530, involved an action to compel the defendant to execute a new and second deed after destruction of the original by fire, and the opinion was written by Mr. Justice Field, who said:

"The proof of the execution of the deed and of its accidental destruction is full and satisfactory, and the jurisdiction of a court of equity to decree a re-execution of the deed is unquestionable."

In Kent et al. v. Church of St. Michael, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693, the foregoing case is cited with approval, and it was held by the New York court that, where the contract has been performed and the deed given, which the purchaser by some accident or misfortune has lost, so that he has no record to the land which was conveyed to him, a court of equity will compel the vendor, or, after his death, those representing his title, to execute another deed, so as to clothe the grantee with the record title. The court declared that the right to bring such action did not depend upon any provision of the Code, but had its sanction in the general jurisdiction of a court of equity. The principle, however, is too well settled to require further consideration. There can be no doubt that the action could have been brought against W. B. Long in his life, and after his death a similar suit could be brought against his administration. In fact, there is specific authority for the action in section 1582 of the Code of Civil Procedure.

[4] Moreover, if said proceeding had been abortive and the judgment rendered therein ineffectual for any purpose, it would be of

no avail to appellant, since she must prevail by the strength of her own title, and not by the weakness of that of defendant. Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; Sears v. Willard, 165 Cal. 12, 130 Pac. 869. She made no such showing, and did not connect herself in any manner with the paramount source of title to said lands, or any portion thereof.

[5] 4. The 120 acres contained in this parcel were included in the probate homestead and were not covered by the Otto mortgage. It constituted the whole of the estate of Mary Wood at the time of her death, which occurred on July 25, 1896. On the 29th of January, 1897, letters of administration of her estate were issued to her daughter, Mary E. Long. Appraisers were appointed and notice to creditors published, but no further proceedings in her estate have even been had. Plaintiff's intestate, Allen J. Wood and Mary E. Long, were the sole heirs of said Mary Wood, and each was entitled to one-half of the said 120 acres, subject to administration and the payment of the debts of the estate. There can be no doubt that said Allen J. Wood, immediately upon the death of said Mary Wood, was vested with the right to sell and convey his interest in said estate, subject, of course, to administration. He exercised this right, and on August 18, 1910, he executed and acknowledged a deed to John T. Long, by which it appears that for the consideration of $500, "receipt whereof is hereby acknowledged," the said Allen J. Wood "doth by these presents grant, bargain, sell, and convey unto said party of the second part, and to his heirs and assigns, all of his right, title, and interest as one of the devisees or legatees of Allen Wood, deceased, and as heir at law of Mary Wood, deceased, in and to the estate of either of said deceased persons in the county of Lassen, state of California, the said interest in real, personal, or mixed property."

This deed is attacked on the ground of fraud, but we find no evidence whatever in the record to justify such claim. The testimony shows that the deed was the voluntary act of said Allen J. Wood, and there is nothing to indicate any misrepresentation, concealment, coercion, undue influence, in fact, any feature of unconscionable conduct on the part of John T. Long or any one else interested in the matter. The evidence shows that at one time the said Allen J. Wood offered to dispose of his interest in his father's estate to defendant for the sum of $300, but the offer was never accepted or acted upon by the parties. There was no money in the hands of the administrator with which to pay the legacy, and it appears that said Wood was anxious to obtain the money, and wrote to defendant that for $500 he would make an assignment of all his interest in both estates. The immediate occasion of the assignment was a letter written by Pardee & Pardee, attorneys for the administrator, to said Wood, dated August 15, 1910, as follows:

"Mr. Long has handed me a recent letter of yours, to him, from which it would seem that you are very desirous of having the estate settled up as rapidly as possible, and Mr. Long has authorized us to say to you that he will, at this time, pay to you $500, if you will make an assignment of all your interest in the estate of either your father or your mother. He says that some time since you wrote him, if he would pay you $500, that you would make such an assignment."

We have carefully read all of the testimony, and it is inconsistent with any accusation or implication of bad faith. But the particular claim of appellant is that the grantor and the grantee of said deed maintained the relation of trustee and beneficiary by reason of the fact that the grantee was the administrator of the estate of Allen Wood, deceased, and that the burden of proof was upon him to show the adequacy of the consideration for the deed, and that he failed to do so.

It is to be remembered, however, that this tract of land belonged to the estate of Mary Wood, and that said John T. Long was not her administrator. The estate of Allen Wood had been divested of all interest in this land long before respondent was appointed administrator of that estate. As far as the purchase of the property of the estate of Mary Wood is concerned, he was under no greater constraint, moral or legal, than a stranger. He could have accepted a gift of Allen J. Wood's interest, and the latter had the right to make such donation, if he desired. But the evidence shows that the transfer was for a valuable consideration. Just what was the market value of said interest does not clearly appear, but it is fairly inferable from the record that it was a very small sum. In this connection it may be said that it is somewhat singular, in view of the present contention of appellant, that she made no inquiry of any of the witnesses as to the value of said land.

Moreover, if we admit that a relation of trust and confidence existed, there was sufficient evidence to justify the court in finding that no advantage whatever was taken of said Allen J. Wood, that the transaction was the result of his own volition, and that it was altogether fair and equitable.

Appellant has furnished an ardent and comprehensive discussion of certain legal propositions, but it seems to us that she has made a wrong application of them to the facts as disclosed by the record.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

181 Cal. 758

In re HAMILTON'S ESTATE. (L. A. 6102.)

(Supreme Court of California. Dec. 29, 1919. Rehearing Denied Jan. 26, 1920.)

1. WILLS ⊂=858(2)—SPECIFIC REQUESTS FOR CHARITABLE USES PREVAIL OVER RESIDUARY LEGACIES ON ABATEMENT OF GIFTS EXCEEDING STATUTORY LIMITATION.

Where testator bequeaths more than one-third of his estate to charitable uses so that it is necessary to reduce the aggregate of such bequests to a third of the estate, as directed by Civ. Code, § 1313, a residuary legacy for a charitable use must give way to specific bequests of the same character.

2. CHARITIES ⊂=32—EVIDENCE COMPETENT TO SHOW PURPOSE OF GIFT FOR MASSES.

On the issue as to whether bequests to pastors of the Roman Catholic Church for masses are charitable bequests, testimony as to the character and objects of the ceremonial according to the doctrine of the church, and as to the rule of the church as to money paid for masses, is competent.

3. CHARITIES ⊂=16—BEQUEST FOR MASSES CREATING TRUST.

A bequest of money direct to the pastor of a certain Roman Catholic church for masses for the repose of the soul of a certain person does not create a trust, as under the rule of the church the money goes direct to the pastor, but where a bequest is left to an archbishop, with a request that masses be said in particular churches within his jurisdiction, the obligation of the archbishop, assuming that testator intends one, is one as to the disposition and use of the money, and there is a precatory trust.

4. WILLS ⊂=675—PRECATORY WORDS AS CREATING TRUST.

Words of favor or petition in a will will not be raised into words of positive directions, so as to create a precatory trust, unless it is clear that they were so used by the testator.

5. WILLS ⊂=675—TEST OF PRECATORY TRUST.

In determining whether or not a bequest created a precatory trust, the question is whether the legatee is the beneficiary or merely a trustee for others of the gift bestowed upon him, whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion.

6. CHARITIES ⊂=16—BEQUEST FOR MASSES CREATING TRUST.

A will, giving the residue of testator's estate to "W., Archbishop of Dublin, Ireland, and I request that masses be offered for the repose of my soul," in certain named churches in Dublin, *held* to create a precatory trust.

7. WILLS ⊂=672(1)—OBLIGATION CREATING TRUST.

To create a trust it need not appear that testator intended that the obligation imposed should be one enforceable by the courts, and, in the absence of anything indicating an intention that it should be so enforced, it is sufficient if it appear that testator did intend to place upon the legatee an obligation as to whose performance the latter has no discretion, and which he cannot fail to perform in good conscience and in good faith toward the testator; but no trust is created where it affirmatively appears that, while the testator did intend an obligation, he did not intend that it should be enforceable by the courts.

8. WILLS ⊂=13(2)—TRUST FOR MASSES FOR "CHARITABLE USE."

A bequest in trust for masses to be said in a Catholic church for the repose of the soul of a specific person is a trust for "charitable uses," within the meaning of Civ. Code, § 1313.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charitable Use.]

9. WILLS ⊂=13(2)—BEQUESTS TO PRIEST FOR MASSES IN OWN CHURCH NOT LIMITED BY CODE.

Civ. Code, § 1313, provides no limitation upon gifts for charitable purposes but places such limitation only upon gifts to charitable corporations or societies, or in trust for charitable uses, and hence places no limitation upon bequests to particular Catholic priests for masses in their own churches.

Department 1.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

In the Matter of the Estate of Patrick J. Hamilton, deceased. From a decree of partial distribution, an heir at law appeals. Reversed for further proceedings.

Jeremiah V. Coffey, Edward I. Coffey, and Edward M. Leonard, all of San Francisco, for appellant.

Willard P. Smith, of San Francisco (Walton C. Webb, of San Francisco, of counsel), for respondent.

OLNEY, J. This is an appeal from a decree of partial distribution. The decedent, Patrick J. Hamilton, died testate, leaving an estate here and in Montana of the net distributable value of $121,000 or somewhat less, depending on whether or not the figures appearing in the record are the net value of the estate available for distribution, a fact which does not appear with certainty. By his will he made bequests plainly not of a charitable character in the amount of $25,450; bequests plainly of a charitable character in the amount of $26,500; bequests to certain bishops of the Roman Catholic Church for masses to be said in certain churches within their jurisdictions in the amount of $8,500, and bequests to the pastors of certain Roman Catholic churches for masses to be said in their churches in the sum of $300. The masses to be said were in every

case specified to be for the repose of the soul of the testator, or those of certain named persons, who, with one exception, were relatives of the testator, or for the souls of the testator and relatives. The residue of his estate he disposed of by the following clause:

"Eighth: I give and bequeath all the rest, residue and remainder of my estate to the Right Reverend William J. Walsh, Archbishop of Dublin, Ireland, and I request that masses be offered for the repose of my soul, and the souls of my parents, brothers, sisters, grandparents, uncles, aunts, cousins and all relatives, in the following named churches to wit: In the Cathedral on Marlborough street, St. Catherine's Church on Meath street, St. Nicholas' Church on Francis street, St. Dominick's Church on Dominick street, and the churches of Adam and Eve and Sts. Michael and John, all in Dublin, Ireland."

The amount of the residue so disposed of, assuming $121,000 as the distributable value of the estate, is $60,250.

The archbishop of Dublin, not in his official capacity but as an individual, petitioned for partial distribution to him under the residuary clause, and this petition was opposed by one of the decedent's heirs at law on the ground that the bequest was one in trust for the saying of masses, and that such a trust was for what is known in legal parlance as a charitable use, although better described by the more general term eleemosynary, and came within the provisions of section 1313 of the Civil Code, limiting gifts of that character by will to one-third of the testator's estate. The lower court took the view that the residuary bequest was one to William J. Walsh individually without any trust, and made its decree, distributing $5,000 to him accordingly. From this decree the opposing heir at law appeals.

[1] It is immediately apparent from the foregoing that two questions present themselves: First, was the residuary bequest one to William J. Walsh for him to do with as he pleased, or was it only to him either officially or individually—it makes no difference which—upon a trust that it was to be used for the saying of masses; and, second, if the bequest were upon such a trust, is a trust of that character a charitable trust within the meaning of the Code section? If it be held that there is a trust, and that it is of a charitable character, then a third question presents itself, namely, as to the character of the other and specific bequests for masses. The reason for this is that the Code section does not make wholly void gifts to charitable organizations or upon charitable trusts when their aggregate exceeds one-third of the testator's estate, but merely requires that upon distribution their aggregate be reduced to the legal limit. In making such reduction the residuary legacy, if it be of the partially prescribed character, must give way to the specific bequests which are of the same character (Estate of Sloane, 171 Cal. 248, 152 Pac. 540), so that there is permitted for distribution under the residuary legacy only the amount by which one-third of the testator's distributable estate exceeds the amount of specific bequests to charitable organizations or upon charitable trusts. The ascertainment of this amount, of course, requires a determination of what specific bequests are of this character and must therefore be taken into account. This means in the present case, if the residuary legacy is found to be upon a charitable trust, a determination of the character of the specific bequests for masses as well.

[2] The court in this case has the advantage of the testimony of the chancellor of the Roman Catholic diocese of Monterey and Los Angeles, given on behalf of the heir at law, as to the character and objects of the ceremonial of the mass according to the doctrine of the church, and also as to the rule of the church as to money paid for masses. This testimony was received in the lower court and subsequently stricken out as not material, but we conceive it to be quite material. It is not controverted. From it two things appear which are of importance and which it is well to state at this point. First, it appears that a mass for the repose of the soul of one deceased differs but little from other masses, and in particular differs not at all in its primary character and objects or the primary results which in the contemplation of the church flow from it. Every mass in the view of the church is a sacrifice to God, the making again of the Supreme Sacrifice upon the Cross and for the same purpose, a sacrifice for all of mankind who will accept it in atonement for their sins. As put by the witness, it gives honor and glory to God; it thanks him for all the benefits he bestows upon the world; it makes petition to him for those blessings and graces which men are in need of, and it makes atonement for his offended justice. When a mass is said for the soul of a departed individual it has also special fruit for his soul. Just the nature of this special fruit does not appear in the testimony, but from our general knowledge of the doctrine of the church we should judge that among other possible things it lies in the direct efficacy of petition to God, a belief of the church, and when the deceased is himself responsible for the mass being said, as when he has left a bequest for that purpose, in the merit or grace which inheres in the doing of a good deed. Just what the special fruit is, is, however, not important here. It is plain that every mass, whether it be a special mass for the soul of a departed one or not, is an act of worship which, according to the doctrine of the church, spiritually benefits all who participate in it and all who are

willing to accept the sacrifice and atonement offered by it; that is, the faithful of the church. From its very nature it must be a most sacred and important act of worship in the ceremonial of the church, representing in fact the very essence of its faith, since in the eyes of the church it is the present repetition of the Crucifixion, which is the foundation of the church.

The second matter of importance appearing in the testimony of the chancellor is that the money paid or left for masses goes, not to the church, but to the particular priest individually in whose church and by whom the masses are said. We understand that generally the priest receiving this or any other money considers himself morally obligated to apply any excess after supplying his own very limited personal needs to some worthy and unselfish purpose, such as the relief of the poor of the parish. But the money, nevertheless, is his, and he can do with it as he wishes. If he fails to apply it to worthy purposes, he is guilty of a moral delinquency, but otherwise has not broken a rule of the church.

Passing now to a consideration of the questions in the case, it is contended strongly by the residuary legatee that the words of the residuary clause, "and I request that masses be offered for the repose of my soul," etc., immediately following the words of gift, were not intended by the testator to impose an obligation upon the legatee, but were addressed merely to the latter's judgment or discretion, so that, if he truly thought it best, he could use the money for any purpose he desired, and not have masses offered as requested, and yet not violate the obligation upon which he received the gift. The contention of the heir at law is that the testator intended that the money should go for masses and for no other purpose, and that because of this a precatory trust is created.

If the intention of the testator be as contended for by the heir at law, it does not necessarily follow that a precatory trust is created. A bequest may be made, and in such language as to admit of no doubt that the testator intended to impose an obligation upon the legatee, and yet no trust exist. For example, a testator might make a special bequest to his oldest son and specify that it was given upon the injunction that every year on the date of his father's death the son should call his brothers and sisters together and offer up a prayer in memory of the father. The words of obligation are precise, and admit of no question, and the obligation upon the son is there, and yet there is no trust. The reason is that the obligation imposed does not run to the disposition of the money or property bequeathed. The money or property is neither given nor received upon any obligation as to what shall be done with it. It is intended to be the son's and for his personal benefit. The essential element of a trust that the subject-matter of the trust—the money or the property—be held by the trustee for some one else, or to be used for the accomplishment of some object or objects other than the personal benefit of the trustee is absent.

[3] Another illustration of the same thing is, we believe, the case of the bequests by the will under consideration here direct to the pastors of three certain churches of a hundred dollars each for masses for the repose of the soul of one John P. Gallagher. By the rules of the church, as we have said, these bequests belong not to the church but to the pastors, personally. As to them, the essential point is that while they will receive the money upon the obligation to offer masses as required, such obligation does not go to the use or disposition of the money. Its use or disposition by the priest is not necessary in order that he offer the masses required. He receives the money, not to be by him expended or used for masses, for that is not necessary, but either as a gratuity, the view of the church, or as compensation; it makes no difference which. In either case he receives it for himself, so that there is no trust. Sherman v. Baker, 20 R. I. 448, 40 Atl. 11, 40 L. R. A. 717; Harrison v. Brophy, 59 Kan. 7, 51 Pac. 883, 40 L. R. A. 721; Moran v. Moran, 104 Iowa, 216, 73 N. W. 617, 39 L. R. A. 204, 65 Am. St. Rep. 443.

The question immediately arises, is the residuary legacy of this same sort? If it is, there is no precatory trust no matter what view may be taken as to the obligatory character of the testator's request for masses which accompanies the gift. We think it plain from the evidence, however, that the residuary legacy is not of this character, assuming that the request for masses is obligatory. The masses requested are masses to be offered in particular churches. The residuary legatee is not the pastor of those churches, and the inference is clear that the testator contemplated that the masses to be offered would be offered by the pastors of those churches in accordance with the usual custom of the church, and not by the archbishop himself. By the rules of the church these pastors are entitled to the stipend for the offering of the masses, and the testator must, therefore, have contemplated and intended that the archbishop would use the legacy, not for his own benefit or as he saw fit, but for paying the stipends of the pastors in whose churches and by whom the masses were to be offered. The obligation of the archbishop, therefore, assuming that the testator intended one, was one as to the disposition and use of the money given him. This is no more than saying that it was given upon a trust, and the essential element which is lacking in a direct gift to the pastor

who is to say the masses, namely, that the obligation go to the use or disposition of the subject-matter of the gift, is here present.

[4] Taking up now the question of the obligatory character of the request for masses, it is, of course, one solely as to the testator's intention. The word used, "request," is accurately one of petition or favor. Yet very frequently what is a real command or positive direction, is, as a matter of polite or deferential expression, cast in the form of a request. The rule is, of course, well established that words of favor or petition in a will will not be raised into words of positive direction so as to create a precatory trust, unless it is clear that they were so used by the testator. There are numerous decisions in our own state to that effect. Is the testator's intention in the present case clear?

[5] It is well at the outset to distinguish clearly just what the intent is which must exist in order that there be a precatory trust. It is thus stated in Estate of Marti, 132 Cal. 666, 669, 61 Pac. 964:

"The question for determination is whether the devisee or legatee is the beneficiary, or merely a trustee for others, of the gift bestowed upon him; whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion."

[6] This language has been subsequently quoted, or its substance repeated, with approval, as correctly stating the test to be applied, in Estate of Mitchell, 160 Cal. 618, 621, 117 Pac. 774, Estate of Purcell, 167 Cal. 176, 179, 138 Pac. 704, and Estate of Browne, 175 Cal. 361, 362, 165 Pac. 960. That it does in fact correctly state the test admits of no doubt. Applying it here, the question is, Was the residuary legacy intended by the testator as one to "William J. Walsh, Archbishop" as himself the beneficiary, with a request addressed to his discretion merely that masses be said for the soul of the testator and his relatives, or was it one to the legatee named, to be applied by him to the particular purpose of having the masses said without intent that he should be at liberty in his own discretion not to so apply the gift. That this is a correct statement of the question immediately involved we do not believe can be gainsaid. So stated, the answer to the question seems to us plain. We cannot believe that the testator contemplated that William J. Walsh should personally benefit by the gift, or that the gift was made for that purpose. It seems to us plain that the gift was made to William J. Walsh, who is the archbishop of Dublin, solely in order that he, the archbishop, might see to it that masses were said in the designated churches under his jurisdiction as requested.

The words of gift and the words of request are directly and immediately coupled together in the same sentence, so that it is apparent that the gift and the requested disposition of it by the legatee ran together in the testator's mind, and there is a strong presumption at least that both were parts of a single purpose which the testator was seeking to accomplish. But if the testator intended both to benefit the legatee personally and also to have a number of masses said in the discretion of the legatee, there were two purposes, and not a single one. The case comes exactly within the further language of Estate of Marti, where it is said (132 Cal. 670, 61 Pac. 965):

"If the testator accompanies his bequest with a desire on his part that it shall be applied in a certain way, or for the benefit of another than the legatee, either by coupling the same as a directing clause in the sentence by which the bequest is made, or by specific reference thereto, there is a clear manifestation that it was his intention that such disposition should be made of the property given to the legatee. In such a case a duty or obligation towards the other is imposed upon the legatee as a consideration for the gift. His acceptance of the property is upon the condition that he will comply with the direction or request of the testator, and he will be held as a trustee for that purpose."

According to the rule of construction so stated, the immediate coupling together in the same sentence of the gift and an unqualified request for its disposition in a certain manner, as was done in the will before us, alone requires the conclusion that it was the intention of the testator that the gift should be disposed of in the manner requested, and is determinative upon the point of a precatory trust. Whether strictly such coupling together would alone positively require such conclusion, certainly it is a very cogent and compelling circumstance, and in the present case there are other circumstances strongly corroborative. So far as appears there was no relation or bond of any character between the testator and the legatee which would make the latter a natural object of the testator's bounty. No reason appears why the testator should have desired to benefit the legatee personally. On the other hand, if the real and final object of the testator were to provide for the saying of masses in certain churches in Dublin, no more natural selection of the person to carry out his desire could be made than that of the archbishop of Dublin, under whose care the Catholic churches of that city are.

It has been repeatedly said that the construction placed upon one instrument, or upon particular words as used in one instrument, is of little value as a precedent for the construction of another. Again referring to Estate of Marti, supra, it is there said that this is particularly true of cases involving the existence or nonexistence of a

precatory trust, and that previous decisions only serve to illustrate the application of general rules for the construction of wills. After all, a question of construction is largely, if not finally, a matter of the impression as to the maker's intention made upon the mind of the court when it picks up and reads the instrument, reading it in the light of the circumstances under which it was made, if such circumstances appear. Picking up the present will and reading it, and particularly the residuary clause, the impression is strong upon us that the testator clearly did not intend a gift in any particular or contingency for the personal benefit of William J. Walsh, but did intend solely to provide for masses, and selected William J. Walsh, the archbishop of the diocese wherein the masses were to be said, as a very natural and suitable instrumentality to carry out his desire.

Our impression in this respect is not affected by the circumstances urged upon us that in preceding clauses of the will there are specific bequests "to Archbishop Walsh or his successor in office," and that such bequests are given directly "for masses for the repose of," etc., without words of request. As so put there is, of course, no doubt as to the testator's intention in connection with these specific bequests, and the differences of expression between them and the residuary clause are entitled to consideration and have some weight. But differences in expression of the same intent are so natural, are so inevitable in fact unless particular care is taken to avoid them, that the significance of differences in expression is not great, where, as here, the same intent may be very suitably and naturally expressed in both ways. In the present case the differences are wholly insufficient to overcome the effect of the immediate coupling together as one of the gift and the request, the absence of any reason why the testator should desire to make the residuary legatee personally the object of his bounty, and the complete explanation of the latter's selection as legatee if the testator's real object was to have masses offered as he requests.

[7] But, it may be said, while there does appear an intention on the part of the testator to impose an obligation upon the archbishop with relation to the gift, yet such obligation is addressed to his conscience, and it does not appear that the testator intended an obligation cognizable or enforceable in law or equity. The answer is that it is not necessary in order to create a trust that it appear that the testator intended that the obligation imposed should be one enforceable by the courts, and it is very rare that such intention does appear. In the vast majority of cases of precatory trusts there is nothing to indicate that the question of whether or not the obligation which he was imposing upon the legatee was enforceable by the courts ever occurred to the testator, and the extreme probabilities are that it did not. The true rule is, we believe, that, in the absence of anything indicating an intention on the testator's part that it should not be enforced, it is sufficient if it appear that the testator did intend to place upon the legatee an obligation as to whose performance the latter has no discretion and which he cannot fail to perform in good conscience and in good faith toward the testator. Upon the obligation so imposed, the courts of equity, whose function is so largely that of courts of conscience, will seize and will enforce it if necessary. The exception to this is where it affirmatively appears that, while the testator did intend an obligation, he did not intend that it should be enforceable by the courts, but deliberately left the matter of its performance exclusively to the good faith of the legatee. Of this character were the wills before the court in O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076, and Estate of Purcell, 167 Cal. 176, 138 Pac. 704, in both of which the testatrix expressly stated that it was not her intention to place any trust or binding obligation upon the legatee. There is no comparable expression in the present will, nor anything from which the intent to impose an obligation, but deliberately to leave its performance exclusively to the good faith of the legatee, may be deduced. Upon this branch of the case our conclusion is that the residuary legacy was upon the obligation, and, since there is nothing to indicate that such obligation should not be enforceable by the courts, consequently upon the trust, that it should be applied so far as it would go to the payment of the necessary stipends for the offering of masses in the churches named by the testator.

[8] The conclusion so reached necessitates a consideration of the question as to whether or not such a trust is one for charitable uses. This depends upon whether masses for the souls of particular decedents are charitable uses in the view of the law. If they be not charitable uses, there is a very serious question as to the validity of trusts for masses. It has been held that as private trusts, trusts for masses are entirely void because of the want of a living beneficiary. Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420; McHugh v. McCole, 97 Wis. 166, 72 N. W. 631, 40 L. R. A. 724, 65 Am. St. Rep. 106; Festorazzi v. St. Joseph's Church, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48.

On the other hand, if trusts for masses are trusts for charitable uses then they are entitled to the favor shown by the law to charitable trusts, and to be relieved from the rules applicable to private trusts, but at the same time are necessarily subject to the limitations imposed by law upon charitable trusts in general. As to what their char-

acter is in this respect, the decisions differ, although the great weight of authority is that trusts for masses, even masses for the souls of particular decedents, are charitable trusts. O'Hanlon v. Logue, 1 Irish Rep. Ch. Div. [1906] 247; Morris v. Edwards, 227 N. Y. 141, 124 N. E. 724; Hoeffer v. Clogan, 171 Ill. 462, 49 N. E. 527, 40 L. R. A. 730, 63 Am. St. Rep. 241; Burke v. Burke, 259 Ill. 262, 102 N. E. 293; Rhymer's Appeal, 93 Pa. 142, 39 Am. Rep. 736; In re O'Donnell, 209 Pa. 63, 58 Atl. 120; Schouler, Pet'r, 134 Mass. 426; Ackerman v. Fichter, 179 Ind. 392, 101 N. E. 493, 46 L. R. A. (N. S.) 221, Ann. Cas. 1915D, 1117; Coleman v. O'Leary's Ex'r, 114 Ky. 388, 70 S. W. 1068; Kerrigan v. Tabb (N. J. Ch.) 39 Atl. 701; Webster v. Sughrow, 69 N. H. 380, 45 Atl. 139, 48 L. R. A. 100; In re Kavanaugh's Estate, 143 Wis. 90, 126 N. W. 672, 28 L. R. A. 470.

In this state, however, it has been held that a bequest for masses for the soul of the testator was not a bequest for a charitable use. Estate of Lennon, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024. The ground upon which the decision is put is that the bequest is for the benefit of the testator alone. This is purely a question of fact, a question as to the purposes and results of the mass according to the doctrine of the church, and if in the present case the evidence as to the fact is different and requires a different conclusion, effect must be given to it. In the Lennon Case the court affirmed a decree where, as stated in the opinion, the record was fragmentary, uncertain, and incomplete, and presented no evidence against the rulings and decisions of the lower court. In the present case the evidence is ample, and leaves no room for doubt. Whether the masses be offered for the soul of particular persons or not, it is shown, as we have said, that they are a most important and sacred act of worship according to the doctrine of the church of whose ceremonial they are a part. When offered for the souls of particular persons, they do have some special fruit individual to such persons, but their primary object and character is the same. They benefit spiritually both all who immediately participate in their celebration and also all the members of the church who by their membership and faith in the church accept the atonement offered by the sacrifice which by the doctrine of the church is made by the mass.

Such being the fact in regard to the character of masses as shown by the evidence in this case, the conclusion that a bequest in trust for masses is a trust for charitable uses follows almost as of course. It is too well established to admit of question or to require the citation of authority that in the category of what the law calls charitable trusts are trusts for the furtherance of religion or for religious purposes, such as the support of a church, the support of missionaries, the inculcating of the doctrines of the church, and the performance of religious observances and acts of worship. Of this nature are masses according to the doctrine of the Roman Catholic Church, and by that doctrine they must be judged in determining whether or not they are of a purely private character or are of general spiritual benefit.

[9] What has already been said practically disposes of the remaining questions in the case. The specific bequests to various bishops for masses to be said in particular churches within their respective jurisdictions are, like the residuary legacy, bequests in trust, since by the rules of the church the masses would be customarily offered by the priests of those churches, who would be entitled to the stipends for so doing, and it must have been the intention of the testator that the bequests should be used for the purpose of paying those stipends. They are also trusts for a charitable use. This is not true of the bequests to particular pastors for masses in their churches. As we have said, these bequests go personally to such priests for them to use as they see fit, and there is no trust. Section 1313, Civil Code, provides no limitation upon gifts in general for charitable purposes. It places such limitation only upon gifts to charitable corporations or societies or in trust for charitable uses. The bequests in this case to the pastors do not come in either of these classes. It follows that in determining the amount of the gifts made by the will, which come within the operation of the Code section, there must be included the specific bequests to the various bishops for masses and excluded the bequests to the pastors.

Decree reversed for further proceedings consistent with this opinion.

We concur: SHAW, J.; LAWLOR, J.

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L. A. PAVING CO. v. LOS ANGELES FOUNDRY CO. (L. A. 5236.)

(Supreme Court of California. Dec. 12, 1919.)

1. MUNICIPAL CORPORATIONS ⊜570(1) — JUDGMENT DENYING FORECLOSURE OF STREET ASSESSMENT LIEN SUFFICIENTLY SPECIFYING IRREGULARITY.

In action to foreclose street assessment lien for work done under the Vrooman Act, judgment denying foreclosure, and specifying as reason therefor the failure to dispose of defendant's appeal to town trustees, and imposing a lien upon defendant's property subject to disposal of such appeal, *held* sufficient under St. 1913, p. 409, § 12¼, requiring the court holding assessment invalid to specify irregularity.

2. MUNICIPAL CORPORATIONS ⊜519(5)—COMPLETION OF STREET IMPROVEMENT WORK CREATES LIEN ON BENEFITED PROPERTY.

Completion of street improvement work imposed a lien on property benefited, notwithstanding failure of town trustees to dispose of owner's appeal taken after work had been completed.

3. MUNICIPAL CORPORATIONS ⊜519(5)—LIEN FOR STREET IMPROVEMENT WORK IS CREATED ON COMPLETION OF WORK AND RECORDING OF WARRANT.

Where street improvement work done under Vrooman Act has been completed and the warrant for assessment has been issued and recorded, together with other requisite papers, in the office of the superintendent of streets under section 9, the assessment became a lien subject to appeal by owner to town trustees within 30 days and disposition of such appeal.

4. MUNICIPAL CORPORATIONS ⊜570(1)—JUDGMENT DENYING FORECLOSURE OF STREET ASSESSMENT LIEN PROPERLY DETERMINED EXISTENCE OF LIEN.

In action to foreclose assessment lien for work done under Vrooman Act, judgment denying foreclosure properly specified reason therefor, and determined that plaintiff had a lien on the land under section 12¼; the matter of the lien not being rendered moot by adjudication denying foreclosure.

5. EVIDENCE ⊜25(2)—JUDICIAL NOTICE THAT CITY IS A MUNICIPALITY.

In street assessment lien foreclosure action, court will take judicial notice that city for which work was done is a municipality.

6. MUNICIPAL CORPORATIONS ⊜567(1)—FAILURE TO ALLEGE IMPROVED STREET TO BE A PUBLIC STREET NOT GROUND FOR GENERAL DEMURRER.

In street assessment lien foreclosure action, complaint was not subject to general demurrer for failure to state that the street improved was a public street.

7. APPEAL AND ERROR ⊜193(5) — OBJECTION TO PLEADING MUST BE RAISED IN LOWER COURT.

In action to foreclose street assessment lien, failure of complaint to allege that the improved street was a public street is not ground for reversal, on appeal, in absence of affirmative showing that the point was raised in the court below.

8. MUNICIPAL CORPORATIONS ⊜567(2)—ALLEGATION AS TO JURISDICTIONAL REQUIREMENTS IN STREET ASSESSMENT LIEN FORECLOSURE ACTION SUFFICIENT.

In action to foreclose street assessment lien, allegation that the resolution of the trustees ordering the work was "duly made, passed and adopted" *held* a sufficient allegation of all jurisdictional requirements as to the steps required to be taken preliminary to such resolution.

9. MUNICIPAL CORPORATIONS ⊜519(2) — STREET ASSESSMENT LIEN VALID NOTWITHSTANDING FAILURE TO RECORD CONTRACT.

That a contract for street improvement work to be done under the Vrooman Act was not recorded as required by section 10 did not invalidate the assessment lien, recordation of the contract not being required until after lien has attached.

10. MUNICIPAL CORPORATIONS ⊜444 — ASSESSMENT FOR STREET IMPROVEMENT VALID NOTWITHSTANDING IRREGULARITY IN SPECIFICATIONS FOR WORK.

That specifications for street improvement work under Vrooman Act provided that the work was to be done to the satisfaction of the city trustees, while the statute required it to be done to the satisfaction of the superintendent of streets, did not affect the validity of assessment for the work done, where the contract itself required the work to be done to the satisfaction of the superintendent, and where the superintendent alone exercised control over such work and presumed to pass upon it.

11. MUNICIPAL CORPORATIONS ⊜365—LETTER OF ABUTTING OWNER ASKING FOR SAMPLES OF MATERIAL NOT A LETTER OF "REMONSTRANCE."

Where owner, during progress of street improvement work under Vrooman Act, wrote letter to city trustees asking permission to take samples, stating that he had been informed that the work was not being done according to specifications, the letter was not a "remonstrance" within section 3, entitling the owner who may feel aggrieved or who may have objections to the performance of the work to file a letter of "remonstrance" with the clerk.

12. MUNICIPAL CORPORATIONS ⊜444—VALIDITY OF STREET IMPROVEMENT ASSESSMENT NOT AFFECTED BY FAILURE TO EXACT VERIFIED DEMAND FOR CLAIMS FOR INCIDENTAL EXPENSES INCURRED.

Failure of street superintendent to insist upon verified demands against city for incidental expenses incurred by city and not the contractor incidental to street improvement work under Vrooman Act did not affect the validity of the assessment lien.

13. MUNICIPAL CORPORATIONS ⊜490—OWNER'S REMEDY ON IMPROPER INCLUSION OF CLAIMS IN ASSESSMENT BY APPEAL TO CITY TRUSTEES.

If claims for incidental expenses incurred by city and not contractor incidental to street

improvement work under Vrooman Act are improperly paid and included in the assessment, the remedy of the property owner is by appeal to the city trustees.

14. Costs ⟸260(4)—Costs will be assessed on appeal for purpose of delay.

Where there was no justification for the appeal of a single worthy point raised by appellant, and where it is plain that the appeal was taken when the merits of the case were clear, and the only result of continuing the litigation would be to harass and annoy the opposite party without any reasonable or proper hope of changing the judgment, $100 will be added to the costs of appeal because of appeal taken for delay.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the L. A. Paving Company against the Los Angeles Foundry Company. From judgment for plaintiff, defendant appeals. Affirmed.

Salisbury & North, Roy A. Linn, and Stuart M. Salisbury, all of Los Angeles, for appellant.

Wm. Brown and Crouch & Crouch, all of Los Angeles, for respondent.

OLNEY, J. This is an action to foreclose a street assessment lien on certain land of the defendant in the city of Vernon. The work was done under the Vrooman Act (Stats. of 1885, p. 147, and subsequent amendments, General Laws of Cal., Act 3930). The lower court found, in brief, that the work had been done and that all the proceedings were regular with the exception that an appeal by the defendant to the town trustees, duly taken after the issuance of the assessment warrant, had not been regularly passed upon and decided against the defendant. Upon these findings the court concluded that the action was prematurely brought, and judgment was entered denying a foreclosure upon this ground, but adjudging, nevertheless, that the plaintiff had a lien upon the land subject to such action as the town trustees might take upon the defendant's appeal to them. From this judgment the defendant appeals upon the judgment roll alone, and its chief contention is that, since the court found that the action was prematurely brought, the judgment should have been simply one of dismissal, and that the portion which adjudges that the plaintiff had a lien subject to the disposition of the defendant's appeal to the town trustees is erroneous.

The portion of the judgment complained of was inserted under section 12¼ of the act (Stats. 1913, p. 409), the material portion of which reads:

"It is hereby made the duty of any court of competent jurisdiction in rendering its judgment holding invalid any assessment or assessments hereafter made or issued, * * * to make a finding as to whether or not the issuing of such assessment was entirely without the power of the said city to issue, and if not, then what omission, irregularity, illegality, informality or noncompliance with the requirements of the statute of which this is amendatory has occurred in the proceedings upon which said assessment or assessments and bonds rest, and what effect shall be given to them in making the reassessment."

[1-3] So far as we can see, the judgment entered here corresponds to this statutory authority and requirement, and, in fact, it is not contended that it does not. It specifies the irregularity in the proceedings, namely, that the defendant's appeal to the town trustees had not been disposed of, and then it specifies the effect which should be given to the proceedings taken, namely, that they created a lien upon the defendant's property subject to the disposal of his appeal. That this was the true effect is plain from the statute. The appeal was taken after the work was completed and the warrant for the assessment had issued and been recorded along with the other requisite papers in the office of the superintendent of streets in accordance with section 9 of the act. With such recording the assessment became a lien according to the express language of the act. The lien was, of course, subject to the defendant's right to appeal to the town trustees within the thirty days prescribed by the statute, and if an appeal was taken, subject to its final disposition. This is exactly what is declared by the judgment.

[4] The objection which the defendant urges to this portion of the judgment is that, as soon as the court determined that the plaintiff could not recover, all other matters became moot. Under the provision of the statute quoted this is not true. The court was authorized to determine the effect of the proceedings had up to that time, and that determination is binding upon the parties and determined their material rights in an existing controversy. Ordinarily, where the plaintiff is refused a recovery, the court is not authorized to go further, but in this case such authority is specially and very wisely given.

[5] The defendant also objects that the complaint does not state a cause of action for several reasons. The first of these is that it is not alleged that Vernon is a municipality. One answer to this is that the court will take judicial notice that it is. City of Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

[6, 7] A second reason advanced is that the complaint fails to state that the street improved is a public street. Possibly this might be a ground for a special demurrer, but certainly it is not a ground for a general demurrer, and particularly cannot be relied upon for reversal on appeal without an affirmative

showing that the point was made in the court below.

[8] It is also claimed that the complaint is defective in not affirmatively showing the taking of a number of steps required to be taken preliminary to the resolution of the trustees ordering the doing of the work. But the taking of such steps, if material at all, was jurisdictional to the resolution ordering the work, and the complaint alleges that such resolution was "duly made, passed and adopted." This is a sufficient allegation of all jurisdictional requirements. Section 456, Code Civ. Proc.; Los Angeles v. Waldron, 65 Cal. 283, 3 Pac. 890; Pacific Paving Co. v. Bolton, 97 Cal. 8, 31 Pac. 625; Williams v. Bergin, 127 Cal. 578, 60 Pac. 164; Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445.

[9] The statute provides (section 10) that after the assessment has been made and become a lien, the warrant issued, payment demanded of the property owner and not made, and a return of nonpayment made to the superintendent of streets, "thereupon the superintendent of streets shall record the return so made in the margin of the record of the warrant and assessment, and also the original contract referred to therein, if it has not already been recorded at full length in a book to be kept for that purpose in his office, and shall sign the record." The lower court found that the contract in this case was not so recorded. Whether or not the failure in this respect would have precluded a foreclosure of the assessment we need not consider. It is perfectly evident that, so far as the judgment here appealed from is concerned, it is immaterial whether the contract was so recorded or not. The only portion of the judgment adverse to the appellant is the portion declaring the assessment to be a lien. But since by the statute the assessment became a lien prior to the time for the recording of the contract under the provision quoted, and there is no provision that such recording shall be a condition subsequent to the lien, the lien is wholly unaffected by the subsequent nonrecording. Perine v. Lewis, 128 Cal. 240, 60 Pac. 422, 772.

[10] The point is made that the specifications for the work provide that it is to be done to the satisfaction of the city trustees, while the statute requires that it be done to the satisfaction of the superintendent of streets, and that the contract contained a provision to that effect. Counsel, however, omit to state that the contract in this case, as distinct from the specifications, did contain the required provision, and that the court particularly found that no one other than the superintendent of streets ever exercised any control over or presumed to pass upon the work, and that the objectionable provision in the specifications, undoubtedly there through inadvertence, did not affect either the work or its cost; in other words, that the provision was a dead letter. No reason is suggested why, under such circumstances, when the work has been actually done under the superintendence and to the satisfaction of the superintendent of streets, as provided by the statute and found to be the fact here, the assessment should be held invalid, and we perceive none. The point would seem to come, if not within the letter, at least within the reason, of McCaleb v. Dreyfus, 156 Cal. 204, 103 Pac. 924.

[11] During the progress of the work the defendant wrote a letter to the city trustees saying that it had been informed that the work was not being done according to specifications, that it had sought to take samples for the purpose of making tests and had been refused by the contractor, and asking that it be allowed to take samples. The point is made that this letter is a "remonstrance" under the provisions of section 3 of the act, and that, not having been passed upon by the trustees at a hearing after due notice, the assessment is void. A sufficient answer is that the sole purport of the letter is a request that the defendant be permitted to take samples to ascertain if the work was being done properly. The trustees had the right to refuse such a request or not, exactly as they saw fit, and a letter asking for the privilege cannot possibly be taken as a "remonstrance." See, also, Girvin v. Simon, 127 Cal. 491, 59 Pac. 945.

[12, 13] The statute provides that the amount of certain expenses termed "incidental expenses" incurred by the city, not the contractor, such, for example, as the cost of advertising for bids, shall be paid to the superintendent of streets by the contractor, and then that the contractor be reimbursed therefor by their inclusion in the amount for which the assessment is made. The act also provides that all demands for incidental expenses, that is, demands not by the contractor, but by the person to whom the money is owing by the city, must be presented to the street superintendent by itemized bill, duly verified. Such expenses were included in the present assessment, but the superintendent of streets failed to exact verified demands for them, and this is urged as a reason for holding the assessment invalid. Plainly, however, the sole purpose of the statute is to require verification before the persons making the claims against the city are entitled to payment. With this the contractor has nothing whatever to do, and the failure of the street superintendent to insist upon a compliance with the verification cannot affect the assessment. If such claims are improperly paid and included in the assessment, the remedy of the property owner is by appeal to the city trustees. Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. 1143.

[14] There are a number of other points made by appellant. The following is typical: The statute provides that, if there is no newspaper published in the city, notice inviting bids may be given by posting only. Notice in the present case was given by posting only,

and to support this the complaint alleges, "That during all the times herein alleged, there was no newspaper published within the city of Vernon." The objection is made that this allegation is insufficient because, "although there may have been no newspaper published 'during all the times alleged,' there may have been a newspaper published during all the times except the first day mentioned." This would be somewhat extreme, even when urged in the trial court in support of a special demurrer on the ground of uncertainty or ambiguity; but, as a ground for reversal on appeal of a judgment rendered after trial where no special demurrer on this ground was interposed, it is simply preposterous. We can see no excuse whatever for taking up the time and attention of the court with such frivolous contentions, or, for that matter, with any of the contentions made on this appeal. Even if there were one or more questions involved of an uncertain or unsettled character so that an appeal were justified, yet court, counsel, litigants, and the public should be protected against the waste of time and labor and the delay in the performance of their functions by the courts caused by involving and incumbering even an appeal justifiable upon some points with a multitude of other frivolous and unworthy points. In the present case there is not even the justification of a single worthy point. The point which nearest approaches that character is the one first considered, the objection to the judgment going further than merely dismissing the action and affirmatively finding a lien upon the defendant's property subject to the disposal of its appeal to the city trustees. But in view of the express statutory mandate that such a judgment be made, we can see no excuse for an appeal on this point. We think it plain that the appeal was born of a desire to litigate, when the merits of the case were clear, and the only result of continuing the litigation, would be to harass and annoy the opposite party without any reasonable or proper hope of changing the judgment given by the trial court.

Judgment affirmed, and let there be added to the costs of appeal assessed against the appellant the sum of $100 as damages because of an appeal taken for delay.

We concur: SHAW, J.; LAWLOR, J.

181 Cal. 680

LOS ANGELES INV. CO. v. GARY et ux.

(L. A. 5221.)

(Supreme Court of California. Dec. 11, 1919. On Motion for Rehearing, Jan. 10, 1920.)

1. DEEDS ⟸155—PROVISION IN DEED CONDITION SUBSEQUENT.

Provision of deed that property shall not be sold, leased, or rented to person other than of Caucasian race, and that no person other than of the Caucasian race shall be permitted to occupy property, with express provision for reversion and re-entry, constitutes a condition subsequent.

2. DEEDS ⟸149—CONDITIONS SUBSEQUENT IN RESTRAINT OF ALIENATION TO OTHER THAN CAUCASIANS INVALID.

A condition subsequent in a deed that the property be not sold, leased, or rented to one not of Caucasian birth, which deed purported to convey the fee, is in restraint of alienation and repugnant to the interest created and void under Civ. Code, § 711, providing that conditions restraining alienation, when repugnant to the interest created, are void.

3. DEEDS ⟸149 — PARTIAL RESTRAINT OF ALIENATION FOR A TERM OF YEARS INVALID.

The invalidity, under Civ. Code, § 711, of a condition that the property conveyed be not sold, leased, or rented to one not of Caucasian race until after January 1, 1930, is not affected by the fact that the restraint on alienation is but partial, being limited both to persons of a particular class and to a comparatively brief period.

4. DEEDS ⟸150 — CONDITION SUBSEQUENT THAT PROPERTY BE NOT OCCUPIED BY PERSONS NOT OF CAUCASIAN RACE VALID.

A condition subsequent in a deed that the property should not be occupied by a person not of Caucasian birth, being not a restraint upon alienation but upon the use of the property, is valid.

5. CONSTITUTIONAL LAW ⟸215—CONDITION SUBSEQUENT THAT PROPERTY IS NOT TO BE OCCUPIED BY OTHER THAN CAUCASIANS NOT UNLAWFUL.

A condition subsequent in a deed that the property is not to be occupied by a person not of Caucasian birth is not an unlawful discrimination within Const. U. S. Amend. 14; such amendment having no reference to action by individuals.

Angellotti, C. J., and Lennon, J., dissenting.

Department 1.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Suit by the Los Angeles Investment Company against Alfred Gary and wife to forfeit title to certain property. From a judgment for defendants, plaintiff appeals. Reversed.

Flint & Jutten, H. S. Mackay, Jr., E. R. Brainerd, Jr., J. H. Schenck, Wm. R. Flint, and Arthur Crum, all of Los Angeles, amicus curiæ, for appellant.

Le Roy D. Barnett, of Los Angeles, for respondents.

OLNEY, J. This is an appeal from a judgment entered upon the plaintiff's failure to amend its complaint after the lower court had sustained a general demurrer thereto interposed by the defendants, and

the sole question is as to the sufficiency of the complaint. We have not been favored by either brief or argument on behalf of the respondents, but the correct conclusion in the case seems fairly certain nevertheless.

The complaint seeks in effect to declare a forfeiture of the title to a certain lot in the city of Los Angeles because of the breach of conditions subsequent subject to which the defendant Alfred Gary held the title. It appears from the complaint that the lot in question is one of 167 which the plaintiff originally owned in a certain tract and some of which it still retains; that the plaintiff conveyed the lot by way of sale to one Renaker by a deed providing that prior to January 1, 1930, it should not be sold, leased, or rented to or occupied by one not of the Caucasian race; that by mesne conveyances the lot passed to the defendant Alfred Gary and is occupied by him and his wife; and, finally, that both Gary and his wife are colored and of African descent.

The provision in the deed by the plaintiff under which the forfeiture is claimed is as follows:

"It is hereby covenanted and agreed by and between the parties hereto and it is a part of the consideration of this indenture, * * * that the said property shall not be sold, leased, or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots; provided further, that a breach of any of the foregoing conditions shall cause said premises to revert to the said grantors, their successors, devisees, or assigns, each of whom respectively shall have the right of immediate re-entry upon said premises in the event of any such breach; provided further, that all and each of the above restrictions, conditions, and covenants herein contained shall terminate and end and be of no further effect, whether legal or equitable, and shall not be enforceable on and after January 1, A. D. 1930."

[1] There can be no question but that the foregoing provision amounts to a condition, or rather to conditions, subsequent. The express language of reversion and re-entry in case of a breach leaves no room for argument upon this point. It will be noted also that there are two conditions; one that the property shall not be sold, leased, or rented to one not of Caucasian race, and the other that it shall be not occupied by one not of that race. Inasmuch as a breach of both of these conditions clearly appears from the complaint, the real questions presented by the demurrer, and therefore by this appeal, are as to the validity of such conditions.

[2] The condition that the property be not sold, leased, or rented to one not of Caucasian birth is clearly a restraint on alienation. The deed likewise purports to convey the fee, and an incident of an estate in fee is the right of free disposal or transfer. The condition is therefore repugnant to the interest created by the deed except for the condition, and falls within a literal reading of section 711, Civil Code, whose language is:

"Conditions restraining alienation, when repugnant to the interest created, are void."

[3] Appellant's counsel, nevertheless, contend that inasmuch as the restraint is but partial being limited both to persons of a particular class and to a comparatively brief period, that is, prior to January 1, 1930, the condition is good. Many authorities outside of this state do make a distinction between partial and general restraints upon alienation, holding the former in some instances valid, but the Code section would seem to leave no room for such distinction in this state, and since the filing of appellant's brief in this case it was so decided by the District Court of Appeal in a scholarly opinion by Judge Finlayson. See Title Guarantee & Trust Co. v. Garrott, 183 Pac. 470. The decision in that case was presented to us for consideration by a petition for rehearing, and the petition was denied because of our conclusion that the decision was correct, a conclusion from which we see no reason for departing. The demurrer was therefore properly sustained as to the alleged cause of action based on the fact that the lot in question had been sold to the defendant Gary.

[4] The condition, however, that the property should not be occupied by a person not of Caucasian birth is in a different category. It is not a restraint upon the alienation, but upon the use of the property. There is no prohibition by statute of such restraints imposed by way of condition nor was there any at common law. 18 Corpus Juris, 361; Cowell v. Colorado Springs, 100 U. S. 55, 25 L. Ed. 547. The instances in which conditions restricting the use of property conveyed have been enforced are exceedingly numerous and the conditions enforced of almost every conceivable variety. Conditions so extreme as to restrain the use to a single specified purpose are not uncommon, and so far as we are aware have been uniformly enforced, except in certain special cases where for particular reasons not existing here and not affecting the generally enforceable character of such conditions the particular condition was held invalid. As an instance of the enforcement of a condition of this extreme character see Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10. In connection with this discussion it may be well to add that what we have said applies only to restraints on use imposed by way of condition and not to those sought to be imposed by covenant merely. The distinction between conditions and covenants is a decided one and the principles applicable quite different.

[5] The particular condition in this case being one against the occupation of the property by persons not of the Caucasian race,

the question suggests itself as to whether it is an unlawful discrimination against certain classes of citizens and therefore within the prohibition of the federal Constitution. This question, however, is settled conclusively against the defendants by repeated decisions of the United States Supreme Court. The provision of the federal Constitution material is the Fourteenth Amendment. It provides:

"No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Construing this amendment, the Supreme Court of the United States has held in a number of instances that the inhibition applies exclusively to action by the state, and has no reference to action by individuals, such as is involved here United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588; Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; United States v. Harris, 106 U. S. 629, 1 Sup. Ct. 601, 27 L. Ed. 290; Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835. See, also, United States v. Washington (C. C.) 20 Fed. 630; Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 South. 641, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248; People v. Forrest Home Cemetery, 258 Ill. 36, 101 N. E. 219, L. R. A. 1917B, 946, Ann. Cas. 1914B, 277; Chilton v. St. Louis, etc., R. R. Co., 114 Mo. 88, 21 S. W. 457, 19 L. R. A. 269; West Chester v. Miles, 55 Pa. 209, 93 Am. Dec. 744.

Our conclusion is that the condition against the occupation of the property by any one not of the Caucasian race is valid, and that since a breach of this condition is alleged the complaint states a cause of action.

Judgment reversed.

We concur: SHAW, J.; LAWLOR, J.

On Motion for Rehearing.

PER CURIAM. Rehearing denied.

ANGELLOTTI, C. J. (dissenting). I dissent from the order denying a rehearing. To my mind the department opinion violates the well-settled general rule that conditions involving a forfeiture must be strictly construed against the grantor and in favor of the holder of the estate. It seems to me that the portion of the condition which is upheld, viz. "Nor shall any person or persons other than of the Caucasian race be permitted to occupy said lot or lots," was not intended by the parties as in any way applicable to occupation by the owner himself. It was apparently designed to prevent the occupancy by others than the owner under his (the owner's) permission or license. Taken in connection with the preceding part of the sentence, from which it is separated by a comma, my opinion is that it can fairly be given no other construction. The preceding part, viz. "That the said property shall not be sold, leased or rented to any persons other than of the Caucasian race," was designed by the parties to prevent the property coming into the ownership or control of any person not of the Caucasian race, leaving, in the contemplation of the parties, as the only matter calling for protection in the matter of occupancy, the prohibition of occupancy by third persons not of the Caucasian race under permission or license of the owner. The language used would be apt language to show this intent as to this part of the provision. Fairly construed it simply said that the owner agreed that he would not permit any person other than one of the Caucasian race to become an occupant of the property, and it is an undue strain of the word "permit," in view of the rule of strict construction, to hold that the owner's own personal occupancy is a violation of the provision. The fact that the first portion of the provision is now held void as an undue restraint on alienation in no way affects the construction to be given to the second portion, for obviously the whole must be considered together in order to arrive at a conclusion as to the meaning intended by the parties to be given to the second portion. I think that by the decision we are attributing to the second portion a meaning neither intended nor expressed by the parties when the deed was executed. In any event, the question of proper construction is so doubtful that the matter should be resolved against the grantor and in favor of the holder of the estate.

I concur: LENNON, J.

(181 Cal. 372)

STANIFORD v. TROMBLY et al.
(S. F. 8789.)

(Supreme Court of California. Oct. 8, 1919. Application for Modification Denied Nov. 6, 1919.)

1. JUDGMENT ⊂⊃255—JUDGMENT ARBITRARILY SELECTING BOUNDARIES.

In suit to quiet title between parties in dispute over the boundary between their lands, judgment for defendants arbitrarily selecting boundaries not contended for or attempted to be shown by either party, and giving defendant about one-half the disputed area, cannot stand.

2. BOUNDARIES ⊂⊃48(2)—ACQUIESCENCE IN FENCE AND OCCUPANCY NOT AMOUNTING TO AGREEMENT THAT FENCE WAS ON TRUE BOUNDARY LINE.

The mere acquiescence by a landowner in the existence of a fence and the occupancy by an adjoining landowner of land on his side of it did not amount to an agreement that the fence was on an accepted boundary line.

3. ADVERSE POSSESSION ⊂⊃90 — NECESSITY THAT TAXES PAID BE ASSESSED AGAINST PROPERTY CLAIMED.

Where plaintiff in suit to quiet title and his predecessors in interest paid taxes on 565 acres, which must have included the land in dispute, while defendants and their predecessors paid taxes on property comprising only 200 acres, the amount of land called for in their deeds, defendants do not hold title by adverse possession to the land in dispute claimed by them on account of the location of a fence.

4. ADVERSE POSSESSION ⊂⊃27, 95—LACK OF SUPPORT OF FINDING BY FACTS.

In suit to quiet title to land in dispute on account of the location of a fence, the finding of title in defendants by adverse possession *held* unsupported by facts bringing their occupancy within the purview of Code Civ. Proc. § 325; there being no evidence of substantial inclosure of the disputed tract, or the payment of taxes.

5. BOUNDARIES ⊂⊃47(1)—OWNER NOT ESTOPPED TO DENY THAT FENCE WAS ON TRUE LINE.

In absence of fraud, actual or constructive, one of two adjoining owners mutually ignorant of the true boundary line was not estopped to assert fence, not built on an agreed line, was not the true line by mere failure to dispute the use of the land.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by F. C. Staniford, trustee, against William T. Trombly and others. From an adverse judgment, plaintiff appeals. Reversed.

Hugh K. McKevitt, of San Francisco (Royal E. Handlos and W. H. Hyatt, both of San Francisco, of counsel), for appellant.

Robert R. Syer and C. L. Witten, both of San Jose (H. D. Tuttle, of San Jose, of counsel), for respondent.

MELVIN, J. Appeal by plaintiff from a judgment against him in a suit to quiet title to certain land in Santa Clara county.

It is conceded that plaintiff has record title to 565 acres and defendant to 200 acres, and that the two tracts adjoin at the south of the land of defendants and the north of that of plaintiff. Defendants claim about 165 acres more than their record title by reason of a boundary fence and an alleged agreement between the parties that said fence should be the true line separating the parcels of land. Defendants also pleaded prescription and estoppel. The whole controversy arises over the boundary line between the two parcels of land. D. C. Riddell and Speer Riddell were the predecessors in interest of plaintiff in the ownership of the land lying south of the tract in dispute, and Peter Trombly was the predecessor in interest of defendants in the ownership of the acreage to the north of the property in dispute.

In the year 1876, 1877 or 1878, as the court found, because the stock owned by one or the other of the possessors of these neighboring properties would wander over the land of the other, causing trouble or annoyance to the owner of the land and the owner of the cattle, D. C. Riddell and Peter Trombly agreed to build a fence to prevent the straying of the stock. Riddell was to build half and Trombly half of the fence. In accordance with this arrangement the fence was built. The court found that "said fence was not built upon an agreed boundary line between the Riddell tract and the Trombly tract to settle any dispute, uncertainty, or controversy arising over or out of the true location of the dividing line between the said two tracts of land." The fence in question extends from a point at the southeast corner of the land described in the original deed to Trombly, but, instead of following the true boundary between the two tracts, as they then existed, ran far to the southwest thereof. It did not extend all the way across the property of Riddell, but to a natural barrier, namely, a creek. Beyond the fence the conformation of the land and the thick growth of underbrush were sufficient to turn cattle. In their answer defendants asserted that the agreed boundary line followed the fence throughout its entire length, and was extended in the same direction to the southwesterly line of plaintiff's property. If this claim had been sustained, it would have resulted in giving to defendants a triangular strip of land south of the true line between the original holdings of the predecessors in interest of these litigants and extending some distance to the southwest of the original Trombly rancho because the land of plaintiff subtended by the supposed agreed boundary extends farther west than does that of defendants.

Notwithstanding the finding that the fence

was not built upon a line agreed upon as a boundary at the time of its construction, but that it was intended to turn cattle, the court also found that the true boundary line was uncertain when the fence was built; that after its construction for a period of 30 years neither Riddell nor any of his successors made any protest against "the fence existing where it was thus built"; that Trombly and his successors had, during all of that period, occupied and cultivated part of the land immediately north of the fence; that their possession was open and well known to plaintiff; that no objection of any sort was made; and that "by reason of such nonobjection of said Riddell and his successors in interest the said Riddell and those claiming under him acquiesced in said fence as being the boundary line between the properties owned respectively by the said Peter Trombly on the one side and the said DeWitt C. Riddell on the other side." It was found also that since 1867 plaintiff's predecessors and plaintiff had paid taxes on land described as "bounded on the north" by the lands of defendants or their predecessors (naming them). Conversely the assessments paid by defendants and their predecessors were on land "bounded on the south" by the property of Riddell or one of his successors, designated by name. But in every assessment the Trombly land was described as containing 200 acres and the Riddell property as having an area of 565 acres.

In its judgment the superior court did not accede to all of the demands of defendants. It was found that the defendants were entitled to about one-half of the disputed area, and this result was reached by treating the fence as an agreed boundary for its full length and then arbitrarily selecting boundaries extending from the fence to the true original line between the properties and following said line to the northeasterly end of the fence at the southeast corner of the land of defendants. The description of the parcel to which defendants were found to be entitled follows the fence to its southwesterly end at "the center of a creek," and "running thence down the center line of said creek in a northerly direction to Murphy canon and creek; running thence along the center of Murphy canon and creek in a westerly direction to where Murphy canon and creek crosses the north line of the Riddell ranch; and running thence N. 76° 37′ E. to the place of beginning."

[1, 2] The judgment must be reversed, if for no other reason, because of these arbitrarily selected boundaries. But there is another and stronger reason for reversal. The finding that the fence was not built to establish the line between the properties is supported by the evidence. The mere acquiescence in the existence of the fence and the occupancy of the land to the north of it would not amount to an agreement that it was on an accepted boundary line. And the large area of the irregular parcel subtended by the fence and the creek to which it extended would go far to indicate that the builders of the fence were fixing a line "for occupancy, and not for title." This case greatly resembles in its facts (except those pertaining to estoppel) Grant's Pass Land & Water Co. v. Brown, 168 Cal. 456, 143 Pac. 754. In that case, as in this, it was shown that a fence had been built to turn cattle; that thereafter one of the builders of the fence occupied the land set off by the fence from his neighbor's property; and that no agreement had been made as to the other parts of the boundaries. Mr. Justice Shaw, who wrote the opinion of the court, used the following language:

"It may be doubted whether in any case so large and irregular a parcel as that shown on the map, departing so far from the true line, could be acquired by an adjoining owner, under the law as to agreed boundaries placed or made with intent to mark or fix the true line. The map itself seems almost conclusive to the effect that they were not fixing a true line, but only placing a boundary for occupancy, and not for title. But we need not decide the question. The doctrine applies only to lines so far as marked or fixed by the agreement. The actual location is the thing to which the parties must agree. Where such agreement extends to a part only of the line, it cannot be extended by construction or implication, so as to embrace a part of the bounds which were not considered or included in the agreement and as to which there was no agreement. The part of the line which was fixed does not inclose the parcel now claimed, but only runs along a part of one side thereof. This defense, therefore, must fail, and that based upon adverse possession also fails because of the failure to show payment of taxes by the defendant on the land within the real bounds of the Providencia Rancho."

[3] The last sentence quoted applies to this case because defendants and their predecessors paid taxes on property comprising but 200 acres (the amount of land called for in their deeds), and appellant and his predecessors in interest paid taxes on 565 acres, which must have included the land here in dispute. The defendants therefore do not hold title by adverse possession.

The respondents seem to rely principally upon the doctrine of estoppel as applying to the appellant. They assert that plaintiff is estopped to deny their title to the land awarded to them by the judgment because the court found (the finding being No. 10) that immediately after the building of the fence Trombly began using the land in the awarded area for raising grain and pasturing stock; that he and his successors since that time have been in the open, notorious, exclusive possession of that space; that Trombly divided this land into fields by cross fences; that he planted and replanted a vineyard; that he and his successors occupied a dwelling on the

disputed strip; that an orchard was planted on this part of the property; that Riddell and his successors had full knowledge of the foregoing facts, and at no time did they assert ownership in the disputed tract until this suit was instituted. We are compelled to construe this finding in connection with others which are, in substance, that it is not true that on January 19, 1894, De Witt C. Riddell was seized in fee of that part of the disputed area which the court awarded to defendants, and that he did not convey that particular parcel by his deed of said date. To sustain these findings there must be evidence that the estoppel had become effective prior to the date of the deed. The court also found that upon the trial of the action it was conceded by the parties thereto that from March 12, 1864, to November 9, 1881, Speer Riddell and De Witt C. Riddell each had record title to a half interest in the Riddell ranch, including the property in dispute; that from November, 1881, the title was in Speer Riddell until his death in 1886; that the decree distributing this property as part of his estate to De Witt C. Riddell was made on September 13, 1887; and that the record title was in De Witt C. Riddell until he and his wife made a deed to Frank C. Staniford, as trustee, on January 19, 1894. Appellant insists, therefore, and we think correctly, that whatever estoppel may be claimed in favor of respondents must be shown to have been created against both the Riddells, if occurring prior to November, 1881; against Speer Riddell alone if occurring between November, 1881, and September, 1887; and against De Witt C. Riddell alone only after the last-named date, which was the date the ranch was distributed to him as devisee under the will of his kinsman.

Some of the supposed elements of estoppel are not supported by the evidence. Trombly did not (as finding No. 10 specifies that he did) begin using the disputed area after the building of the fence. The Trombly residence on that territory had been occupied since 1873, and the fact that the fence was built, as found by the court, to restrain cattle, would indicate that the space north of it was already in use as pasture for Trombly's cattle.

There is no evidence that hay was raised on the triangular strip of land prior to 1894, or that Peter Trombly cultivated grain thereon. One witness testified that his father as a renter put in grain on the Riddell place, south of the fence. Our attention has been called to no other testimony regarding the planting of grain.

[4] The finding of adverse possession is not supported by facts bringing the occupancy within the purview of section 325, Code of Civil Procedure. There is no evidence of substantial inclosure of the disputed tract or the payment of taxes. Such occupancy as was shown would not support the finding of an adverse possession, and, upon the same principle, would not suffice to estop plaintiff from claiming possession under his deed.

There is evidence that there were cross fences on the place when Trombly went there, but no showing that he built any or that any such fences were built prior to 1894.

The evidence with reference to the vineyard indicates that it was planted after 1894.

No testimony has been called to our attention which would justify the finding that an orchard had been planted on any part of the disputed territory.

Appellant concedes the long occupancy of the house by the Trombly family, the demolition and reconstruction of the barn found there when they first went on the land, and that the Riddells had full knowledge of all that their neighbors (who were their intimate friends) were doing.

Regarding that part of finding No. 10 that Riddell did not at any time after the fence was built assert ownership of the land to the north thereof, appellant insists that the record fails to show any denial of his ownership prior to 1894, and that therefore he was not called upon to make any such assertion.

[5] In view of the finding that the fence along the south line of the disputed territory was not built upon an agreed boundary line, the estoppel, if any exists, must have been created by declarations or conduct, and not by contract. True, there was testimony to the effect that at the time of the construction of the fence the builders declared it to be a boundary fence, but evidently the court did not accept that version of the reason for its construction. The real question therefore is whether or not the mere failure to dispute the right of the Tromblys to the use of the property north of the fence amounted to conduct which prior to 1894 estopped the plaintiff's predecessor or predecessors in interest from claiming title to it. That the Riddells and the Tromblys were both ignorant of the true line between their properties is very apparent, but there is nothing in this record disclosing any false representation or concealment of material facts by plaintiff which misled his neighbors on the north to their disadvantage. The location of the residence was an established fact. The use of some of the land for grazing purposes was also an established fact. The ascertainment of the true line was equally within the power of the owners of both tracts, but their mutual or common ignorance continued for years. There was an absence of the essential elements of estoppel, namely, false statements or concealments, or conduct amounting to false statements or concealments, with reference to the boundary made by one having knowledge, actual or virtual, of the facts, to one ignorant of the truth with the intention, resulting in consummation, that he should act upon such false statements or concealments or equivalent conduct. Bigelow on Estoppel (Edition of 1913) 603 et

seq.; Boggs v. Merced Mining Co., 14 Cal. 279–367; Stanley v. Green, 12 Cal. 148; Grant's Pass Land & Water Co. v. Brown, supra. The decision of the superior court is not supportable, therefore, upon the ground of estoppel.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; OLNEY, J.; LAWLOR, J.

44 Cal. App. 587

WEAVERING v. SCHNEIDER. (Civ. 3079.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1919.)

1. APPEAL AND ERROR ⊂781(6) — APPEAL FROM ORDER APPOINTING RECEIVER DISMISSED WHERE SALE OF ALL PROPERTY WAS AGREED TO.

An appeal from an order appointing a receiver will be dismissed, where, on calling of the case in the appellate court, there is presented a certified copy of a stipulation of the parties filed in the superior court from which it appears that appellant and respondent have agreed to an immediate sale by the receiver of all of the property in his hands, and for a disposal of the proceeds of the sale and of all other property belonging to the copartnership, existing between the parties to the action.

2. APPEAL AND ERROR ⊂781(1)—IN ABSENCE OF CONTROVERSY APPEAL NOT CONSIDERED TO DETERMINE COSTS.

Where an appeal no longer involves the determination of adversary rights, the questions presented will not be considered, even for the purpose of deciding who should pay the costs on appeal.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frederick Weavering against Fred Schneider. From an order appointing a receiver, the defendant appeals. Appeal dismissed.

W. H. Barrows, of San Francisco, for appellant.

A. M. More, of San Francisco (E. B. Mering and M. J. Gillespie, both of San Francisco, of counsel), for respondent.

WOOD, Judge pro tem. [1] This is an appeal from an order appointing a receiver. Upon the calling of the case in this court there was presented a certified copy of a stipulation of the parties filed in the superior court. It appears from an examination of this stipulation that the appellant and respondent have agreed to an immediate sale by the receiver of all the property in his hands, and for a disposal of the proceeds of the sale and of all other property belonging to the copartnership existing between the parties to the action. It follows that there is now no actual controversy between the parties.

[2] It was held in Nelson v. Nelson, 153 Cal. 204, 94 Pac. 880, that where an appeal no longer involves the determination of adversary rights, the questions presented would not be considered, even for the purpose of deciding who should pay costs on appeal.

The appeal is dismissed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 487

VAILE v. WALKER CONST. CO. (Civ. 2390.)

(District Court of Appeal, Second District, Division 1, California. Dec. 1, 1919.)

MASTER AND SERVANT ⊂73(2)—RIGHT OF EMPLOYÉ TO COMPENSATION DURING VACATION.

Where vacations taken by an employé were in accordance with the prevailing custom in the employment, and the employer in each case assented, and, except as to the last year, paid the employé full salary, thus recognizing his right to take vacations without deduction, the employé was entitled to compensation for time on vacation.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Robert B. Vaile against the Walker Construction Company. Judgment for plaintiff, and defendant appeals. Reversed.

George H. Banta, of El Centro, for appellant.

J. W. Glassford, of El Centro, for respondent.

SHAW, J. The complaint herein contains two counts. The first states a cause of action for disbursement of money made by plaintiff for and on behalf of defendant at its special instance and request. In the second count plaintiff sues for a balance alleged to be due him from defendant under the terms of a written contract of employment at a salary of $125 per month. The court, in effect, found that the sum of $100 was due to plaintiff upon the first count and $574.58 due upon the second count, making a total of $674.58, upon which defendant was entitled to a credit of $350, as the value of a lot, title to which defendant caused to be conveyed to plaintiff, upon which finding the court gave judgment against defendant for $324.58, from which it appeals. The finding as to the amount due upon the first count is not questioned by appellant.

The term of employment, as alleged in the

complaint, was from August 1, 1913, to September 1, 1916, making 37 months, which, at the salary specified in the contract of $125 per month, amounts to $4,625, notwithstanding which fact the court found the total sum earned during the 37 months to have been $4,775, upon which it found that $4,200.42 had been paid. Deducting this latter sum from the amount of $4,625, which was the actual sum earned, leaves a balance of $424.58, instead of $574.58, as found by the trial court.

Appellant's contention that plaintiff was not entitled to compensation for periods of time in each year covered by his service during which he was on vacation is without merit. The evidence shows that the vacations taken by him were not only in accordance with the prevailing custom in the employment in which plaintiff was engaged, but that defendant, as such employer, in each case assented thereto, and, except as to the last year, paid his full salary, thus recognizing his right to take a vacation without any deduction from his salary.

Upon the proofs made it clearly appears that plaintiff is entitled to recover for the amount erroneously found due by the court, less $150, and, since the contract provides that he should have 30 days' notice by defendant of the termination of the employment, perhaps also for an additional month's salary. But upon the allegations of the complaint and findings made we are unable to order a modification of the judgment so as to afford him the relief to which otherwise he is entitled.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

(44 Cal. App. 489)

MANN v. DETTLING et al. (Civ. 3048.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1919.)

APPEAL AND ERROR ⇐1008(1)—FINDINGS OF COURT ON CONFLICTING TESTIMONY CONCLUSIVE.

Findings of the trial court sitting without a jury are conclusive on appeal.

Appeal from Superior Court, City and County of San Francisco; D. C. Deasy, Judge.

Action by G. P. Mann against Michael Dettling, etc., and others. Findings and judgment for plaintiff, and defendants appeal. Affirmed.

J. L. Morris, of San Francisco, for appellants.

Augustin C. Keane, of San Francisco, for respondent.

WASTE, P. J. This is an action for damages to an automobile belonging to the plaintiff, and for personal injuries suffered by him, alleged to have been caused by a collision between plaintiff's automobile and a milk wagon belonging to Michael Dettling and driven by his employé, Fred Seiler. The cause was tried before the court sitting without a jury. The findings and judgment were in favor of the plaintiff in the sum of $500, and defendant appeals.

Plaintiff was driving his automobile at a speed of about 20 miles an hour along the rails of the southeasterly car track on Howard street, near Twelfth street, in the city of San Francisco. Just ahead of him and proceeding at a speed of about 12 to 15 miles an hour, the defendant, Fred Seiler, was driving a motortruck along the portion of the street lying between the car track and the southeasterly curb of the street. There was ample room for plaintiff and defendant, thus driving along the right half of the roadway, to continue in the same direction, or, while so driving, for plaintiff's automobile to overtake the truck driven by the defendant and to pass along the left-hand side thereof. This last plaintiff attempted to do, when the defendant Seiler, without sounding any warning or gong, or giving any alarm or warning by word of mouth, or raising his hand, or otherwise giving any signal of his intention or purpose, and without looking to see whether there was sufficient space therefor, turned the motortruck he was driving abruptly to the left and collided with plaintiff's automobile, throwing it across the street and against a pole on the northwesterly curb, wrecking and demolishing the machine and injuring plaintiff.

There is a conflict in the testimony as to the rate of speed at which the two machines were progressing, and as to whether or not defendant Seiler turned the motortruck in front of the plaintiff. Appellants contend that plaintiff was proceeding at an unlawful rate of speed and attempted to pass the motortruck driven by Seiler without giving any warning of his approach, as required by the ordinance of the city of San Francisco, and in fact collided with the motortruck, which was proceeding straight ahead. The court, however, found the facts, as we have stated them to be true. There is no merit in the appeal.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

44 Cal. App. 365

STONE v. HANCOCK et al. (Civ. 3108.)

(District Court of Appeal, First District, Division 1, California. Nov. 19, 1919.)

1. MORTGAGES ⊂⊃415(1) — ELECTION TO RESCIND OR DEFEND FOR FRAUD OR WANT OF CONSIDERATION.

Mortgagors affected by fraud or failure of consideration were not required to rescind the transactions out of which the note and mortgage arose, but had an election to do so, or to defend the action of the corporate mortgagee or its assignee to enforce the obligation on the ground of fraud or the want or failure of consideration.

2. APPEAL AND ERROR ⊂⊃907(3)—PRESUMPTION IN FAVOR OF TRIAL COURT IN ABSENCE OF EVIDENCE.

In case of an appeal on the judgment roll, the appellate court is bound to conclude, in the absence of the evidence in the case, that the findings of the trial court are fully sustained.

3. MORTGAGES ⊂⊃256 — TRANSFERRED SUBJECT TO DEFENSES.

A note and mortgage, which were nonnegotiable, were taken by the transferee subject to all outstanding equities and defenses, as fraud and want of consideration on the part of the mortgagee, in favor of the mortgagors.

4. APPEAL AND ERROR ⊂⊃187(3)—POINT OF DEFECT IN PARTIES NOT RAISED BELOW NOT AVAILABLE.

The transferee of a note and mortgage securing it, suing the mortgagors for foreclosure, who did not object during trial that the original mortgagee was not made a party, cannot raise the point on appeal.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by L. G. Stone against Arrialus Hancock and others. From a judgment for defendants Hancock, plaintiff appeals. Affirmed.

John E. Daly and James H. Daly, both of Long Beach, for appellant.

Warner & Jones, of San Bernardino, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants Arrialus Hancock and Mary Hancock, his wife, in an action brought by the plaintiff herein as the assignee of a certain mortgage made and executed by the said defendants Hancock to a certain corporation known as the Garden Colonies, Incorporated, and by it transferred to said plaintiff. The answer of said defendants set forth in detail the history of the transaction between themselves and said corporation, resulting in the making and execution of said mortgage and in the alleged failure of consideration therefor. The court found in favor of the said defendants Hancock upon the issues tendered by their said answer; but the court further found that at the time said mortgage was made the premises covered thereby were subject to a prior mortgage given to secure the sum of $432.15, which mortgage the Garden Colonies, Incorporated, had caused to be released by the payment of said sum secured thereby, and the court thereupon found that an equity existed in favor of the plaintiff in this action as the transferee of the rights of the Garden Colonies, Incorporated, in the premises, requiring the repayment to said plaintiff of the sum thus expended by its assignor, and accordingly rendered judgment in the plaintiff's favor for said sum, but for no other or further sum. The plaintiff appeals from said judgment upon the judgment roll alone.

[1-3] The first point made by him upon such appeal is that the defendants were not entitled to the relief granted them, for the reason that they had taken no steps to rescind the transaction between themselves and the said corporation. The defendants, however, were not required to rescind the transaction out of which said note and mortgage arose, since they had their election under the law either to take affirmative action in the way of rescinding the transaction between themselves and said corporation, or of not taking such action, but of defending against the action of said corporation or its assignee to enforce their obligation upon the ground of fraud or of the want or failure of consideration. This appeal being upon the judgment roll we are bound to conclude, in the absence of the evidence in the case, that the findings of the court were fully sustained by such evidence. The contention of the appellant that the plaintiff, as the assignee of said corporation, took said mortgage without knowledge of the alleged fraudulent acts of its assignor and without knowledge of the want or failure of consideration, and therefore took and held the same free from the equities asserted by the defendants herein, is entirely without merit, since the note and mortgage were nonnegotiable, and hence were taken by the transferee thereof subject to all of the outstanding equities and defenses in favor of the mortgagors. Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Briggs v. Crawford, 162 Cal. 124, 121 Pac. 381; National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881; Taylor v. Jones, 165 Cal. 111, 131 Pac. 114.

[4] The appellant's next contention is that the original mortgagee was not made a party to this action, but aside from the fact that the record discloses that the Garden Colonies, Incorporated, had ceased to exist prior to the institution of this action, and hence could no longer perform any of the terms of its contract with said defendants, it appears that no objection was urged by the plaintiff during

the trial upon the ground of defect of parties; hence the point is not available upon appeal.

We find no merit in this appeal. Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 390

WARD v. ANDREWS. (Civ. 2429.)

(District Court of Appeal, Second District, Division 1, California. Nov. 21, 1919. Hearing Denied by Supreme Court Jan. 19, 1920.)

1. APPEAL AND ERROR ⟸1011(1)—FINDINGS ON CONFLICTING EVIDENCE NOT DISTURBED.

The appellant court will not disturb a finding of the trial judge based upon conflicting evidence.

2. PRINCIPAL AND AGENT ⟸48—GRATUITOUS AGENT TO USE GOOD FAITH.

A gratuitous agent is bound to use the same degree of good faith toward his principal as an agent for compensation.

3. PRINCIPAL AND AGENT ⟸69(2)—AGENT CANNOT MAKE PROFIT FOR HIMSELF.

An agent cannot while dealing for his principal make any profit for himself out of the transaction being conducted by him.

4. PLEADING ⟸236(6) — AMENDMENT OF PLEADING AT OPENING AND CLOSE OF TRIAL DISCRETIONARY.

The denial of motions to amend the answer by striking out matter therefrom at the opening and close of a trial was within the discretion of the trial court.

5. EVIDENCE ⟸471(6)—ANSWER OBJECTIONABLE AS CONCLUSION.

A statement of a witness, "The conversation was just simply that he asked Mr. A. to look after my affairs, and Mr. A. consented," was objectionable as being expressive of the conclusion of the witness.

6. APPEAL AND ERROR ⟸1050(1)—ADMISSION OF CONCLUSION OF WITNESS HARMLESS IN VIEW OF CROSS-EXAMINATION.

Allowing a witness to testify, "The conversation was just simply that he asked Mr. A. to look after my affairs, and Mr. A. consented," was not prejudicial error, where the witness was fully cross-examined as to the conversation that occurred.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Lillian A. Ward against Harry Andrews. Judgment for plaintiff, and defendant appeals. On death of the defendant, his administratrix, Elizabeth Lyman Andrews, was substituted. Affirmed.

Griffith Jones and Warren L. Williams, both of Los Angeles, for appellant.

Constan Jensen, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment entered in favor of the plaintiff. The action was brought to recover the sum of $1,000. Plaintiff, in her complaint, alleged facts showing that the defendant, while acting as her agent in negotiating for the purchase of certain furniture, furnishings, and lease of an apartment house, made a profit of the sum mentioned without her knowledge or approval. The facts alleged show that the agency was gratuitous, that plaintiff was a widow, and that defendant had been a friend of her late husband and herself. The allegations were, in part, as follows:

"That defendant at all said times stated and represented to plaintiff that he was her friend and had been the friend of her deceased husband; that he was engaged in the real estate and apartment house brokerage business, and had had many years' experience in such business; that by reason of such friendship and such experience he could and would aid plaintiff in investing her money in the manner she stated as aforesaid, and could and would do so without receiving or expecting any compensation from plaintiff therefor."

The undisputed evidence showed that defendant did negotiate for the purchase of furniture, furnishings, and lease of an apartment house, and that a deal was consummated whereby plaintiff became the owner of the same at a price of $12,000. The first price made by the owner of the place was $12,500. The owner took up the matter of paying a commission with the defendant, and they finally agreed upon a price of $12,000, out of which defendant was to receive and did receive the sum of $1,000. Upon making discovery that the defendant had been paid the amount mentioned, plaintiff brought this action.

[1-3] The court made findings in accordance with the facts alleged, and it may be said that there was ample evidence to show that defendant assumed the duties of an agent toward the plaintiff. There was evidence also showing that the defendant, after the deal was consummated, had made statements to third persons to the effect that he had made no profit on the deal. In his own testimony the defendant, while admitting his friendship and acquaintance with the plaintiff and her deceased husband, denied that he had assumed the confidential relation of agent toward the plaintiff. This testimony, however, merely presented a conflict in the evidence which the trial judge had the duty to resolve and as to which conflict this court can have no concern. That a gratuitous agent is bound to use the same degree of good faith toward his principal as an agent for compensation is clearly settled beyond any room for dispute. Mr. Mechem, in his work on Agency (2d Ed.), at paragraph 1223 et seq., restates the rule and cites authorities

thereunder. We quote from paragraph 1226 of the same work:

"In accordance with this rule, where one who, while pretending to act as the agent of the purchaser of certain real estate, was in reality acting as the agent of the seller, and received as his compensation from the seller a note given by the purchaser as part of the purchase price, it was held that he should be restrained from enforcing payment of the note, and that it should be delivered up and canceled."

A number of illustrations are given by the text-writer, all of which are in harmony with the invariable rule that an agent cannot, while dealing for his principal, make any profit for himself out of the transaction being conducted by him.

Appellant makes the point that the complaint fails to state a cause of action, but, as we have already said, we think the allegations, while perhaps needlessly prolix, were sufficient to show that the obligation assumed by the defendant was that of an agent.

[4] The defendant in his answer alleged in one of the paragraphs that—

"By the employment of his skill, knowledge, and experience, and acting in behalf of plaintiff, he induced the owner of said furniture and furnishings to accept the sum of $12,000."

Both at the opening and close of the trial a motion was made by the defendant to amend the answer by striking out this clause, which the court refused to allow to be done. At the point in the proceedings where this motion to amend was made the court undoubtedly had discretion to refuse the leave asked for.

[5, 6] Another alleged error is predicated upon the fact that plaintiff was allowed to testify to a conversation that occurred between her husband and the defendant at the time of the husband's last illness. In this regard the witness stated:

"The conversation was just simply that he asked Mr. Andrews to look after my affairs, and Mr. Andrews consented."

While the answer was objectionable as being expressive of the conclusion of the witness, at the same time the witness was fully cross-examined as to the conversation that there occurred, and we think the error of the court in refusing to strike out the statement was not so prejudicial as to require a reversal for that reason alone.

We think that the testimony given by Carl Bronson, which referred to a conversation he had had with the defendant a considerable time subsequent to the purchase of the lodging house, was competent, even though not entitled to great weight. It was corroborative of the fact, as claimed by the plaintiff, that she was being guided by the advice of the defendant, all of which was relative to the question of the claimed agency relationship. Were we to concede that the rulings of the court in admitting this and refusing other testimony constituted error, we would still not be warranted in concluding, in view of the evidence, which amply sustains the findings of the court, that a miscarriage of justice has resulted.

For the reasons given, the judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 470

LAWRENCE v. LONG BEACH PLEASURE PIER COMPANY et al. (Civ. 3042.)

(District Court of Appeal, Second District, Division 2, California. Nov. 22, 1919. Hearing Denied by Supreme Court. Jan. 19, 1920.)

1. CORPORATIONS ⊂⊃98—STOCK CERTIFICATE SUFFICIENTLY DELIVERED BY LEAVING AT PURCHASER'S HOUSE.

A certificate of stock having been issued to the purchaser and left at his house for him in pursuance of a contract, there was a sufficient delivery, which was not defeated by his refusal to retain it and its return.

2. BILLS AND NOTES ⊂⊃496(1), 524—BURDEN OF PROOF AS TO OWNERSHIP OF NOTE MADE PAYABLE TO AND INDORSED BY MAKER IN BLANK.

Where a note was made payable to the maker and indorsed by him in blank, it passed presumptive title by delivery, and the production and presentation of it in evidence on the trial by certain persons was prima facie evidence of their ownership, but where it appeared that the note was delivered to such persons as agents for another, it was incumbent upon them to make some further showing of a transfer of title to them.

3. PROPERTY ⊂⊃9—POSSESSION AS EVIDENCE OF OWNERHIP.

Possession of property alone without explanation is evidence of ownership, but it is the lowest species of evidence, being merely presumptive and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner, and if the custody and possession is shown to be equally consistent with an outstanding ownership in a third person, no presumption of ownership arises solely from possession.

4. JUDGMENT ⊂⊃243—NO JURISDICTION TO GIVE JUDGMENT AGAINST PERSONS NOT PARTIES.

In an action involving a note, where it appeared that a third person, not a party to the action, was the owner of the note, the court could not enter judgment directing a cancellation of the note.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Henry Lawrence against the Long Beach Pleasure Pier Company and others. Judgment for plaintiff and defendants S. H. Ward and R. H. Mullineaux appeal. Modified and affirmed.

I. Henry Harris and Chas. A. Bank, both of L s Angeles, for appellants.

A. S. Maloney, of San Bernardino, Earl D. Finch, of Redlands, and Frank F. Oster, of Los Angeles, for respondent.

SLOANE, J. This appeal is taken under the alternative plan. It involves a typewritten transcript of 370 pages, 100 typewritten pages of pleadings, including an original and four amended complaints, a cross-complaint and full complement of demurrers, motions, and answers, and represents the activities of several resourceful lawyers. In the final analysis, however, it seems to resolve itself into a simple action on the cross-complaint to recover on a promissory note, and an answer thereto setting up fraud in procuring the execution of the note, failure of consideration, and denial of cross-complainants' ownership of the note. The original action was abandoned. The judgment appealed from is on the cross-complaint in favor of the cross-defendant, Henry Lawrence, the maker of the note, under findings of the court to the effect that he executed the note in question, which was made payable to his own order, indorsed by himself and delivered to the cross-complainants S. H. Ward and R. H. Mullineaux, as agents of the M. M. & W. Syndicate, a corporation, which was not a party to the action. The court further found that the note was given without consideration, and without a meeting of the minds of the parties, and that cross-complainants, appellants here, did not become the owners of it. The findings were against the fraudulent misrepresentations and inducements set out in the answer to the cross-complaint, but held that the respondent did not read the note before signing it, or know its nature or contents, but signed it in the belief that he was signing an option whereby he was agreeing to sell certain shares of stock in a corporation.

[1] There is much evidence in the record—taking into account the apparent stupidity and lack of comprehension of the respondent, and the fact that he was a foreigner without much business experience—which might have justified a finding that the note was executed through fraud and misrepresentation. But in the absence of a finding of such fraud, the circumstances of the signing and indorsement of the note by respondent were such as would establish a valid obligation; and the contract signed by him and the receipt for his note in payment of the corporate stock for which it was given show a complete meeting of the minds of the parties to the transaction, and that the note was given in consideration of the purchase of this corporate stock. The certificate of stock, having been issued to respondent and left at his house for him in pursuance of the contract, constituted a sufficient delivery, which was not defeated by his refusal to retain it and its return to appellants.

[2] But there is a further independent defense to the cause of action set up in the cross-complaint. By an amendment to his answer to the cross-complaint respondent denied that the cross-complainants were the owners or holders of the note. The court finds in accordance with this denial, and holds that—

"Said Ward and Mullineaux, nor either of them, ever have been the owners or owner, holders or holder of said promissory note except as the agents of said M. M. & W. Syndicate."

It is true this note was made payable to the maker and indorsed by him in blank, and so would pass presumptive title by delivery, and the production and presentation of it in evidence on the trial by the appellants was prima facie evidence of their ownership. But the appellants themselves introduced into the evidence of the case the contract under which this note was given, which is as follows:

"It is agreed that neither party shall be bound by any condition or representations not expressed herein. Agreement. M. M. & W. Syndicate, Los Angeles, California. Mr. Lawrence of El Casco hereby agrees to buy and the M. M. & W. Syndicate agrees to sell 1,000 shares of the capital stock of Neptune Pier Company, a California corporation, for the sum of one thousand and note dollars ($1,000). Dated this 17th day of March, A. D. 1915. M. M. & W. Syndicate, ——— Agent. Name—Henry Lawrence. Address—Redlands, Cal."

Also a receipt for the note was introduced, which was as follows:

"Receipt. M. M. & W. Syndicate, Los Angeles, California, March 17, 1915. Received of Henry Lawrence one thousand (note) dollars ($1,000) in full payment for 1,000 shares of the capital stock of Neptune Pier Company, a California corporation. M. M. & W. Syndicate, S. H. Ward, R. H. Mullineaux, Agent."

These documents, together with the note, were executed and delivered at the same time and as part of the same transaction. They show that this note was delivered to, and at that time became the property of, this corporation, the M. M. & W. Syndicate, and that the possession of it by the appellants was the possession of their principal. Under these circumstances it was incumbent upon the appellants, who originally came into the possession of this note of their principal in their capacity as agents, to make some further showing of a transfer of title to themselves than their mere possession.

[3] It is a significant fact that, notwithstanding the raising of this issue by an amended answer during the trial, not one word of testimony appears in the record to substantiate the possessory claim of the

cross-complainants to any right or ownership in this note. The citations of authority made by appellants are not in point. The possession relied on in each instance in these cases is at least under some color of actual assignment or transfer. As said in Rawley v. Brown, 71 N. Y. 85, 89:

"Possession of property alone without explanation is evidence of ownership; but it is the lowest species of evidence. It is merely presumptive, and liable to be overcome by any evidence showing the character of the possession, and that it is not necessarily as owner. If the custody and possession is shown to be equally consistent with an outstanding ownership in a third person, as with a title in the one having the possession, no presumption of ownership arises solely from such possession."

[4] The M. M. & W. Syndicate, not having been made a party to this action, and it being found to be the owner of this note, it is obvious that the part of the judgment directing the cancellation of the note cannot be sustained.

We call attention to the fact that the portions of the record printed in the briefs on this appeal are entirely inadequate to bring to the attention of the court the matters relevant to the points in issue. The Legislature, by its recent amendment to section 953a of the Code of Civil Procedure, has provided that no appeal shall be adversely disposed of because of failure to print in the briefs the portion of the record required, or any part thereof, but that the appellate court shall require such matter to be printed and supplied by supplemental brief. Not having any legislative directions as to the course to pursue when there has been an ostensible, but inadequate, effort to supply relevant parts of the record, we have found it necessary to make an independent research through the voluminous transcript in this case for our facts.

The judgment is modified by striking out that part thereof directing the cancellation of the note sued on, and, as so modified, is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

44 Cal. App. 421

Ex parte SELOWSKY. (Cr. 492.)

(District Court of Appeal, Third District, California. Nov. 22, 1919.)

1. CRIMINAL LAW ⊂⊃1216(2)—STATUTE AS TO IMPRISONMENT WHERE TWO SENTENCES ARE IMPOSED NOT APPLICABLE, WHERE PUNISHMENT FOR ONE IS A FINE, WITH ALTERNATIVE OF IMPRISONMENT.

Pen. Code, § 669, providing that when a person is convicted of two or more crimes before sentence is pronounced for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be, refers to cases where there have been two convictions, and punishment for each has been that of imprisonment, and is not applicable where a second judgment for contempt required payment of the fine and imprisonment in default thereof under section 1205.

2. CONTEMPT ⊂⊃72 — JUDGMENT IMPOSING FINE, WITH ALTERNATIVE OF IMPRISONMENT, ENFORCEABLE BY EXECUTION OR IMPRISONMENT.

Ordinarily, when one is sentenced to imprisonment for contempt, the imprisonment begins to run at once, but where a fine is imposed it simply becomes a judgment for so much money due to the people, and, like any other judgment against a party owing money to the state, it may be enforced before it has become barred by the statute of limitations, either by execution or by imprisonment.

In the matter of the application of Mary M. Selowsky for writ of habeas corpus. Writ discharged.

Frank J. Murphy, of San Francisco, for petitioner.

Clarance N. Riggins, Dist. Atty., of Napa, for respondent.

ELLISON, Judge pro tem. This is an action for the release of the petitioner upon habeas corpus. It appears from the record that on November 19, 1917, in the superior court of Napa county, in an action wherein the people of the state of California was plaintiff and said Mary M. Selowsky was defendant, a judgment was duly given, made, and entered, wherein it was ordered, adjudged, and decreed that the premises therein described were, at all times recited in said judgment, maintained by said Mary M. Selowsky as a place of lewdness, assignation, and prostitution, in violation of the laws of the state of California, and that said premises, at all of said times, constituted a public nuisance; said judgment decreed that said nuisance be abated, and that said Mary M. Selowsky, as the owner of said premises, be perpetually enjoined from directly or indirectly maintaining or permitting such nuisance, and from directly or indirectly permitting the use of said premises, or any part thereof, for the purpose of lewdness, assignation, or prostitution, and from directly or indirectly maintaining and permitting on said premises, or any part thereof, any act of lewdness, assignation, or prostitution.

It further appears that on the 9th day of July, 1918, after due petition and notice and service made, the said Mary M. Selowsky was by order of said court adjudged guilty of contempt in violating the terms of said judgment above referred to, and she was sentenc-

ed to pay a fine of $1,000, and be imprisoned in the county jail of Napa county for a period of six months. Immediately thereafter she commenced the service of such sentence, and on August 17, 1918, she was released upon bail in habeas corpus proceedings instituted in this court. These proceedings were followed by certiorari in the Supreme Court in which the validity of such sentence was affirmed. While petitioner was on bail another charge of contempt was preferred against her, and on June 29, 1919, she was convicted of contempt of court in having again violated said judgment by continuing to maintain a public nuisance on said premises, and, as punishment thereof, it was adjudged that she pay a fine in the sum of $200, and that in default of payment thereof, she be imprisoned in the county jail in the county of Napa, state of California, for the term of one day for each $2 of said fine until the same be fully paid and discharged.

Said judgment further provided:

"Said term of imprisonment shall commence upon the expiration of the term of imprisonment heretofore imposed upon her by judgment made and entered in the above-entitled court and cause convicting said defendant of contempt and entered on or about the 9th day of July, 1919, and upon which judgment she has this day been committed."

[1] Upon the second judgment of contempt, a commitment was issued on the 16th day of October, 1919, and delivered to the sheriff of Napa county, and under it he retained her in custody. Since the entry of said judgment of contempt made on the 29th day of June, 1919, the defendant has served in the county jail of Napa county more than 100 days. It is the contention of petitioner that imprisonment upon the two judgments run concurrently, and that when the judgment of her last contempt was rendered on the 29th day of June, 1919, she, being then in prison on the former judgment, the two sentences run together, and when the longer one was served she was entitled to her discharge. This contention is based upon section 669 of the Penal Code, which reads as follows:

"When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second or other subsequent term of imprisonment, as the case may be."

Considering this section, the Supreme Court said in Ex parte Morton, 132 Cal. 348, 64 Pac. 469:

"This section prescribes one exception to the rule, but it does not cover the present case, because the prisoner was not convicted of the second offense until after sentence on the first conviction. There would seem to be no rational ground for a distinction between this case and the case provided for, but the distinction is clearly drawn in the statute, and we cannot hold that the provision quoted warrants the sentence under which alone the prisoner can now be held.

"The only other statutory provision for cumulative sentences called to our attention is contained in section 105 of the Penal Code, which applies exclusively to escape from the state prison.

"These exceptions seem to prove and establish the rule that in all other cases the term of imprisonment commences to run from the delivery of the convict at the prison. It must therefore be held that the direction in the second sentence of the prisoner, making it cumulative upon the first, was invalid, and that the lawful term of his imprisonment has expired."

We are of the opinion that said section refers to cases where there have been two convictions and the punishment for each has been that of imprisonment. The second judgment for contempt against the petitioner was not a judgment of imprisonment in the county jail. The judgment was that she pay a fine of $200, and, in default thereof, she should be imprisoned.

In Ex parte Karlson, 160 Cal. 378, 117 Pac. 447, Ann. Cas. 1912D, 1334, the question of the court's power to punish for contempt was very fully considered. In that case the petitioner had been sentenced to pay a fine of $200, and upon his failure to pay said fine to be committed to the county jail until such fine was paid at the rate of one day's imprisonment for each $2 of the fine. After serving five days, he petitioned for his release upon habeas corpus, taking the position that under the section of the Code, imprisonment for five days was the longest period the court could imprison him. In that case, quoting from People v. Tyler, 64 Cal. 438, 1 Pac. 887, the court said:

"In the punishment inflicted the court did not exceed its jurisdiction. It had jurisdiction to punish by fine not exceeding $500, or imprisonment not exceeding five days, or by both. Code Civ. Proc. § 1218. In the exercise of its jurisdiction, it imposed a fine of $500, and that exhausted its statutory power of punishment; but the commital was not an additional punishment; it was simply the written mandate or process by which the court undertook to enforce its judgment. A judgment of fine is enforceable by an execution, as on a judgment, in a civil action (Pen. Code, § 1214; Code Civ. Proc. § 1006), or by commitment under the criminal law. * * * A person against whom such a judgment has been pronounced has therefore the privilege, under the law, of paying it either by money or by imprisonment. * * * If he refuses to pay in that way, the commitment follows, as an incident to the judgment, until the judgment has been complied with according to law."

The judgment in this case against the petitioner was that she pay a fine of $200. The provision as to imprisonment was simply added as a method that might be used to enforce the judgment in case the fine was not paid.

Section 1205 of the Penal Code provides:

"A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied."

The sentence imposed upon the petitioner was that she pay a fine. Imprisonment was not the punishment inflicted, but was only to take place in the contingency that the fine was not paid or collected.

We think the section of the Penal Code quoted, and upon which petitioner relies, must be limited to those cases where there have been two convictions and the punishment for each is fixed at imprisonment, and is not applicable to a case where the punishment of one of the offenses is a fine, with an alternative of imprisonment in the event the fine is not paid.

[2] Further, it appears in this case that the commitment upon the second judgment was not delivered to the sheriff until the expiration of the term of imprisonment upon the first judgment. Counsel for petitioner takes the position that when judgment is pronounced against one convicted of contempt, it must be enforced at once, whether it be a judgment of imprisonment or a judgment that the party pay a fine. We are unable to concur in this position. Ordinarily, when one is sentenced to imprisonment for contempt, the imprisonment begins to run at once, but, where a fine is imposed, it simply becomes a judgment for so much money due to the people of the state of California, and, like any other judgment against a party owing money to the state, it may be enforced, before it has become barred by the statute of limitations, either by execution or by imprisonment.

We know of no statutory law or decision which holds that upon the imposition of a fine against a party, as punishment for contempt, execution must be issued at once to collect the money or a commitment issue directing imprisonment.

The people might well wait with the expectation that the fine might be paid and the county saved the expense of feeding the defendant, or it might wait in expectation of finding property out of which to satisfy the judgment, and by taking either action it would be well within its legal rights.

For the reasons above stated, the court is of the opinion that the petitioner is not entitled to her release, and the writ is discharged.

We concur: BURNETT, J.; HART, J.

44 Cal. App. 510

Ex parte WILLIAMS. (Cr. 881.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1919.)

HABEAS CORPUS ⟸53 — APPLICATION, NOT SUFFICIENTLY SHOWING WHEREIN IMPRISONMENT IS ILLEGAL, DENIED.

Where it does not sufficiently appear from habeas corpus application, aside from certain conclusions stated, how or in what manner it is claimed the applicant's imprisonment is illegal, the application must be denied.

Application by Earl Williams for writ of habeas corpus directed to the Chief of Police of the City and County of San Francisco. Application denied.

Raine Ewell, of San Francisco, for petitioner.

WASTE, P. J. Aside from certain conclusions, contained in the application for a writ of habeas corpus, it does not sufficiently appear therefrom how, or in what manner, it is claimed the imprisonment of the person, in whose behalf the writ is applied for, is illegal.

The application is therefore denied.

44 Cal. App. 426

McVITTY v. FLENTGE. (Civ. 2970.)

(District Court of Appeal, First District, Division 1, California. Nov. 24, 1919. Hearing Denied by Supreme Court Jan. 22, 1920.)

LANDLORD AND TENANT ⟸95 — NOTICE TO MOVE AFTER SALE MADE WITHIN REASONABLE TIME.

In an action by a purchaser from the landlord of defendant for the possession of farming land, and for damages for the withholding thereof, where defendant, under his lease, was to move on sale of the property, "provided purchaser wants possession immediately," a finding that a notice served on April 6th to remove from the land, which was sold and conveyed January 22d, was given within a reasonable time, *held* correct.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Edward Q. McVitty against Obi Flentge. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 34 Cal. App. 781, 169 Pac. 666.

Alex Webster and Chas. R. Nelson, both of Paso Robles, for appellant.

C. F. Lacey, of Salinas, for respondent.

WASTE, P. J. This is an appeal by the defendant from a judgment, in favor of plaintiff, for the possession of certain farm-

ing land, and for damages for the withholding thereof.

The defendant was in possession of the land in question under a lease from one Otto L. Harden, for the term of three years, commencing November 1, 1915. On November 1, 1916, he paid Harden $110, the rent for the year next ensuing after that date. The lease contained this provision:

"If said land is sold before expiration of said lease, the party of the second part to be paid for all summer-fallow at going price per acre, provided purchaser wants possession immediately."

Harden sold, and conveyed the land to plaintiff by deed, executed and delivered January 22, 1917. Plaintiff, relying on his grantor to place him in possession of the land, personally made no demand on the defendant to vacate the property until April 6, 1917, when he served a written notice requiring defendant to deliver possession within three days, under penalty of suit brought for possession and damages. Defendant refused to deliver and plaintiff instituted this action. On the trial it was developed that the land had not been summer-fallowed the previous year; consequently, there was no sum to which the lessee was entitled. Notwithstanding this fact, the defendant rested his case upon a motion for a nonsuit on the ground that the reservation in the lease, above quoted, required the plaintiff to exercise his right to take possession without any delay, and that by his waiting from January 22d to April 6th, he lost this right. The motion for nonsuit was granted, and plaintiff appealed from the judgment entered thereon.

On the appeal this court reversed the judgment, holding that the clause in the lease was intended by the parties to it to be a reservation in favor of, and for the benefit of, the lessor, and was to be so interpreted; and consequently, as there had been no summer-fallowing of the land for the previous year, defendant's lease was terminated upon the transfer of the land by the lessor to plaintiff, who was entitled to the possession of the property, upon his proper demand, whenever made. McVitty v. Flentge, 34 Cal. App. 781, 169 Pac. 666. The Supreme Court denied a petition for a rehearing, and, in doing so, held that the phrase, "providing purchaser wants possession immediately," does not mean that the buyer must take possession forthwith after his purchase, or not at all, but that such act must be done within a reasonable time after the preceding event. That court said further (34 Cal. App. at page 784, 169 Pac. 667, supra):

"The question, What is a reasonable time? would depend upon the circumstances existing at the time of the sale and following presently thereafter. The defendant in his answer alleged facts which, if true, would show that the option of the purchaser to take possession under the reservation was not exercised within a reasonable time after his purchase and which would have the effect of a waiver on his part, or create an estoppel which would defeat his right to possession at the time this action was begun."

The defendant thereupon filed a second amended answer, setting forth more fully the matters referred to in the opinion of the Supreme Court, denying the petition for a rehearing. At the trial he resisted the claim of plaintiff, upon the ground that no demand for possession was served on him within a reasonable time after the sale; but he was permitted to perform work and labor upon the property, under the belief that he was to retain possession of the premises. The trial court found that notice was given to defendant within a reasonable time, and from the judgment entered in favor of the plaintiff, defendant appeals.

The sole question presented for consideration is whether or not appellant received any notice or demand for possession of the leased premises within a reasonable time after the sale was made. As one of his defenses, defendant alleged that on or about the first of December, 1916, preceding the sale of the ranch, plaintiff told him, defendant, that he was about to purchase the property, and that the defendant would not be disturbed in his possession until November 1, 1917; that, relying on said notice and promise, he disced and seeded 10 acres of the ranch, raked and burned the stubble on a portion, and allowed 110 acres to go to a volunteer crop, which crop he alleged, was worth $1,000. The court found, and there is no evidence to the contrary, that no such notice or promise was ever made. The conversation, on which the alleged promise was based, was had by defendant with one of plaintiff's foremen, employed on an adjoining ranch, who had no orders or authority, to act for plaintiff in the matter. Consequently, defendant did not substantiate the facts which the Supreme Court said, "if true, would show that the option of the purchaser * * * was not exercised within a reasonable time."

Plaintiff at all times after the sale was urging Harden to secure the possession of the ranch. He demanded that Harden notify defendant of the sale and return the money received as rent for 1917. Three weeks after the deed passed Harden wrote to Fernando Flentge, brother of defendant, who had on one occasion paid the rent of the place for defendant. He lived with and appears to have been acting at all times with the knowledge of and consent of the defendant. In this letter Harden said that he had been waiting to see if his deal with plaintiff "was going through," and that he would return the "rent money right away out of the first payment," adding:

"That you can do business with McVitty, as I will turn the lease over to him."

Fernando replied, declining to accept a return of the rent paid, stating he would "deal with McVitty next year, if he buys the place, but he has nothing to do with this year's crop." On March 14th Harden sent defendant a check for the $110, which defendant returned. While the defendant on the stand denied any knowledge of the correspondence between his brother, Fernando, and Harden, the testimony of his brother was sufficient to warrant the trial court in believing to the contrary.

Defendant knew in December, 1916, that the ranch was sold, or was about to be sold, to plaintiff. It is equally certain that he knew in February, and in March, 1917, that McVitty was the owner of the place. The work he performed in preparation for the 1917 season amounted to only $25. Harden returned the rent money to him, which he declined to keep, for the reason, as he testified, that he—

"supposed the crop [he] put in was worth more than $110. I didn't think he [Harden] was paying me enough. * * * I thought I should be paid for my work on the place."

Defendant remained in possession of the place and received the benefit of the 1917 crop, which the court found to be worth $1,000, and the crop for 1918 worth $180. Under all the showing made, we are of the opinion that the trial court was correct in its finding that the allegations of the complaint are true and that the notice was served on the defendant by the plaintiff within a reasonable time.

Appellant contends that the notice served on defendant on April 6, 1917, was insufficient in form. When the case was here on the former appeal this court held that the demand, in respect to both form and time, was such as to have entitled plaintiff to possession of the premises. McVitty v. Flentge, supra, 34 Cal. App. 783, 169 Pac. 666.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

44 Cal. App. 380

WARD v. GILDEA. (Civ. 3001.)

(District Court of Appeal, Second District, Division 1, California. Nov. 20, 1919.)

1. APPEAL AND ERROR ⟸110—ORDER DENYING MOTION FOR NEW TRIAL NOT APPEALABLE.

An order denying motion for new trial is not the subject of a separate appeal.

2. MUNICIPAL CORPORATIONS ⟸705(2)—AUTOMOBILE DRIVER HAD RIGHT TO CROSS INTERSECTION WHERE DRIVER TO HIS RIGHT WAS 145 FEET FROM INTERSECTION.

Automobile driver, reaching street intersection at a time when motorcycle driver approaching on intersecting street to his right was at a distance of 145 feet from the intersection, had the right to cross the street, notwithstanding Motor Vehicle Act, § 20, subd. (e), requiring driver of vehicle to yield right of way to vehicle approaching intersection from the right; such statute not being applicable under the circumstances.

3. APPEAL AND ERROR ⟸1010(1) — FINDING OF LOWER COURT CONCLUSIVE UNLESS EVIDENCE ON WHICH IT IS BASED COULD NOT BE TRUE.

Decision of trial court is conclusive on appeal, unless the admitted and uncontradicted facts are sufficient to show that the testimony on which such decision is based could not be true.

4. APPEAL AND ERROR ⟸1010(1)—APPELLATE COURT WILL NOT SOLVE PROBLEM IN PHYSICS TO OVERTURN SUFFICIENCY OF EVIDENCE.

Appellate court will not enter upon solution of problem in physics, in order to hold that, evidence on which finding is based could not be true under admitted facts.

5. MUNICIPAL CORPORATIONS ⟸706(5)—EVIDENCE THAT MOTORCYCLE REACHED POINT OF INTERSECTION SIMULTANEOUSLY WITH AUTOMOBILE NOT UNBELIEVABLE UNDER UNCONTRADICTED FACTS.

In action involving motorcycle-automobile street intersection collision, where it was claimed that plaintiff, motorcycle driver, had right of way over defendant, approaching intersection to his left, under Motor Vehicle Act, § 20, subd. (e), evidence of plaintiff that he had reached point of intersection simultaneously with defendant, *held* not unbelievable under the uncontradicted facts.

6. APPEAL AND ERROR ⟸1011(1) — FINDING ON CONFLICTING EVIDENCE CONCLUSIVE.

Where the evidence is conflicting, the appellate court will accept finding of trial court on disputed points.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by Arno Ward against P. Gildea. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Appeal from order denying motion for new trial dismissed, and judgment affirmed.

Tipton & Cailor, of Los Angeles, for appellant.

Head & Marks, of Fullerton, for respondent.

JAMES, J. [1] In this action plaintiff was awarded judgment for a sum of money. The recovery allowed him was based upon a cause of action in which plaintiff alleged that the

defendant had carelessly and negligently operated an automobile, so as to cause it to collide with a motorcycle upon which the plaintiff was riding. An appeal is taken from the judgment, and also from an order denying a motion for a new trial. As the last-named order was not the subject of a separate appeal, the appeal therefrom should be dismissed.

The principal negligence complained of, and which charge was sustained by the court in its findings, was that the defendant at the intersection of two streets failed to observe the requirement of the law that he should yield the right of way to the plaintiff who was in the act of crossing the intersection from the right of the defendant. Section 20, Motor Vehicle Act of 1915; Stats. 1915, p. 397. Subdivision (e) of the section referred to provides as follows:

"(e) * * * The operator of a vehicle approaching an intersection of the public highway shall yield the right of way to a vehicle approaching such intersection from the right of such first named vehicle."

It is first contended on behalf of appellant that the complaint was insufficient in its statement of a cause of action, in that it did not show that the plaintiff was at the point of intersection when the defendant started to make the crossing. We think that the complaint did in fairly appropriate language show the fact that both parties were at the point of intersection of the streets and about to cross the same. The complaint, too, contained a general allegation that the defendant, "disregarding the rights of the plaintiff and his right of way at said crossing, did wrongfully, carelessly, and willfully drive his said automobile onto and over the said crossing while plaintiff was crossing the same." The findings of the court, also, we think, were sufficiently within the issues made by the pleadings and covered all material issues tendered.

[2, 3] The principal contention of defendant is that the findings were not sustained by the evidence. It is urged that not only was the weight of the evidence on the side of the defendant, but that such weight was not opposed by any substantial evidence—in other words, that any testimony shown to have been given by the plaintiff as to the facts material to liability on the part of the defendant was inherently improbable. This contention, of course, is designed to meet the rule of appellate review, which forbids an appellate court to disturb a decision of fact, where there is any substantial conflict in the evidence. So far as the apparent weight of evidence is concerned, judged by the narrative presented in the record, we may well agree with appellant that there was much evidence, amply corroborated, which tended, not only to show that at the time of the accident the plaintiff was traveling on his motorcycle at a high rate of speed, but that at the time defendant entered the intersection of the two highways the plaintiff was at a distance of about 145 feet from such intersection. If such was the situation of the parties, of course the rule of the road announced in the Motor Vehicle Act was not applicable, and defendant would have had clear right to make the crossing in advance of the plaintiff. The plaintiff's testimony as to the situation of himself and the defendant immediately before the accident, stands practically alone. However, unless the admitted and uncontradicted facts are sufficient to show that the plaintiff's testimony could not be true, the decision of the trial judge upon the disputed point is final and conclusive.

It is claimed by appellant that respondent's statements given in evidence were utterly contrary to the physical facts, as well as the testimony of other witnesses. Leaving out for the moment the character of the damage wrought by the collision, it must be said, we think, that the statement of the plaintiff that he reached the point of intersection simultaneously with the defendant, notwithstanding that other witnesses disputed with him directly as to that fact, furnished some tangible and substantial evidence which would support the finding of the court made in his favor. It was shown that the motorcycle struck the automobile immediately back of the right-hand front wheel, that the fender or mudguard of the automobile was bent in at that point, and that the footboard on the same side was forced to the rear, bending some of its attachments until the rear mudguard rested against the rear wheel, so as to completely block it. Plaintiff testified that he had slowed down at the street intersection to about 10 miles an hour, and that when he saw that the defendant was about to cross in front of him he applied his brake and at the moment of collision his machine was not moving more than 3 or 4 miles per hour.

Defendant argues that, considering the damage wrought, it would be impossible for such to have resulted, had the motorcycle been traveling only at the rate specified by the plaintiff. It was further shown by the defendant that by reason of the impact the throttle rod was bent on the automobile to such a position as to force open the throttle, which caused the automobile to jump forward rapidly. The automobile did progress for the distance of possibly half a block before it was stopped. Plaintiff was thrown to the ground, and the motorcycle was damaged considerably.

[4] We do not think it proper for an appellate court to enter upon a solution of the problem in physics presented in order to reach the results claimed by the appellant. Just how much the original impact of the motorcycle contributed to cause the resultant damage, we cannot here determine. It might reasonably have been that the first impact disarranged the throttle and that when the

automobile started suddenly forward, as described by the defendant, the footboard was forced backward, and that the major portion of the damage was caused by this after movement.

[5, 6] Sufficient has been stated, we think, to illustrate the point that it cannot be determined from the record on appeal here presented that the court should have disregarded the testimony of the plaintiff because it was unbelievable. Trial judges have the advantage of having the witnesses testify in their presence, and can better judge of their credibility by their appearance, attitude, and manner of testifying than can appellate courts hearing the testimony from the cold printed page. For such reason, in considering the point as to the sufficiency of the testimony wherever a conflict is shown, it is the appellate court's duty to accept the finding of the trial court upon such disputed point.

The appeal from the order denying a motion for new trial is dismissed. The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 367

GILES v. REED. (Civ. 3130.)

(District Court of Appeal, Second District, Division 1, California. Nov. 19, 1919.)

1. FRAUDS, STATUTE OF ⊂=54½—CONTRACT TO DEVISE MUST BE IN WRITING SUBSCRIBED BY DECEASED.

It was not error to exclude testimony tending to prove that deceased in her lifetime orally agreed with plaintiff for a consideration to make a will devising to plaintiff certain described real estate; such a contract being invalid, because without note or memorandum in writing, subscribed by deceased (Civ. Code, § 1624, subd. 7).

2. EXECUTORS AND ADMINISTRATORS ⊂=431(2)—ACTION LIMITED TO CLAIM PRESENTED.

A cause of action based upon a rejected claim against the estate of a deceased person is limited to that contained in the claim presented.

3. EXECUTORS AND ADMINISTRATORS ⊂=431(2)—CLAIM ON CONTRACT TO DEVISE DOES NOT WARRANT RECOVERY ON QUANTUM MERUIT.

A claim against an estate for services rendered under contract with deceased to make a will devising realty, which will was not made, is in the nature of damages for breach of contract, and does not entitle claimant to sue on quantum meruit for the reasonable value of the services.

4. TRIAL ⊂=163 — MOTION FOR NONSUIT SHOULD PARTICULARLY POINT OUT DEFECTS OF PLAINTIFF'S CASE.

A party moving for nonsuit should state in his motion the precise grounds upon which he relies, so that attention of court and opposite counsel may be particularly directed to supposed defects in plaintiff's case.

5. APPEAL AND ERROR ⊂=1061(3)—DEFECTIVE MOTION FOR NONSUIT DOES NOT REQUIRE REVERSAL, WHERE COMPLAINT WAS INSUFFICIENT AND NOT AMENDABLE.

Where a complaint was subject to general demurrer, as failing to state a cause of action, and no evidence was received touching any material facts necessary to entitle plaintiff to recover, and the complaint was not susceptible of amendment warranting recovery, so that no purpose could be served in reversing the judgment, it will not be reversed on the ground that the motion for nonsuit was defective, in failing to specify the weakness of plaintiff's case.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Libbie Giles against Edwin Reed, as administrator of the estate of Rhoda A. Loud, deceased. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Charles B. De Long, of San Diego, for appellant.

Hamilton & Lindley, of San Diego, for respondent.

SHAW, J. Plaintiff appeals from a judgment in favor of defendant, rendered upon the granting of his motion for a nonsuit. The action is based upon a claim presented to defendant as administrator of the estate of Rhoda A. Loud, deceased, which was by him rejected. As presented, the claim is as follows:

"Estate of Rhoda A. Loud, Deceased, to Libbie Giles, Dr.

"To services rendered by claimant to said deceased as housekeeper, companion, nurse, etc., under and by virtue of a contract with said deceased, whereby she agreed, in consideration of the rendition of such services, to make a will in favor of claimant, leaving and devising her property situate in the county of San Diego, state of California, described as lot 33 and the south one-half of lot 34 of block 184 of University Heights, according to the official map thereof on file in the office of the county recorder of said county, together with the buildings upon said above-described property, and the furnishings and household furniture and other personal property of said deceased in said building, $3,073.82"

—to which was attached an affidavit that the amount thereof was justly due and no part thereof had been paid. It is alleged in the complaint that the contract, made in April, 1915, pursuant to which the services were rendered, was oral, and that plaintiff complied with her part thereof and rendered personal services to deceased, the reasonable value of which was the sum of $3,073.82; that deceased died without devising the said real property to plaintiff in accordance with

said agreement, or otherwise making any provision for the payment to plaintiff of the amount claimed.

[1] The chief error urged by appellant is predicated upon the ruling of the court in sustaining defendant's objections to questions whereby it was sought to elicit testimony tending to prove that deceased in her lifetime orally agreed with plaintiff, for the consideration named, to make a will devising to her the real estate described in the complaint. That the alleged contract was invalid, by reason of there being no note or memorandum thereof in writing and subscribed by deceased, admits of no question (subdivision 7, § 1624, Civ. Code); hence there was no error in the ruling.

[2] Nevertheless, counsel for appellant insists that under her complaint she is entitled to recover upon a quantum meruit for services rendered by her at the special instance and request of deceased. The record, however, fails to show that plaintiff offered any evidence upon such theory. The position of her counsel is summed up in the following statement:

"We expect to prove your honor, by this witness and by most of these other witnesses, that Rhoda A. Loud said to this witness in different conversations that she would, or she intended to, leave Mrs. Giles her home when she passed out of the body, and that Mrs. Giles was the best friend she ever had and rendered services for her."

Conceding, however, that testimony tending to show the reasonable value of services rendered by plaintiff for deceased was proffered, and an objection thereto sustained, nevertheless it cannot be said that the court erred in its ruling. The law is well settled that a cause of action based upon a rejected claim against an estate of a deceased person is limited to that contained in the claim so presented. Morehouse v. Morehouse, 140 Cal. 88, 73 Pac. 738; Enscoe v. Fletcher, 1 Cal. App. 659, 82 Pac. 1075. In other words, the holder of a claim against an estate cannot bring action therefor until it has been presented and rejected, and then in such action his right to recover is restricted to the cause of action stated in the claim which has been so presented and rejected. He is not entitled to recover against an administrator for any other cause of action (Brooks v. Lawson, 136 Cal. 10, 68 Pac. 97), and cannot allege and prove a cause of action other than or different from that stated in the claim (Etchas v. Orena, 127 Cal. 588, 60 Pac. 45).

[3] By no stretch of the imagination can the claim as presented be construed as one for the reasonable value of services performed for deceased. It is stated in the claim that the services rendered by plaintiff were under and by virtue of a contract made with said deceased whereby the latter agreed to make a will devising to plaintiff certain real property. While no breach of this contract is stated in the claim, nevertheless, assuming the affidavit shows a breach thereof, the amount claimed is in the nature of damages, and not for the reasonable value of services rendered. Conceding that plaintiff offered such testimony, the court did not err in sustaining objections to evidence touching the question of plaintiff's right to recover upon a quantum meruit for services alleged to have been performed for and on behalf of deceased, for the reason that no claim therefor was at any time presented to the administrator for allowance.

[4] At the close of plaintiff's evidence counsel stated:

"We make a motion for judgment of nonsuit for failure to establish a case by the plaintiff."

It is true, as contended by appellant, that a party moving for nonsuit should state in his motion the precise grounds upon which he relies, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in plaintiff's case. Coghlan v. Quartararo, 15 Cal. App. 668, 115 Pac. 664; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 Pac. 322.

[5] As appears, however, in the instant case, no evidence was received touching any material facts which it was necessary to establish in order to entitle plaintiff to recover; indeed, in that the complaint failed to state a cause of action, the complaint was subject to a general demurrer; and conceding the motion as made was defective in that counsel in making it failed to comply with the rule announced in the cases cited, nevertheless, since the complaint is silent as to facts under which any evidence was admissible and not susceptible of an amendment which could warrant a recovery by plaintiff, no purpose could be served in reversing the judgment upon such ground.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 463

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA v. HANSEN et al. (Civ. 3141.)

(District Court of Appeal, First District, Division 2, California. Nov. 26, 1919.)

1. JUDGMENT ⟸21—JUDGMENT NOT UNCERTAIN THOUGH ITEMS GIVEN WERE NOT ADDED.

There is no uncertainty about mathematical additions, so that a judgment setting out the specific items thereof is sufficient, although the blank left therein for the total sum is not filled.

2. APPEAL AND ERROR ⟸880(1)—DEFENDANT, VOLUNTARILY APPEARING, CANNOT OBJECT TO MANNER OF SERVICE ON OTHER DEFENDANTS.

Defendant appellant, not served with summons, but voluntarily appearing, filing demurrer and submitting to court's jurisdiction, alleging that she had been named in the complaint as a fictitious defendant, could not object to the manner of service upon other defendants in the mortgage foreclosure proceeding.

3. MORTGAGES ⟸448—ALLEGATION OF NONPAYMENT OF MORTGAGE NOTE SUFFICIENT.

The allegation in a complaint for mortgage foreclosure that named defendants, makers, "have defaulted in payment of the principal sum of said note, together with interest thereon from the 18th of January, 1915, at the rate of 6 per cent. per annum, no part of which said sum, nor interest thereon, has been paid," is a sufficient allegation of nonpayment as against a general demurrer.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the Pacific Mutual Life Insurance Company of California against S. Maude Hansen and others. Judgment for plaintiff, and the named defendant appeals. Affirmed.

F. E. Davis, of Los Angeles, for appellant.
Cassius D. Blair, of Los Angeles, for respondent.

LANGDON, P. J. This action was brought for the foreclosure of a mortgage set out in full in the complaint, as was also the note secured by the mortgage. Said note was given by the defendants Rudolf Mausard and Edith Mausard, his wife. The mortgage was also given to secure the payment of attorney's fees in any reasonable amount fixed by the court, the payment of all costs and expenses of suit, and also all sums that the mortgagor might pay for searching the title of the mortgaged property subsequent to the date for recording the mortgage, and all sums advanced by the mortgagor for taxes, assessments, incumbrances, etc.

There were 18 parties defendant whose names were known to plaintiff, and 4 sued under fictitious names. The defendants against whom judgment was taken were served with summons, and all defaulted except Timothy Goodwin, who filed an answer, which denied on information and belief the allegations of the complaint, and set up the fact that the defendant Gilbert L. Dennison had executed a lease of a portion of the premises to him—the said Timothy Goodwin—and that his claim to the premises was represented by said lease, the terms of which were alleged. It was also alleged that said Timothy Goodwin makes no further claim whatsoever to said described property. Later, the said Timothy Goodwin confessed and acknowledged judgment in favor of the plaintiff as prayed for in its complaint. It does not appear that any service was had upon the fictitious defendants, by publication or otherwise, but the appellant, S. Maude Hansen, voluntarily appeared before the court and filed a general demurrer to the complaint, alleging that she had been sued under the name of Jane Doe. Her demurrer was overruled. Thereupon, she having failed to answer, her default was duly and regularly entered. The action was dismissed as to certain defendants not served with summons, and judgment was entered for the plaintiffs, declaring that there is due from the defendants Rudolf and Edith Mausard "principal and interest upon the debt evidenced by the note and secured by the mortgage mentioned, and set forth in the complaint in this action, the sum of $6,362.07; also the sum of $123.29, principal and interest for sums expended by plaintiff according to the terms of said mortgage; also the sum of $235 attorney's fee; also the sum of $27.10 costs of suit; that the plaintiff have and recover judgment against defendants Rudolf Mausard and Edith Mausard, his wife, for the several amounts above found due to plaintiff, amounting to the total sum of $———."

The judgment then provides for the sale of the property and the distribution of the proceeds, and for a deficiency judgment against said Rudolph and Edith Mausard, and that the other defendants and all persons claiming under them, etc., be forever barred and foreclosed of all equity of redemption in the said premises.

[1] Appellant contends that the portion of the judgment above quoted is indefinite and uncertain because the total of the respective sums is not computed and entered therein, but is left blank, and that the clerk when he enters the judgment or issues the execution will have to make the computation, or, it is naïvely suggested, that perhaps this difficult task will fall to the lot of the sheriff when he advertises the sale, or, indeed, to the Supreme Court upon appeal. The point is without merit. There is no uncertainty or indefiniteness about mathematical additions. The judgment states definitely the several amounts due to the plaintiff by the defendants.

[2] The second objection of appellant is that the service of summons upon every defendant

who was served was made by the attorney for the plaintiff, and that the attorney for the plaintiff is an improper party to make such service. This question is not presented for our consideration upon this appeal. The appellant was not served with summons. She voluntarily appeared and filed a demurrer, and submitted herself to the jurisdiction of the court, alleging that she had been named in the complaint as a fictitious defendant. She has no concern with the manner of service upon other defendants.

[3] The next objection urged is that the allegation in the complaint of nonpayment of the note is insufficient. The complaint sets out the fact that the defendants Rudolf and Edith Mausard have defaulted in the payment of the principal sum of said note, together with the interest thereon from the 18th day of January, 1915, at the rate of 6 per cent. per annum, no part of which said sum, nor interest thereon, has been paid. This is a sufficient allegation of nonpayment as against a general demurrer.

The other objections urged are as lacking in merit as those already discussed, and it would serve no purpose to consider them here.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

44 Cal. App. 405

SCHAEFER v. DINWIDDIE et al.

(Civ. 3047.)

(District Court of Appeal, Second District, Division 2, California. Nov. 22, 1919.)

1. APPEAL AND ERROR ⊜607(1)—MERE PRESENCE IN COURT NOT NOTICE OF ORDER DENYING NEW TRIAL SO AS TO REQUIRE FILING OF NOTICE REQUESTING TRANSCRIPT WITHIN TEN DAYS THEREAFTER.

The mere presence of counsel for appellant in court on a hearing at which a motion for new trial was denied cannot be presumed to have been actual notice at that time of the order denying the new trial, so as to require the filing of a notice, requesting a transcript within ten days thereof, under Code Civ. Proc. § 953a.

2. JUDGMENT ⊜518—ATTACK ON ORDER SETTING ASIDE DEFAULT ON APPEAL FROM FINAL JUDGMENT A COLLATERAL ATTACK.

On appeal from a final judgment in the case, an objection that the trial court was without jurisdiction to set aside a default judgment by reason of the fact that the motion therefor was not made within one year, as provided by Code Civ. Proc. § 473, was a collateral attack; no appeal or other direct action having been taken from the order vacating the default and judgment.

3. APPEAL AND ERROR ⊜935(2) — PRESUMED IN FAVOR OF JURISDICTION THAT NOTICE OF MOTION TO VACATE DEFAULT JUDGMENT WAS MADE WITHIN A YEAR.

Where notice of intention to move to set aside a default and to vacate a judgment recited that defendant on a certain day within a year of the entry of the default would move to vacate the judgment, and there was no other entry in the record regarding the matter until some time after the expiration of the year, when the minutes of the court recited, "Motion to set aside default and judgment made in open court, argued by counsel, and the motion granted," it must be presumed on appeal that the moving party made the motion within the year and secured a continuance of the hearing to the date when the motion was granted.

4. JUDGMENT ⊜153(1)—MOTION TO VACATE DEFAULT PROPERLY HEARD AFTER EXPIRATION OF YEAR WHEN PROPERLY CONTINUED BEFORE.

If a motion to vacate a default judgment was noticed and presented to the court within a year, and continued for hearing to a date after the expiration of the year, the court did not lose jurisdiction to act on the motion.

5. JUDGMENT ⊜675(1) — CROSS-DEFENDANT BOUND BY FINDINGS AGAINST PLAINTIFF NOT APPEALED FROM.

On appeal by defendant in an action to quiet title, who filed cross-complaint against a third person who was claiming under a deed from plaintiff, the third person, who participated in the trial without filing any pleading, was bound by a finding of the trial court that plaintiff had never owned the property in suit; neither the plaintiff nor the cross-defendant appealing from the judgment.

6. JUDGMENT ⊜18(1) — NO AFFIRMATIVE RELIEF TO CROSS-DEFENDANT WITHOUT PLEADING.

In an action to quiet title, where defendant filed cross-complaint against plaintiff and a third person, the latter, who did not answer, could not obtain affirmative relief, although she appeared on the trial with counsel, and evidence was introduced in her behalf.

7. APPEAL AND ERROR ⊜714(5) — PLEADING SET OUT IN BRIEF BUT NOT IN TRANSCRIPT CANNOT BE CONSIDERED.

A copy of an alleged answer filed by cross-defendant, printed as an appendix to her brief on appeal, cannot be considered, where it nowhere appears in the authentic transcript; there being no suggestion for the diminution of the record.

8. TAXATION ⊜762—SALE TO STATE VOID IN VIEW OF STATEMENT OF AMOUNT OF ASSESSMENT.

Where neither the certificate nor the deed on sale of land to the state for nonpayment of taxes contains a statement of the amount of the assessment under which the sale was made, the certificate and deed to the state were fatally defective, under Pol. Code, §§ 3776, 3785.

9. TAXATION ⟸762—AMOUNT OF ASSESSMENT NOT SHOWN IN CERTIFICATE AND DEED.

A recital in a certificate and deed to the state on sale of land for taxes: "That said property was assessed according to law in the year A. D. 1899 for the year 1899–1900 at dollars to A., and the same was liable and subject to taxation; that said taxes were levied upon said property and its value was equalized as required by law. That amount of the tax so levied on said property was the sum of dollars as follows: For county purposes the sum $....., for state purposes $.....; and the penalties, costs and charges which have since accrued thereon amount to $8.50"—was insufficient to show the amount of the assessment as required by Pol. Code, §§ 3776, 3785, and the certificate and deed were fatally defective.

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by G. A. Schaefer against George I. Dinwiddie, Anna M. Johnson, and others, in which the defendant Johnson filed cross-complaint. From an adverse judgment, cross-complainant appeals. Reversed.

Arvid G. Alm and Shepard & Alm, all of Los Angeles, for appellant.

A. H. Winder, of Riverside, for respondents.

SLOANE, J. This action was originally brought by G. A. Schaefer, the plaintiff, to quiet title to a five-acre tract of land in Riverside county against Anna M. Johnson and a number of other defendants. Judgment was taken by default against all defendants. Anna M. Johnson, having been served by publication, within a year moved to vacate the default and judgment, which motion was granted. She answered, and also filed a cross-complaint, claiming title to the land and naming the plaintiff, G. A. Schaefer, and one Grace B. Talbot (who was not made a party by the original complaint), as cross-defendants, and asking to have cross-complainant's title quieted against these defendants. Cross-defendant G. A. Schaefer answered the cross-complaint, but no proof of service of the cross-complaint upon, or of any appearance, answer, or other pleading on the part of cross-defendant Grace B. Talbot appears in the judgment-roll or transcript of the record. She, however, appeared on the trial, with counsel, and evidence was introduced in her behalf. Judgment was against the plaintiff, as well as the cross-complainant, and in favor of cross-defendant Grace B. Talbot, adjudging her to be the owner and in the possession of the premises, and quieting her title to the same against the other parties to the cross-action. Cross-complainant Anna M. Johnson appeals from this judgment.

[1] Respondents raise certain objections to appellant's standing in court on this appeal, which will first be considered. It is claimed that the appeal fails by reason of the alleged fact that appellant did not file with the clerk her notice requesting a transcript, as required by section 953a of the Code of Civil Procedure, within ten days after notice of decision denying her motion for a new trial. It does not appear by the record that any notice of the denial of the motion for a new trial was served on appellant, but the record of the court's minutes does show that counsel for appellant were present in court on the hearing at which the motion was denied, and it is argued that this fact presumes actual notice at that time, under the authority of Estate of Keating, 158 Cal. 109, 110 Pac. 109. The date of this hearing was March 27, 1916. The notice of demand for transcript was filed April 7, 1916—on the eleventh day after the date of ruling on the motion.

It will be noticed that in Estate of Keating, supra, the fact that appellant had actual notice of the order appealed from upon a given date was conclusively evidenced by his having filed his notice of appeal from such order on that date, thus showing actual notice by an overt act of his own. The courts do not give such effect to the mere presence of a party in court on a hearing at which the action in question may be taken, unless by some affirmative proceeding in the matter he indicates that he has taken cognizance of the ruling of the court. Brown v. Superior Court, 175 Cal. 141, 165 Pac. 429, is directly in point on this question. There is nothing, therefore, in the record to show that the request for transcript was not in time.

[2-4] Respondents also raise the objection that the court was without jurisdiction to set aside the default judgment against appellant and to reopen the case, by reason of the fact that the motion was not made within one year, as provided by section 473 of the Code of Civil Procedure. No appeal or other direct action was taken upon this order vacating the default and judgment. This objection constitutes a collateral attack upon the action of the court in vacating this default and judgment. Even conceding that the order would be void on the face of the record, if it affirmatively appeared therefrom that no motion was made to open the default until the year had expired, in this case it does not so appear, and every presumption is in favor of the jurisdiction. The notice of intention was filed on February 10, 1914, and recited that "defendant will, on February 21, 1914, move the court to vacate the judgment." This date was within the year by several days. There is no further entry regarding the matter until Mach 14, 1914, when the minutes of the court recite: "Mo-

tion to set aside default and judgment made in open court, argued by counsel and motion granted." Non constat but that on the date—February 21st—for which the hearing was noticed the moving party appeared, made her motion and secured a continuance of the hearing to March 14th. If the motion was noticed and presented to the court within the year and continued for hearing to a later date, the court did not lose jurisdiction to act, and the presumption of regularity in the court's proceedings is not overcome by the mere fact that the minutes recite that a motion to set aside the default was made on the last-named date. It not infrequently happens that such motions are repeated from time to time, where the hearings are postponed.

[5] On the merits of the appeal the only question to be considered is whether the pleadings and evidence sustain the judgment in favor of cross-defendant Grace B. Talbot. The court found and decided that the plaintiff, Schaefer, never was the owner or in possession of the land in question. The plaintiff is not appealing, so that the only parties concerned are the appellant and cross-complainant, Anna M. Johnson, who claims as the record owner of the premises, and the cross-defendant Grace B. Talbot, who, as indicated by the evidence given on the trial in her behalf, claims under color of title by mesne conveyances from the plaintiff, Schaefer, and by virtue of actual possession of the land. She is not appealing, and is therefore bound by the decision of the court that Schaefer never had any title. The issue, then, resolves itself into one between the alleged record title of appellant and the possessory title of respondent Grace B. Talbot.

[6, 7] As hereinbefore stated, there is no record before us of any appearance or pleading on behalf of respondent Grace B. Talbot, and she is therefore without standing in this case to obtain affirmative relief. It is true that she prints, as an appendix to her brief on this appeal, what purports to be a copy of an answer filed to appellant's cross-complaint, in which is alleged ownership and possession of this land, but this nowhere appears in the authenticated transcript. There has been no suggestion for diminution of the record. Without some pleading in her behalf, the court was without jurisdiction to give a judgment establishing her title to this land. Wilson v. White, 84 Cal. 239, 24 Pac. 114; Kimball v. Richardson-Kimball Co., 111 Cal. 386, 397, 43 Pac. 1111. If, however, we were permitted to treat this document, printed in respondent's brief, as part of the record, we do not think this respondent was entitled to judgment in her favor.

The record discloses that appellant Anna M. Johnson was the record owner of this land up to July 3, 1900, at which time the property was sold and afterwards deeded to the state of California under a sale for delinquent taxes. The period of five years had elapsed without a redemption, but without a valid sale and conveyance by the state. There has been an attempt by the state to convey to the plaintiff, Schaefer, and it was by virtue of this deed that he brought this action; and, under subsequent mesne conveyances, pending the suit, respondent Grace B. Talbot claims through the same deed. But the court found that the state had not conveyed any title under this deed, and this finding, as has been pointed out, is conclusive against this respondent. It therefore follows—assuming the tax sale and conveyance to the state to be valid—that respondent Grace B. Talbot's paper title fails, and she has only her naked possession of the land to oppose against appellant's claim of title.

[8, 9] The court finds that appellant was the owner of this land up to July 3, 1900, the date of the tax sale; and, unless she was divested of title under this tax sale she is still the owner. In support of her contention that she has not lost her title, appellant interposes many objections to the validity of the assessment, sale, certificate, and deed upon which the finding that she was divested of her title rests. The most obviously tenable of these, in our judgment, is that neither the certificate nor the deed contains a statement of the amount of the assessment under which the sale was made. This was required as to the certificate, by the provisions of section 3776 of the Political Code as it read at the time of this transaction, and was a material requirement in the tax deed, under section 3785 of the Political Code. The only attempt at a recital of the amount of the assessment is the statement which appears in both the certificate and deed as follows:

"That said property was assessed according to law in the year A. D. 1899 for the year 1899–1900 at dollars to Adam Hoffman, and the same was liable and subject to taxation; that said taxes were levied upon said property, and its value was equalized as required by law. That the amount of the tax so levied on said property was the sum of dollars as follows: For county purposes the sum of $....., for state purposes the sum of $.....; and the penalties, costs and charges which have since accrued thereon amount to $8.50."

There could be no valid basis for penalties, costs, and charges without an adequate amount assessed. We think the certificate and deed to the state fatally defective. Griggs v. Hartzoke, 13 Cal. App. 429, 109 Pac. 1104; Henderson v. De Turk, 164 Cal. 296, 128 Pac. 747; Grimm v. O'Connell, 54 Cal. 522.

This leaves the record title in appellant. The findings of the court against the title

of appellant and in favor of the respondent Grace B. Talbot are not supported by the evidence.

It is not necessary to consider the other points raised by appellant's brief.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

44 Cal. App. 523

DARRELL v. MUTUAL BEN. LIFE INS. CO. (Civ. 2885.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1919.)

1. TRIAL ⟸253(8) — INSTRUCTION ON PRESUMPTION OF DEATH IGNORING DEFENDANT'S EVIDENCE IMPROPER.

In an action on a life policy, where insured was absent for seven years, an instruction in effect charging that plaintiff was the beneficiary and that the premiums were paid and the policy in force, and that insured disappeared and has not been heard from for seven years, and at the end of that time he is presumed to be dead, and you will therefore find a verdict for plaintiff, was erroneous in that it withdrew from the jury the consideration of defendant's evidence and raised the disputable presumption of death created by statute (Code Civ. Proc. § 1963, subd. 26) to the plane of a conclusive presumption.

2. APPEAL AND ERROR ⟸1170(9)—INSTRUCTION AS TO PRESUMPTION OF DEATH IGNORING DEFENDANT'S EVIDENCE PREJUDICIAL ERROR.

An instruction in an action on a life policy, in effect charging the jury that insured was presumed to be dead after seven years' absence, and that the beneficiary was therefore entitled to a verdict, was erroneous and prejudicial and called for a reversal, although other proper instructions were given, notwithstanding Const. art. 6, § 4½.

3. TRIAL ⟸295(1) — IF INSTRUCTIONS CONSTRUED TOGETHER ARE CORRECT, THEY ARE SUFFICIENT.

If all the instructions taken together, and not being inconsistent with each other or confusing, give to the jury a fair and just notion of the law upon the point to which they are addressed, they are sufficient.

4. DEATH ⟸2(3) — PRESUMPTION FROM ABSENCE MAY BE OVERCOME WITHOUT PROVING PERSON IS LIVING.

To overcome the disputable presumption of death arising from seven years' absence of insured, under Code Civ. Proc. § 1963, subd. 26, it is proper to show the circumstances under which he left, his reasons for leaving, if any, or concealing his whereabouts, the state of his health, his age, and any other relevant facts which might account for his absence upon some theory other than death; but it is not necessary to prove he is alive, and it is only necessary to produce evidence of such weight as will, in the minds of the jury, overcome the force of the presumption.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Margaret Darrell against the Mutual Benefit Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Shelton & Levy, of San Francisco, for appellant.

McClellan & McClellan, of San Francisco (Edward Lande, of San Francisco, of counsel), for respondent.

BARDIN, Judge pro tem. The appeal is taken by the defendant from the judgment upon the verdict of a jury, in an action upon a life insurance policy, in which the plaintiff is named as the beneficiary. The vital question involved in the action is whether or not Loys Darrell, husband of the plaintiff, and the person whose life was insured, is dead or alive.

At the trial the plaintiff produced evidence showing that Loys Darrell and the plaintiff intermarried in the city of San Francisco in February, 1908, and that they continued to reside together in congenial relationship as husband and wife until the 14th day of August, 1909, upon which date the husband departed from his home in San Francisco, with the avowed purpose of going to the city of Sacramento, to be absent a day or two, whither he was going to make arrangement to exhibit some horses at a fair. At the time of his departure he had about $1,000 in cash in his possession. The testimony further shows that from the time of this departure his wife has never heard from him or of his whereabouts or whether or not he was living or dead, although a fair degree of diligence was exercised by her and some of the friends of the family, following his disappearance, to ascertain whether or not he had met death or what in fact had become of him. The plaintiff relies upon the presumption created by subdivision 26 of section 1963 of the Code of Civil Procedure as proof of her husband's death, which provides that a disputable presumption of death arises when a person is not heard from in seven years.

It is defendant's theory that the disappearance of Loys Darrell and his failure to communicate with his wife or friends at his home is to be accounted for, not by reason of his death, but because he deliberately absented himself from his home upon the occasion referred to, and has since intentionally refrained from communicating with his wife or friends in San Francisco, and that the probable motives impelling him so to do arose by reason of certain financial difficulties which overtook him which might have led to proceedings of a criminal nature, as well, also, from the conclusion to yield to his

desire to travel to distant parts of the world. Evidence tending to support this theory was adduced at the trial which, if believed by the jury, was of such substantial weight as would have supported a verdict in favor of the defendant.

Among the instructions given by the court at the request of counsel for the plaintiff was the following:

"I charge you that if you find that the plaintiff, Maggie Robinson Darrell, is the beneficiary in the policy herein sued on; that the premiums were paid from June 8, 1909, until September 8, 1916; and that said policy was in full force and effect from the said 8th day of June, 1909, to and including the 8th day of September, 1916; that on the 14th day of August, 1909, the insured, Loys Darrell, disappeared from the city and county of San Francisco, state of California, and for the period of seven years from that date had not been heard from; that at the expiration of seven years from said date of August 14, 1909, the said Loys Darrell is presumed to be dead—then the plaintiff is entitled to recover on said policy, and you will find for the plaintiff."

The assault upon this instruction, standing alone, has been undefended. Thus considered, the respondent has tacitly assented to the claims of the appellant that it constituted, under the circumstances of the case, an erroneous declaration of law and provided for, in effect, a directed verdict not warranted by the state of the case. But the respondent endeavors to overcome the vice of the instruction by the argument that it should not be read apart from the rest of the charge of the court, but should be deemed modified by other instructions which correctly state the law, and that, if so considered, the conclusion must follow that the jury was not misdirected as to the law of the case.

[1, 2] This particular instruction is an unequivocal direction to the jury to return a verdict for the plaintiff, provided the jury find the facts to exist as stated within its terms, and which facts the defendant seems quite willing to grant could and did exist and without doing violence to defendant's theory of the case. As stated in appellant's brief:

"The court has in effect charged the jury thus: Plaintiff is the beneficiary; the premiums were paid and the policy was in force. Darrell disappeared and has not been heard from in seven years. At the end of that time he is presumed to be dead. You will therefore find a verdict for plaintiff."

It will thus be seen that the court, by this instruction, withdrew from the jury the consideration of defendant's evidence, and raised the disputable presumption of death created by the statute (Code Civ. Proc. 1963, subd. 26) to the plane of a conclusive presumption. This manifestly was error. Section 1961, Code Civ. Proc.; Mutual Benefit Life Ins. Co. v. Martin, 108 Ky. 11, 55 S. W. 694; Fuller v. New York Life Ins. Co., 199 Fed. 897, 118 C. C. A. 227; New York Life Ins. Co. v. Holck, 59 Colo. 416, 151 Pac. 916; Magness v. Modern Woodmen of America, 146 Iowa, 1, 123 N. W. 169; Winter v. Supreme Lodge, K. P. of World, 96 Mo. App. 1, 69 S. W. 662; Bonslett v. New York Life Ins. Co. (Mo.) 190 S. W. 870; People v. Wong Sang Lung, 3 Cal. App. 221, 84 Pac. 843. And it is error of such substantial weight, affecting the vital issue of the case, as to be beyond the application of section 4½ of article 6 of the state constitution.

[3] It is true, as stated in respondent's brief, that the established rule is (quoting from Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323):

"If all the instructions taken together, and not being inconsistent with each other or confusing, give to the jury a fair and just notion of the law upon the point to which they are addressed, it is sufficient."

But the instruction complained of is in utter conflict with the other instructions referred to. The jury did not receive "a fair and just notion of the law" to guide them in the determination of the vital issue of the case. The effect of the instruction, if followed by the jury, was to withdraw from their consideration the only seriously disputed question in the case. Whether or not they followed the instruction complained of it is impossible to say. In Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 Pac. 700, it is said:

"It is true that other instructions were given at the request of defendant that stated the law in these respects as favorably to defendant as was warranted, if not more favorably. But the giving of these other instructions simply produced a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of plaintiff."

At the request of plaintiff the court also charged the jury that—

"The presumption of death after continued absence of over seven years consecutively must be overcome by proof that the person is living."

[4] The burden of proving the death of Darrell rested, throughout the case, with the plaintiff. Upon proof of the facts showing that he had not been heard from within seven years, the disputable presumption of death arose, and, assuming that the other essential elements of plaintiff's case were proven, a prima facie case was established in favor of the plaintiff. The burden of overcoming the effect of the presumption was then cast upon the defendant. Such presumption might have been overcome by offering direct proof that Darrell was alive. Or it was proper to produce evidence of a circumstantial nature tending to show that his absence and silence were to be account-

ed for, not because of death, but for some other reason, and in this connection it was proper to offer evidence, as was done, showing the circumstances under which the absent person left; his reasons, if any, for leaving or concealing his whereabouts; the state of his health, his age and any other relevant facts which might account for his absence upon some theory other than death. But it was not necessary that the defendant prove that the absent person was alive. It was only necessary to produce evidence of such weight as would, in the minds of the jury, overcome the force of the disputable presumption of death.

The judgment is reversed, and a new trial ordered.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 394

WALKER v. HASLETT et al. (Civ. 3013.)

(District Court of Appeal, Second District, Division 2, California. Nov. 21, 1919. Hearing Denied by Supreme Court Jan. 19, 1920.)

1. COVENANTS ⟸49—RESTRICTIONS ON USE OR MODE OF ENJOYMENT OF LAND CONVEYED VALID.

Restrictions on the use or mode of enjoyment of granted premises made by grantor in furtherance of a general plan of improvement, when reasonable and within the policy of the law, are valid and enforceable.

2. INJUNCTION ⟸62(1) — RESTRICTIONS ON USE OR MODE OF ENJOYMENT ENFORCEABLE WITHOUT SHOWING OF ACTUAL DAMAGE.

Covenants constituting restrictions on the use or mode of enjoyment, made in furtherance of general plan of improvement, when clearly expressed, will be strictly enforced, and equity will enjoin violation thereof without any showing of actual damage or substantial injury.

3. COVENANTS ⟸49—RESTRICTIONS AGAINST USE OR MODE OF ENJOYMENT NOT FAVORED.

Restrictions against particular uses or modes of enjoying property held in fee are not favored, and doubts will, in general, be resolved against them, but, where the intention of the parties is clearly manifested, they will be enforced in equity.

4. COVENANTS ⟸49—TEST AS TO INTENTION OF PARTIES STATED.

The intention of the parties to a deed containing covenants restricting the use or mode of enjoyment of the premises must be determined from the language of the covenant itself, considered in the light of the entire context of the instrument and the circumstances existing at the time when the covenant is made.

5. COVENANTS ⟸51(2)—DUPLEX NOT A "RESIDENCE" OR A "PRIVATE RESIDENCE."

Covenant providing that "no building or structure whatever, other than a first-class private residence," should be erected, placed, or permitted on premises, *held* to prohibit the construction and use on the premises of a duplex to be used by two families; such building not being "a residence," and not being a "private residence."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Private Residence; Residence.]

6. INJUNCTION ⟸189 — INJUNCTION TO RESTRAIN USE OF BUILDING BY TWO FAMILIES WILL BE GRANTED NOTWITHSTANDING USE AS ONE FAMILY RESIDENCE AT TIME OF TRIAL.

Where a covenant required the construction of a first-class private residence, defendant, who in violation thereof had constructed a duplex, which building, as far as exterior was concerned, was similar to a one-family private residence, will be enjoined from using such building for more than one family, notwithstanding that the building is occupied as a one family residence at time of trial.

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Evangeline D. Walker against Mary M. Haslett and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action to enjoin the violation of a certain covenant or restriction in a deed to defendant Mary M. Haslett, whereby she covenanted that, until January 1, 1925, the premises granted to her shall be used for residence purposes only, that "no building or structure whatever, other than *a* first-class *private residence* of at least two full stories in height, with customary outbuildings, including a private garage, shall be erected, placed, or permitted on said premises or any part thereof," and that "any such residence shall cost and be fairly worth not less than $5,000." The grantee constructed on the premises what is commonly known as a "double" house, or a "duplex" or two-family residence, that can conveniently be used by two families living entirely separate and apart from each other. The principal question is: Does the building violate the covenant not to erect, place, or permit on the premises any building other than a first-class "private residence"?

From a judgment declaring that defendants have not violated the restriction, and adjudging that plaintiff is not entitled to any relief whatever, this appeal is taken.

The defendant Haslett is the only interested defendant, and for that reason, as well as for brevity, we shall refer to her as the "defendant."

As we think the findings alone suffice to show that the judgment should be reversed and the lower court directed to enter a judgment in accordance wth the views hereinafter set forth, we shall briefly summarize the facts as found by the court. Plaintiff and defendant are the owners, respectively, of lots in a tract of land in the city of Los Angeles that originally was owned by the Title Insurance & Trust Company. The tract was subdivided by the trust company into lots. Pursuant to a general plan of improvement and development for the benefit of all the lots in the tract, deeds to the lots were executed containing uniform restrictive covenants, one of which was the covenant here in question, namely, the covenant that no building other than a first-class "private residence" shall be erected, placed, or maintained on any lot. All the lots in the tract have been sold by the original owner. In each deed the grantee expressly covenants that the restrictions and covenants therein shall operate as covenants running with the land and that the original grantor, or any of its successors or assignees or any owner of any lot in the tract, may enjoin or abate, or remedy, by proper proceedings, the breach of any covenant. Prior to the construction of the building on defendant's lot she made application to the city for a building permit wherein she referred to the structure that she contemplated building as follows: "A double residence. Number of families: Two." A permit, describing the building as it was thus described in the application, was issued. Thereupon defendant began the construction of the building according to a written contract wherein the structure is described as: "A double residence. Number of families: Two." About four weeks after work was commenced plaintiff for the first time learned of the character of the structure that defendant was proposing to erect. Thereupon, "acting with due diligence," as the lower court finds, plaintiff duly notified defendant that the building, as proposed to be constructed would be a violation of the restrictions and conditions in defendant's deed, and that, if defendant proceeded with the erection of the building, she would do so at her peril. Shortly thereafter, and notwithstanding such warning, defendant notified plaintiff that she would proceed with the construction of the building in accordance with her original plans. When summons was served on defendant, the framework of the first floor had been erected, but no further work had been done. During the pendency of the action, but prior to the trial, and notwithstanding the warning which she had received before the action was commenced, as well as that afforded by the commencement of the action itself, defendant completed the building in accordance with the original design. The building, so the lower court finds, "is so designed and constructed that it can be conveniently used by two families, and if put to such use the families could, by reason of the construction of such building, live entirely separate and apart from each other." At no time prior to the trial of the action had the building been used by two families. The court found that "one of the two separate and distinct parts thereof had been used by a single family, and the other and distinct part thereof had not been occupied." The court found—doubtless because up to then only one of the two separate and distinct parts of the building had been occupied—that the building, "as now used," constitutes "a strictly first-class private residence." We are of the opinion however, that if the building, as constructed, was not a "private residence," plaintiff is entitled to relief, notwithstanding it may be now used and occupied by but one family.

[1] Restrictions on the use or mode of enjoyment of granted premises, made by the grantor in furtherance of a general plan of improvement, when reasonable and within the policy of the law, are valid and enforceable. 6 Am. & Eng. Ency. of Law (2d Ed.) 513; Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190.

[2] When clearly expressed, covenants of this description will be strictly enforced, and a court of equity will decree an injunction, and this without any showing of actual damage or substantial injury. The reason why no actual damage or substantial injury need be shown is that the owner of the land, when selling it to another, may insist on just such covenants as he pleases touching its use or mode of enjoyment. He has the right to define the injury for himself, and also for his grantees of the remaining lots in his tract, where he is subdividing a whole tract into lots and selling them pursuant to a general plan of improvement or development, and the purchaser of any lot contracting with him must abide by his definition of what shall be deemed to be an injury to the balance of the land. He, or any subsequent owner of any part of the remaining land for the benefit of which the restrictive covenant is made, may enforce the covenant when it is broken, and is not to be defeated by the opinion of any number of persons that the breach occasions no substantial injury. Hartman v. Wells, 257 Ill. 167, 100 N. E. 500, Ann. Cas. 1914A, p. 901, and note on page 904 et seq.; Kenwood L. Co. v. Hancock Inv. Co., 169 Mo. App. 715, 155 S. W. 861.

[3, 4] Restrictions against particular uses or modes of enjoying property held in fee, it is true, are not favored, and doubts will, in general, be resolved against them. But where the intention of the parties is clearly manifested in the creation of the restrictions, they will be enforced in a court of equity. The intention of the parties must be determined

from the language of the covenant itself, considered in the light of the entire context of the instrument and the circumstances existing at the time when the covenant is made.

[5] The terms of the covenant relied on by the plaintiff here are clear and unmistakable. They forbid the erection or maintenance of a building such as is here complained of, constructed for the use of two families living separately and apart from each other—a building usually described in the cases as a "double house" or a "duplex building." The covenant is that no building or structure whatever other than "*a* first-class private residence" shall be erected or permitted on the premises; the restriction is to "a" private residence—in the singular, not the plural. There are authorities which hold that such a covenant forbids the erection on the premises of more than one dwelling house or residence, and therefore prohibits the construction of a double house, although it is all under one roof with a single entrance. Schadt v. Brill, 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726; Skillman v. Smatheurst, 57 N. J. Eq. 1, 40 Atl. 855.

It appears from the findings that the building is so constructed that it has "two separate and distinct parts," in each of which a family could live, and further that the two families could "live entirely separate and apart from each other." It is not clear from the findings whether the division of the building into two separate and distinct parts is horizontal or vertical; that is, it does not appear from the findings whether the "two separate and distinct parts" are arranged in flats or whether the structure is a double house divided vertically by a partition wall separating the two parts from each other and extending from the ground to the roof. However, regardless of any such uncertainty, if, as the lower court finds, the structure is divided into "two separate and distinct parts," in each of which a family can live entirely separate and apart from the family in the other part, then, whether the structure be divided horizontally or vertically, there are two residences on the premises, even though both be under one roof. Such a structure is as much two buildings for residence purposes as though separate roofs existed, and, if sanctioned, would enable the owner of the lot to violate indirectly the covenant in the deed that any residence erected on the lot "shall cost and be fairly worth not less than $5,000." A building planned and designed for the residence or place of abode of two families cannot properly be described as one residence. Gillis v. Bailey, 21 N. H. 149; Bagnall v. Young, 151 Mich. 69, 114 N. W. 674; Harris v. Roraback, 137 Mich. 293, 100 N. W. 391, 109 Am. St. Rep. 681; Koch v. Gorruflo, 77 N. J. Eq. 172, 75 Atl. 767, 140 Am. St. Rep. 552; Skillman v. Smatheurst, supra; Brigham v. Murlock Co., 74 N. J. Eq. 287, 70 Atl. 185; Sanders v. Dixon, 114 Mo. App. 229, 89 S. W. 577; Schadt v. Brill, supra, and note thereto in 45 L. R. A. (N. S.) 729, 735, 736; Kingston v. Busch, 176 Mich. 566, 142 N. W. 754; Misch v. Lehman, 178 Mich. 225, 144 N. W. 556; Levy v. Schreyer, 27 App. Div. 282, 50 N. Y. Supp. 584; note to Sayles v. Hall, Ann. Cas. 1912D, p. 478; Ilford Park Estates v. Jacobs, 1903, 2 Ch. 522, 1 B. R. C. 988, and note on page 993 et seq.; Rogers v. Hosegood, 1900, 2 Ch. 388.

It is not necessary, however, to place our decision upon a construction of the covenant in question that forbids the erection on the premises of more than a single residence. For the purposes of our decision we shall assume that the covenant does not restrict the grantee of the lot to the erection thereon of but one dwelling. But, even so, defendant has violated the covenant, for the building erected by her is not a "private" residence or a "private" dwelling, and the covenant clearly forbids the erection of any building other than a "private residence."

A house designed for the accommodation of more than one family cannot be deemed to be a "private" residence or a "private" dwelling. All the authorities agree that a "private" residence or a "private" dwelling is a building intended and designed for the convenient accommodation of but one family. Koch v. Gorruflo, supra; Skillman v. Smatheurst, supra; Levy v. Schreyer, supra, affirmed, so far as this question is concerned, by the Court of Appeals in 177 N. Y. 293, 69 N. E. 598; note to Schadt v. Brill, 45 L. R. A. (N. S.) 732.

We have examined the several cases cited and relied on by counsel for defendant, and find that in each of them the decision was governed by certain controlling facts which clearly distinguish it from the case at bar. Indeed, some are direct authority for the views expressed by us, notably the case of Hunt v. Held, 90 Ohio St. 280, 107 N. E. 765, L. R. A. 1915D, 543, Ann. Cas. 1916C, 1051; where the court said that, if by the covenant there in question "it had been intended that the building was to be for the use of one family only, words indicating such an intention would have been used, as is frequently done, such as * * * 'a private residence.'"

[6] The trial court did not find that the building erected by defendant was, as constructed, "a first-class private residence"; nor could it well have done so under the particular facts specifically found by it as to the structural character of the building. Instead, it found that the building, "as now used and occupied"—it being then used and occupied by one family—constitutes a strictly first-class private residence, and denied plaintiff any relief whatever. Even though the structure may never have been used by more than the one family, it does not, therefore, follow

that plaintiff should be turned out of court remediless. She is entitled to an injunction enjoining defendant, during the period covered by the covenant, from using the building as a double or duplex house, or for any purpose other than that of a private residence. Kenwood L. Co. v. Hancock Inv. Co., supra; Cornish v. Weissman, 56 N. J. Eq. 610, 35 Atl. 408. And that is the extent of the relief to which she is entitled. Levy v. Schreyer, supra, decision of Court of Appeals, 177 N. Y. 293, 69 N. E. 598; Lignot v. Jaekle, 72 N. J. Eq. 233, 65 Atl. 221. Defendant's building answers the requirements of the covenant so far as outward appearances are concerned. It does not offend in that regard. It violates the covenant only in so far as the interior arrangement is concerned. As was said by the New York Court of Appeals in Levy v. Schreyer, supra, the departure of the interior arrangement from the strict letter of the covenant "may be remedied by the enjoining of its use as [a double house], or of using it for any other purpose than that of a private residence or dwelling, without ordering a destruction of the entire building."

The decree should provide that it shall be without prejudice to the right of defendant to move, at any time hereafter, for a modification or dissolution of the injunction. This is because possible future changes in the condition of the neighborhood may entitle defendant to a modification or even a dissolution.

The judgment is reversed, and the cause remanded, with directions to the court below to enter a judgment, on the findings, in accordance with the views expressed in this opinion.

We concur: SLOANE, J.; THOMAS, J.

(44 Cal. App. 322)

RANDOLPH et al. v. STANISLAUS COUNTY et al. (Civ. 2036.)

(District Court of Appeal, Third District, California. Nov. 18, 1919.)

1. INJUNCTION ⊜85(1)—OFFICERS NOT TO BE RESTRAINED FROM EXECUTING PUBLIC STATUTE.

In view of Civ. Code, § 3423, county board of supervisors cannot be restrained from calling an election of directors of a public utility district, the creation of which has been already declared by them and by the secretary of state, being required to do so by Act May 27, 1915 (St. 1915, p. 866) § 16, authorizing the creation of public utility districts.

2. WATERS AND WATER COURSES ⊜226—IRRIGATION DISTRICT NOT A "MUNICIPAL CORPORATION" WITHIN STATUTE AS TO DIVISION.

An irrigation district is not a "municipal corporation," and hence a public utility district, created under act of May 27, 1915 (St. 1915, p. 866), which included only a part of an irrigation district, did not divide a "municipal corporation" as prohibited by section 1 of such act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

3. WATERS AND WATER COURSES ⊜226—PETITION DESCRIBING BOUNDARIES OF PUBLIC UTILITY DISTRICT SUFFICIENT.

Petition and ordinances, describing a public utility district as being "composed of all the territory within the Modesto irrigation district and the Turlock irrigation district, which is within the county of Stanislaus," sufficiently set forth the "boundaries" required by the act of May 27, 1915 (St. 1915, p. 866), relating to the creation of public utility districts, boundaries of the irrigation districts being required by the act under which they were formed to be definitely described by metes and bounds; it being sufficient to describe or set out a boundary in such a manner as will enable a competent person to locate the same, and to this end resort may be had to maps, plats, documents, records, adjacent lands and the like, and a defective description may even be supplemented by oral testimony.

4. EVIDENCE ⊜10(2)—MATTER OF COMMON KNOWLEDGE THAT MUNICIPAL CORPORATIONS ARE NOT OFTEN CONTIGUOUS.

It is a matter of common knowledge that in the state of California municipal corporations are not often contiguous, but are separated by intervening territory.

5. WATERS AND WATER COURSES ⊜226—PUBLIC UTILITY DISTRICT MAY INCLUDE TERRITORY NOT CONTIGUOUS.

A public utility district, created under Act May 27, 1915 (St. 1915, p. 866), need not be composed of contiguous units of land or territory.

Appeal from Superior Court, Stanislaus County; W. M. Conley, Judge.

Action by John Randolph and another against the County of Stanislaus and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, and L. J. Maddux, of Modesto, for appellants.

Brown & Hindman and J. M. Cross, both of Modesto, for respondents.

ELLISON, Presiding Judge pro tem. The plaintiffs, as taxpayers, bring this action to obtain an injunction restraining the board of supervisors of Stanislaus county from calling an election to elect directors of a proposed public utility district, known as the Stanislaus public utility district, and from expending the moneys of said county for holding said election.

The court, after trial, refused to issue an injunction, and entered judgment for the de-

fendants for their costs. The plaintiffs appeal.

The said public utility district is described as being "composed of all the territory within the Modesto irrigation district and the Turlock irrigation district which is within the county of Stanislaus, state of California, including all the municipalities therein, namely, the city of Modesto and the city of Turlock."

From the record it appears that after proper petitions had been filed with the board of supervisors and with the clerk of each of said cities, elections had been held, and the returns certified to the board of supervisors, and thereafter said board, after reciting the filing of said petitions and the elections held thereon, entered its order, as follows:

"The board further finds from said examination of said certificates that at said election, so held as aforesaid, a majority of all of the votes cast in each of said municipalities and in said unincorporated territory was in favor of said proposition, and that a majority of the electors voting at said election in each of said municipalities and in said unincorporated territory voted in favor of the incorporation of said Public Utility District. Now, therefore, it is ordered, by this board that at said special elections, so held as aforesaid in each municipality aforesaid, and in said unincorporated territory, in which said elections were held [the election?] was in favor of the incorporation of said public utility district. It is further ordered that a public utility district known as the Stanislaus public utility district and comprising all that portion of the Modesto irrigation district and the Turlock irrigation district, which is within the county of Stanislaus, and state of California, jointly with the municipalities therein contained, namely, the city of Modesto and the city of Turlock, is formed accordingly under the provisions of an act of the Legislature of the state of California, providing for the incorporation of public utility districts by municipalities and unincorporated territory, approved May 27, 1915, and in effect August 8, 1915."

The complaint alleges that thereafter, on the 13th day of December, 1916, the secretary of state received duplicate rolls of the certificates of the result of said elections, and he issued a certificate, reciting that said duplicate rolls were filed in his office, and that a public utility district, naming it, as the Stanislaus public utility district, was incorporated as a public utility district under the provisions of the act of the Legislature of the state of California, approved May 27, 1915 (St. 1915, p. 866).

It is then alleged in the complaint that the defendants threaten to, and unless enjoined and restrained by the court will, call an election within the territory described in said petition for the purpose of electing directors of said proposed public utility district, and to expend the money of said county for the holding of said election, and it is such threatened acts of the board of supervisors that this suit was brought to have enjoined.

The appellants claim the said district has been illegally formed, and no election of directors should be had, because: (1) Said district divides a municipal corporation; (2) that the boundaries of the said proposed district are not set forth in the petition, as required by the act; (3) that said district is comprised of two noncontiguous tracts of land.

Before considering these several alleged defects in the organization of the district, it is well to call attention to the position taken by the attorney for the respondent, in which he asserts:

The relief sought herein is forbidden by section 3423 of the Civil Code, wherein it is provided an injunction cannot be granted: "4. To prevent the execution of a public statute, by officers of the law, for the public benefit. * * * 6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession."

If this position is well taken, it would seem to be decisive of the case, and we direct our attention to it first.

Section 16 of the act of May 27, 1915, provides that a public utility district organized under the provisions of the act shall proceed within 90 days after its formation to the election of a board of directors, consisting of as many members as there are territorial units in the district, and as many additional members, not less than three or more than four, that may be required to constitute a board composed of an odd number of directors. The said section also provides that said election shall be called by the board of supervisors of the county in which the district, or the greater part thereof is situated. It is this election that the board of supervisors are threatening to call, and which is asked to be enjoined.

[1] That the act providing for public utility districts is a public statute cannot be gainsaid. That the defendants, the board of supervisors, are officers of the law is equally certain, and the act which they are threatening to perform is one especially enjoined upon them by the statute under review. We think respondents' position upon this point is correct; that this is a proceeding to prevent the officers of the law, to wit, the board of supervisors of Stanislaus county, from executing a public statute passed for the public benefit.

The case of People v. Board of Supervisors of Shasta County, reported in 75 Cal. 179, 16 Pac. 776, is very much in point. The statement of the case is as follows:

"In this action an injunction is prayed for enjoining the * * * board of supervisors from declaring the result of an election, and from giving notice thereof, under section 3981 of the Political Code, * * * upon the question of a removal of the county seat of Shasta county. It is alleged that the election was illegally ordered by the board when they had no jurisdic-

tion so to do, and therefore that they should be enjoined from making known and publishing the result of such election. * * *

"The question which meets us upon the threshold is, did or did not the court below have any right to grant an injunction to prevent the board of supervisors from announcing and publishing the result of an election?"

After quoting the statute outlining the duties of boards of supervisors in such matters, it is said:

"In this case we do not think that an injunction would lie."

Quoting section 3423 of the Civil Code, the opinion proceeds:

"The board of supervisors are simply endeavoring to perform a duty enjoined on them by law to announce the result of an election which in good faith they believe to have been duly ordered and legally held, and we think it would be a most dangerous interference by the courts to prevent them from performing a legal duty, and in effect to determine the result of a contested election, in this action for an injunction."

So, in the present case, the board of supervisors of Stanislaus county are simply threatening to perform a duty enjoined upon them by law, namely, to call an election of directors of a public utility district, the creation of which has already been declared by the board of supervisors and by the secretary of state, and we do not think injunction will lie.

While this point seems to be decisive of the case, and, perhaps, would render unnecessary a discussion of the points raised by appellant, we shall refer to them briefly.

[2] I. Does the proposed public utility district divide a municipal corporation? Section 1 of the act provides:

"Such a district may include municipalities only, or both incorporated or unincorporated territory, but no municipal corporation shall be divided in the formation of such a district."

A considerable portion of the Turlock Irrigation District lies in Merced county. The proposed irrigation district includes only so much of the Turlock Irrigation District as lies in Stanislaus county. And, basing his argument upon the proposition that the Turlock Irrigation District is a municipal corporation, counsel argues that the district is illegal because only a part of this irrigation district is included in the exterior boundaries of the proposed public utility district.

We think it does not require very much argument to demonstrate that an irrigation district formed under the laws of the state of California is not a municipal corporation.

"A municipal corporation in its strict and proper sense is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof." Dillon on Municipal Corporations (5th Ed.) § 31.

Our Supreme Court, in Re Wener, 129 Cal. at page 572, 62 Pac. at page 99, had occasion to discuss the question of whether a sanitary district formed under the laws of the state was or was not a municipal corporation, and used this language, which is as applicable to an irrigation district as it was in that case to a sanitary district:

"A sanitary district, no more than an irrigation district, or a reclamation district, or a drainage district, possesses police powers properly belonging to cities and municipal bodies exercising local governmental functions. Such districts are created for the purpose generally of some special local improvement, and should exercise only such powers as may be conferred upon them by the Legislature in the line of the object of their creation. Although in the nature of public corporations, they are not municipal corporations in the proper sense of that term. All municipal corporations are public corporations, but the converse does not follow that all public corporations are municipal. Railroad corporations are deemed quasi public corporations, but they are not deemed quasi municipal corporations. In some of the cases expressions may doubtless be found which would seem to indicate that public corporations and municipal corporations are synonymous, but it is nevertheless inaccurate to designate a drainage district or a sanitary district, although public corporations, as municipalities. Webster defines 'municipal' as pertaining to a city or corporation having the right of administering local government—as municipal rights, municipal officers; and 'municipality' is defined as a municipal district, a borough, a city, town, or village. The Century Dictionary defines 'municipal' as pertaining to local self-government or corporate government of a city or town; and 'municipality' as a town or city possessed of corporate privileges of local self-government; a community under municipal jurisdiction. Bouvier's Law Dictionary says 'municipal' strictly applies only to what belongs to a city. Among the Romans cities were called municipia. In a general sense, we say that all law other than international is municipal law, but when we speak of corporations as municipal we mean cities or towns. These existed before the Constitution. They came down to us from former times, and they have always formed an important part of our system of government."

We hold that the Turlock Irrigation District is not a municipal corporation, and that the fact that all of it is not included within the proposed irrigation district does not affect the legality of its organization.

[3] II. We are of opinion that the boundaries of the proposed public utility district are set forth in the petitions and ordinances in all respects as required by the act. The description of the district is as follows:

"That said district shall comprise all the territory embraced within the boundaries of and comprising the Modesto irrigation district and the Turlock irrigation district, which is within the county of Stanislaus, and state of California, including the municipalities therein con-

tained, namely, the city of Modesto and the city of Turlock."

Section 7 of the act provides that after the election for the incorporation of such proposed public utility district, the sufficiency of the petition, in any respect, shall not be subject of judicial review, or be otherwise questioned.

Without considering whether this section does not preclude the plaintiffs at this time from raising any question as to the accuracy of the boundaries of the proposed district, we are clearly of the opinion that the district is described with certainty.

Section 5 of the act provides that if such proposed district includes only municipalities, it shall be sufficient to state the names thereof, without further setting forth the boundaries of the district. This makes it clear that the territory embraced within the cities of Modesto and Turlock are sufficiently described by stating the names of said cities. But counsel argues that, because a reference to the cities by name is sufficient in the statute to describe the territory therein, it follows that the description of the territory in any other incorporated territory is not sufficient unless described by metes and bounds. He says:

"The provision that municipalities may properly be designated by name only shows a legislative intent that territory not comprised within a municipality must be described in the other manner prescribed; that is, by setting forth of the boundaries thereof."

The act only requires that the boundaries of the proposed district shall be set forth. The boundaries of the irrigation districts are required by the act under which they were formed to be definitely described by metes and bounds. The entire area of one of those irrigation districts is included within the proposed district, and all of the other lying within the county of Stanislaus.

A boundary is described in Burrill's Law Dictionary as follows:

"A boundary is a line or mark indicating the limit or furtherest extent of a tract of land or territory; a separating or dividing line between countries, states, districts, or territories, or tracts of land."

Webster defines a boundary as "that which indicates or fixes the limit or extent, or marks a bound, as of territory; a bounding or separating line; a real or imaginary limit."

There is nothing in the statute we are reviewing that provides that the boundaries of the proposed public utility district shall be set forth by metes and bounds. If they are described by natural or other objects which make their limits definite and certain, the statute is fully complied with.

We think counsel for respondent has clearly stated the rule wherein he says:

"In all cases it is sufficient to describe or set out a boundary in such a manner as will enable a competent person to locate the same. To this end, resort may be had to maps, plats, documents, records, adjacent lands, and the like, and a defective description may even be supplemented by oral testimony"—citing Greenleaf on Evidence, § 301; Ferris v. Coover, 10 Cal. 589; Manson v. Koppikus, 11 Cal. 89; Miller v. Grunsky, 141 Cal. 447, 66 Pac. 858, 75 Pac. 48.

[4, 5] III. Counsel claims that the proposed district has not been legally formed because composed of two or more noncontiguous units, and the argument is that because the Modesto irrigation district and the Turlock irrigation district are separated by the Tuolumne river, and the overflow lands adjacent thereto, that the organization of the utility district is a nullity.

We find nowhere in the provisions of the act any provision that the territory comprising the utility district shall be contiguous. Section 1 of the act provides such a district may include municipalities only or both incorporated and unincorporated territory. And section 2 provides that two or more municipalities may join in the formation of a district. "Each municipality within the district shall for the purposes of this act be regarded and treated as a territorial unit of the district, and all unincorporated territories situated in one and the same county and included within the district shall be so regarded and treated as an entirety and as a territorial unit of the district. Each municipal territorial unit, and each unit of unincorporated territory having a population of at least five thousand, shall be entitled to one director," etc. Section 17.

It is a matter of common knowledge that in the state of California municipal corporations are not often contiguous, but are separated by intervening territory, and if the formation of districts composed of two or more municipal corporations is to be confined to municipal corporations that are adjacent to each other, then very few public utility districts composed entirely of municipal corporations can be formed in the state of California. The act does not so limit the scope of its proceedings. The act provides:

"Each municipality within the district shall for the purposes of this act be regarded and treated as a territorial unit of the district, and all unincorporated territory situated in one and the same county and included within the district shall be so regarded and treated as an entirety and as a territorial unit of the district."

In this case all the territory of the proposed district is in one county. The unincorporated territory in the same county that is included in the district comprises one unit of the district, and is to be regarded as an entirety. There is nothing in the act requiring that all the unincorporated territory in the county

shall be included in the district. Such parts of it may be included as is desirable, and it need not be all in one body. It may consist of different and separate pieces of unincorporated territory. There is nothing in the act forbidding this. But, when selected, all the unincorporated territory that is included in the district, and that lies in the same county, constitutes one unit of the proposed district. The fact that two described pieces of unincorporated territory are severed by a river, and that the river bed is not included in the district, is unimportant.

For all the reasons herein stated, we think that the position of the appellants is not sound, and that the judgment should be affirmed; and it is so ordered.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 375

LUCKENBACH v. LISSNER. (Civ. 2392.)

(District Court of Appeal, Second District, Division 1, California. Nov. 20, 1919. Hearing Denied by Supreme Court Jan. 19, 1920.)

1. LANDLORD AND TENANT ⟸199½—RENT NOT RECOVERABLE FOR PREMISES USED AT ELECTION, WHERE BILL WAS NOT PERSENTED WITHIN REQUIRED TIME.

If premises are rented to the representative of a political organization to promote certain candidacy, or to a representative of the candidate himself, and the bill for rent is not presented within ten days after the election, under Purity of Election Law, the landlord is not entitled to recover the rent.

2. LANDLORD AND TENANT ⟸233(2)—QUESTION OF WHETHER PREMISES HAVE BEEN RENTED TO REPRESENTATIVE OF CANDIDATE, OR CANDIDATE'S ORGANIZATION, JURY QUESTION.

In action for rent for premises used to promote campaign of certain candidate, where defense was that the bill for rent had not been presented within ten days after the election, under Purity of Election Law, the question of whether the premises had been rented to defendant as an individual, or to him as the representative of the candidate, or as representative of his campaign organization, *held* for the jury.

3. LANDLORD AND TENANT ⟸199½—LESSOR TO AN INDIVIDUAL NOT REQUIRED TO PRESENT BILL WITHIN STATED TIME AFTER ELECTION, THOUGH BUILDING IS USED BY POLITICAL COMMITTEE FOR POLITICAL PURPOSES.

Where premises are rented to tenant personally, and not as the representative of any candidate, or organization to promote candidate's campaign, the landlord is not required, under the Purity of Election Law, to present bill for rent within ten days after election, notwithstanding that tenant has permitted a political organization to use the building for campaign purposes, or has rented building for such use to such organization.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by John Luckenbach against M. Lissner. Judgment for defendant, and plaintiff appeals. Reversed.

Drew Pruitt, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

CONREY, P. J. The action is brought to recover rent at the agreed rate of $150 per month for the use of the first and second floors of the Luckenbach Building in the city of Los Angeles for a stated period of time, and also to recover as rent the reasonable value of the use of the fifth floor of said building, alleged to have been leased to the defendant for a shorter period of time. The case was tried before a jury. After all of the evidence had been received, the court refused to give to the jury certain instructions requested by the plaintiff, and, instead thereof, gave the following instruction, directing the jury to return a verdict for the defendant:

"Gentlemen of the jury, this is an action brought by the plaintiff to recover from the defendant a sum of money due for rent of the premises at 317 South Hill street in the city of Los Angeles. The evidence is without conflict that the purpose in renting these premises was for the use of an organization called the Johnson for Senator Club, which had its headquarters on the first and second floors and later the fifth floor of the building. Because of the fact there is no conflict in the evidence as to the purpose for which the building was rented, the only controversy being whether or not the building was rented to the defendant, Myer Lissner, or to the Johnson for Senator Club, the question as to whether or not the claim is one coming within the statutes of the state of California for the regulation of elections known as the Purity of Election Law, the question becomes a question of law. The Purity of Election Law contains a provision to the effect that any act or omission made an offense under the general laws shall be a violation of the primary election law. This provision is found in section 32, subdivision 3, of the Primary Election Law, and reads as follows:

" 'Any act or omission declared to be an offense by the general laws of this state concerning primaries and elections shall also in like case be an offense concerning primary elections as provided for by this act and shall be punished in the same manner and form as therein provided, and all the penalties and provisions of the law governing elections, except as herein otherwise provided, shall apply in equal force to primary elections as provided for by this act.'

"Under this provision of the general law, referred to in the Primary Law, and made a part of it, there is a provision with regard to the payment of claims incurred by, or on behalf of, a candidate at any election held in this state. This provision makes it a misdemeanor for a candidate, or committee, to pay any bill which

is not presented to the committee or candidate as the case may be within a certain length of time after the holding of the election. The question involved in this case is whether or not it is a claim within the meaning of the provision of the statute which reads that every claim must be presented to such candidate within ten days of the date of the election. In determining that question it will be observed that under the provision of section 3 [section 29, subd. 4] the expenditure for the renting of rooms necessary for the transaction of the business of the candidate, or committee, is a proper expense for the candidate to incur. It is provided in the primary election law that every candidate at an election must file a verified statement of his expenses. This provision is found in section 30 of act 1010, passed in 1913, on page 1379, the Statutes of 1913. Now the question involved here is whether or not this bill contracted for the purpose of furthering the election of Governor Johnson as United States Senator, comes within the meaning of the law requiring that such bill be presented to the candidate within ten days after the date of the election. The court instructs you, that it does come under the provision of the law, and for that reason the court instructs you to return a verdict in this case in favor of the defendant."

Upon the verdict returned by the jury in accordance with the foregoing instruction, judgment was entered in favor of the defendant. From that judgment the plaintiff appeals.

[1] If the evidence had shown without conflict that the plaintiff rented the premises to the defendant as the representative of the Johnson for Senator Club, or as the representative of the candidate, the case would have been appropriate for an instructed verdict and judgment in favor of the defendant. But there is evidence tending to prove that the premises were rented to the defendant as a person acting solely in his own behalf; both parties knowing, however, that defendant intended to have the premises occupied by the Johnson for Senator Club in connection with the candidacy of Governor Johnson for nomination and election to the office of United States Senator. The plaintiff in his testimony admitted that defendant told him that the premises were to be used for headquarters for the purpose of promoting the candidacy of Governor Johnson:

"Q. He told you that he was representing Governor Johnson or some organization looking toward that purpose? A. Yes, he was representing—but I didn't recognize that."

According to plaintiff's testimony, he told defendant that he would not rent his space to any political organization or club, but would rent it to the defendant. The defendant said, "Well, I will rent the space." The plaintiff replied:

"I will rent you the whole building, if you want it, but not any political organization; I will do business with you personally, but nobody else."

[2] Under this evidence and other evidence of similar character which was before the court, the jury might have found that plaintiff rented the premises in question to the defendant as an individual, and not as a representative of any organization, and that the defendant under said agreement of lease had the authority and power to use said premises for any purposes he might have seen fit or proper, not contrary to law or public policy. Plaintiff requested the court to instruct the jury that if they did so believe, then that the defendant would be personally liable to plaintiff for the amount due for the rent in accordance with such agreement. The court refused this instruction and other requested instructions, and instead thereof gave the instruction which we have quoted. Evidently this was done upon the theory that, since the plaintiff knew that the defendant intended to turn the premises over to a political organization, to be used for the purposes stated in said instruction, that therefore the lease itself was necessarily for a political purpose, and that rent could not be recovered thereon, except by complying with the provisions of the law for the regulation of elections, known as the Purity of Election Law.

[3] In this we think the court erred. The owner of real property might allow his premises to be used by a candidate or an election committee without charging any rent therefor. The owner of a leasehold interest in a building might do the same thing; or, if he so desired, might rent such building to a candidate or committee for political purposes. In the latter case the rent would be due from the candidate or committee to the holder of the leasehold interest, and not to his lessor, the owner of the fee. Under such circumstances, the person renting the building to the candidate or committee would be the person, and the only person, who would be entitled to demand and collect the rent, subject to the limitations of the Purity of Election Law. If it be said that this leaves open an opportunity for evasion of the law, the answer must be that in cases where the facts establish an attempted evasion and where in reality the owner is leasing to a candidate or committee, but is using a nominal go-between as lessee for the purpose of evading the law, courts and juries should be able to deal properly with any situation of that kind. It is not necessary here to go further than to say that evidence was produced which, if believed by the jury, would have warranted it in finding that the Johnson for Senator Club occupied the premises solely under the authority and permission of the defendant, and that the defendant's lease from the plaintiff was a general lease having no relation to any candidate or election committee. That issue should have been presented to the jury under an appro-

priate instruction which would have permitted a verdict in favor of the plaintiff, if the jury had found in favor of the plaintiff on this issue of the fact.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 474

MOSS v. H. R. BOYNTON CO. (Civ. 3134.)

(District Court of Appeal, First District, Division 2, California. Nov. 28, 1919.)

1. NEGLIGENCE ⊂⊃136 (27)—CONTRIBUTORY NEGLIGENCE WHEN QUESTION OF LAW.

Contributory negligence is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that plaintiff was guilty of contributory negligence, as when the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that, an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury.

2. NEGLIGENCE ⊂⊃80—CONTRIBUTORY NEGLIGENCE TO BE DETERMINED WITHOUT REGARD TO NEGLIGENCE OF DEFENDANT.

The question of contributory negligence must be determined without regard to any negligence on the part of defendant.

3. MUNICIPAL CORPORATIONS ⊂⊃705(10)—CARE DEVOLVING UPON PEDESTRIAN CROSSING STREET.

It was a duty devolving upon a pedestrian, as the act of an ordinarily prudent man immediately before placing himself in a position of danger in crossing a street, to look in the direction from which danger was to be anticipated, and such was a continuing duty, and was not met by looking once and then looking away.

4. MUNICIPAL CORPORATIONS ⊂⊃705(10)—PEDESTRIAN TO EXERCISE GREATER CARE IN CROSSING STREET BETWEEN INTERSECTIONS.

In attempting to cross a city street at a point between intersections, the duty rests upon a pedestrian to exercise a greater degree of care than if he were at an established crossing, especially if his view is to any extent obstructed by standing automobiles.

5. MUNICIPAL CORPORATIONS ⊂⊃705(10)—PEDESTRIAN GUILTY OF CONTRIBUTORY NEGLIGENCE.

A pedestrian who looked once in the direction from which an automobile would naturally come and then looked in the other direction and stepped into the street without again looking and was struck by an automobile as he took the first step *held* guilty of contributory negligence.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Albert E. Moss against the H. R. Boynton Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Robert J. Gardner and John L. Fleming, both of Los Angeles, for appellant.

Joseph Scott, Willis I. Morrison, and A. G. Ritter, all of Los Angeles, for respondent.

NOURSE, J. Plaintiff appeals from a judgment of nonsuit granted at the close of plaintiff's case upon the ground of his contributory negligence. The action is for the recovery of damages for personal injuries sustained by plaintiff as the result of an automobile colliding with him, which automobile was owned by defendant and was being driven by an employé of defendant while in the course of his employment. Appellant contends that the question of plaintiff's negligence was one of fact for the jury.

Plaintiff testified that at about 10:45 o'clock on the morning of August 17, 1916, he walked to the outer edge of the sidewalk on Spring street about 40 feet north from Fourth street; that the traffic was moving east and west on Fourth street across Spring street, and the traffic policeman at that corner was facing north; that he stood there for a moment or two, looking north; that while looking in that direction he saw nothing that was moving, except a trolley car running south on Spring street; that he also saw a jitney bus standing at the curb about 5 or 6 feet north of him, unloading passengers; that he then looked south toward the policeman, and, having looked away from the north for about three or four seconds, he started to step from the curb without again looking in that direction; that while he had one foot in the street and the other yet upon the curb he was struck by defendant's automobile coming from the north receiving the injuries forming the basis of this action. He further testified that he did not see the automobile until after he was struck. The traffic policeman testified that he first observed the automobile which struck plaintiff when it was about the middle of the block; that until it got up to the rear of the jitney bus it was traveling at the rate of about 20 miles an hour, but that it slowed down suddenly, so that when it got in front of the jitney bus it was going at the rate of 10 or 12 miles an hour, at which rate it was being driven when the collision occurred; that the driver of the automobile "switched in front of the jitney bus, and came up close to the curb there just as the doctor stepped off the curb, and he caught the doctor right in the knee and knocked him down," and that the machine then traveled about two-thirds of its length before coming to a stop. The speed limit in the downtown section where the accident occurred was 12 miles an hour between crossings.

[1, 2] Contributory negligence "is a question of law only when the evidence is of such a character that it will support no other legitimate inference than that in the one case the plaintiff was guilty of contributory negligence. * * * When the evidence is such that the court is impelled to say that it is not in conflict on the facts, and that from those facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his own injury, then, and only then, does the law step in and forbid plaintiff a recovery. * * * Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." Zibbell v. Southern Pac. Co., 160 Cal. 237, 240, 116 Pac. 513; Wing v. Western Pac. Co., 182 Pac. 969. And the question of contributory negligence must be determined without regard to any negligence on the part of defendant. Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 703, 89 Pac. 1093.

[3-5] Giving to plaintiff's evidence all the value to which it is legally entitled, and resolving every reasonable inference which may be drawn therefrom in favor of plaintiff, the inevitable conclusion must be that plaintiff left his place of safety on the sidewalk and stepped directly into the path of the moving automobile. It was a duty devolving upon plaintiff, as the act of an ordinary prudent man, immediately before placing himself in a position of danger, to look in the direction from which danger was to be anticipated. This was a continuing duty, and was not met by looking once and then looking away. In the exercise of ordinary care it is the duty of a pedestrian "to look to the right and to the left whenever he has voluntarily put himself in a position which may be one of peril coming from either direction." Sheldon v. James, 175 Cal. 474, 479, 166 Pac. 8, 11 (2 A. L. R. 1493). There was no dispute that there was no danger from the south because the traffic was moving east and west on Fourth street across Spring street. It is likewise clear that the traffic from the north was entitled to proceed to Fourth street past the place where plaintiff was standing. In attempting to cross at that point a duty rested upon him to exercise a greater degree of care than if he were at the established crossing. Sheldon v. James, supra. This was particularly true if his view was to any extent obstructed by the jitney bus. Contrary to the allegations of the complaint, the only testimony given on the subject was that at the time of the accident defendant was driving at a lawful rate of speed, and that the automobile was under control. Plaintiff's witness, the traffic policeman, saw the automobile when it was in the middle of the block, and it is apparent that plaintiff could have seen it in time to have avoided the accident had he looked. His failure to do so under the circumstances constituted contributory negligence barring recovery in this action.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 588

KUHNS et al. v. MARSHALL. (Civ. 3107.)

(District Court of Appeal, First District, Division 1, California. Dec. 4, 1919.)

1. MUNICIPAL CORPORATIONS ⊂=706(5)—EVIDENCE SUPPORTING VERDICT FOR INJURIES TO WIFE STRUCK BY AUTOMOBILE.

In an action by husband and wife for injuries to the wife when struck by defendant's automobile near a street intersection, evidence as to defendant's negligence and wife's freedom from contributory negligence *held* sufficient to support verdict for plaintiffs.

2. DAMAGES ⊂=158(3)—EVIDENCE ADMISSIBLE UNDER COMPLAINT FOR INJURIES TO WIFE STRUCK BY AUTOMOBILE.

Under complaint by a husband and wife for injuries to the wife when struck by defendant's automobile, alleging that the wife was made sick, sore, and lame, and physically impaired, and that she received a serious nervous shock, testimony of her attending physician that a certain subsequent condition of the bladder was attributable to the blow was admissible; plaintiff not being required to allege specifically each physical injury sustained or resulting.

3. DAMAGES ⊂=158(4)—TESTIMONY OF WIFE STRUCK BY AUTOMOBILE AS TO HER OWN CONSEQUENT NERVOUSNESS ADMISSIBLE.

In an action for injuries to a wife struck by defendant's automobile, the complaint alleging nervous shock in addition to physical injury, testimony of the wife, as to the extent and nature of her nervousness, that the noise in the street affected her, but especially the noise of a bell or an automobile or police ambulance, *held* admissible.

4. DAMAGES ⊂=50—NERVOUSNESS AN ELEMENT OF DAMAGE THROUGH PHYSICAL INJURY.

Nervousness, when the reasonable outcome of physical injuries, is always an element of damages from such injuries.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Lizzie P. Kuhns and another against Tully Marshall. From judgment for plaintiffs, defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

Herbert D. Gale, D. L. Cobb, and C. J. Milliron, all of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal by defendant from a judgment by which the plaintiffs recovered damages for personal injuries suffered by Lizzie P. Kuhns.

The action was brought by Lizzie P. Kuhns and Frank C. Kuhns, her husband, for personal injuries suffered by the former and alleged to have been caused by the negligence of the defendant in the operation of his automobile, whereby it is averred he came into collision with said Lizzie P. Kuhns.

The accident happened near the intersection of Second and Spring streets, in the city of Los Angeles, in the evening after dark and at a time when traffic was congested. On that evening the said plaintiff, holding an umbrella above her, undertook to cross Spring street from the northeast corner of said intersection. She proceeded westerly, using the crosswalk, until more than half way across, when the defendant, driving an automobile northward on the east side of Spring street, and having passed the center of Second street, turned west, describing a semicircle in doing so, and came up behind and collided with said plaintiff, who was struck by the right-hand front part of the automobile on the posterior of the left thigh, being thereby thrown and caused certain serious injuries.

There is evidence that upon stepping from the sidewalk said plaintiff looked to her left in a southerly direction for approaching vehicles, and that when about the center of the street she looked north to her right; these being the respective directions from which traffic should properly approach. She was accompanied by her husband, who, from the moment of leaving the sidewalk, kept a lookout in both directions. They saw no vehicles in close proximity to them, but upon reaching the point already described the defendant's car, being driven at a speed of from six to eight miles an hour, and its approach being unannounced by any warning signal, came into collision with said plaintiff as already narrated. One of the witnesses described the occurrence as follows:

"I looked straight out in the street. Mr. Marshall was coming down Spring street this way, and he was going to make this turn; whether he was going up Second street or south on Spring street I don't know. Mr. Kuhns and his wife were coming here, and as he was making the turn and got in the middle of the track he ran directly right into them and knocked them down, and he goes clear over here in front of the drug store of the Hollenbeck Hotel before he stops. I was looking just as I am looking at you, right out into the street, and I noticed him coming up and I noticed Mr. and Mrs. Kuhns coming across the street. Before he hit them I noticed that he was going to run into them, and I hollered. Of course he ran into them, and I thought he was going to run away. * * *"

[1] These are the facts of the case as testified to by the plaintiff and her husband and a disinterested witness. In some essential respects this testimony is contradicted by the defendant through his own testimony, which, however, was unsupported by other witnesses. In view of this condition of the record, it is clear that it cannot be successfully maintained that the evidence fails to support the verdict of the jury.

[2] Over the objection of the defendant, the court admitted evidence that a few weeks after the accident the said plaintiff developed serious bladder trouble. Defendant's contention is that this evidence was inadmissible under the allegations of the complaint. The complaint, after setting forth a certain specific injury, alleged that by reason of the accident the plaintiff Lizzie P. Kuhns was made sick, sore, and lame; that she was physically impaired, and had also received and was suffering from a serious nervous shock. The attending physician, referring to the bladder trouble, testified that in his opinion this condition of the bladder was attributable to the blow which the plaintiff received and to the consequent nervous shock.

We think the testimony was admissible under the allegations of the complaint. A plaintiff is not required to allege specifically each physical injury sustained or which may have resulted from the accident. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury. Samuels v. Cal. St. Ry. Co., 124 Cal. 296, 56 Pac. 1115; Lauder v. Currier, 3 Cal. App. 28, 84 Pac. 217; Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Worden v. Cent. Fireproof Bldg. Co., 172 Cal. 94, 155 Pac. 839.

[3, 4] Appellant next contends that the court erred in admitting over his objection evidence by the plaintiff describing her condition as to nervousness since the accident. It appears that she had without objection testified that since the collision she was extremely nervous, and then, over objection, proceeded to describe how noise affected her, saying:

"The noise in the street affects me very much, but especially the noise of a bell on an automobile or police ambulance, sends a nervous chill from the base of the spine to the base of the brain."

Nervousness, when the reasonable outcome of physical injuries, is always an element of damage, and obviously evidence relating thereto may properly be submitted to the jury. Easton v. U. T. School Con. Co., 173 Cal. 199, 159 Pac. 597, L. R. A. 1917A, 394. The plaintiff's testimony as to the extent and nature of her nervousness was plainly admissible.

Finally, the appellant asserts that the court erred in refusing to give to the jury certain instructions offered by him. We have carefully examined these instructions,

together with those given by the court, and we find no ground for the appellant's criticism. The instructions given fully and fairly cover every phase of the case presented by the pleadings, particularly as to the reciprocal rights and duties of drivers of vehicles and pedestrians using a public street, and they certainly do not emphasize any feature of the case against the defendant.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 349

REID v. SUPERIOR COURT IN AND FOR TRINITY COUNTY et al.

(Civ. 2017; Sac. 3034.)

(District Court of Appeal, Third District, California. Nov. 19, 1919. Opinion of Supreme Court, In Bank, Denying Hearing Jan. 15, 1920.)

1. EVIDENCE ⊜44, 45 — JUDICIAL NOTICE TAKEN AS TO TERM OF OFFICE OF DISTRICT ATTORNEY.

In view of Pol. Code, §§ 4013, 4021, and Code Civ. Proc. § 1875, the court will take judicial notice that a district attorney is an officer of a county, and that county officers are elected at the general election at which the Governor is elected and hold office for the same term, and that a district attorney took office in Trinity county on the 1st day of January, 1915, and that such term expired on the first Monday in January, 1919, being matters established by law.

2. CERTIORARI ⊜60—VALIDITY OF JUDGMENT OF REMOVAL OF OFFICER MOOT QUESTION AFTER EXPIRATION OF TERM.

A judgment, removing a county officer from office, cannot be reviewed on certiorari after the officer's term would have expired; the question then being merely moot and academic.

3. ACTION ⊜6 — MORAL VINDICATION NOT GROUND FOR DETERMINATION.

Courts are not constituted or operated for the moral vindication of litigants.

4. CERTIORARI ⊜41—FAILURE OF REMOVED OFFICER TO ATTACK JUDGMENT OF REMOVAL BEFORE EXPIRATION OF TERM LACHES.

An officer who did not attack a judgment removing him from office for nine months after the rendition thereof, during which time his term of office expired, was guilty of laches, and cannot have the judgment reviewed by certiorari, in the absence of a showing of a sufficient excuse for the delay.

5. OFFICERS ⊜74—PROCEDURE FOR REMOVAL OF OFFICERS DOES NOT REQUIRE STRICT APPLICATION OF RULES GOVERNING ACTIONS.

Procedure under Pen. Code, § 758, relating to the removal of officers, does not require a strict application of the rules that govern civil or criminal actions.

6. OFFICERS ⊜74—ACCUSATION OF MISCONDUCT SUFFICIENT, THOUGH IT DID NOT ALLEGE THAT HE WAS AN OFFICER AT TIME OF MISCONDUCT.

An accusation under Pen. Code, §§ 758, 759, relating to the removal of officers for willful or corrupt misconduct in office, *held* sufficient, although there was no express averment that the removed officer, a district attorney, was the district attorney during the time that he was alleged to have done the unlawful act; such fact appearing by necessary intendment.

7. CERTIORARI ⊜64(1)—OMISSION IN ACCUSATION FOR REMOVAL OF OFFICER CURED BY ADMISSIONS OF COUNSEL.

An omission in an accusation against a district attorney under Pen. Code, §§ 758, 759, of the fact that the accused was district attorney at the time of the alleged wrongful conduct, was entirely cured by an admission of accused's counsel, in his objection to the sufficiency of the accusation, to the effect that accused was district attorney at such time.

8. OFFICERS ⊜74—ACCUSATION FOR REMOVAL OF DISTRICT ATTORNEY SUFFICIENT.

An accusation against a district attorney under Pen. Code, §§ 758, 759, relating to removal of officers for misconduct, was not bad because failing to state that a prosecution for which compensation was unlawfully charged did not take place in the county; petitioner being sufficiently informed of the charge notwithstanding the failure to so allege.

9. CERTIORARI ⊜29—DEFECTIVE ACCUSATION FOR REMOVAL OF OFFICER NOT GROUND.

Where an accusation under Pen. Code, §§ 758, 759, relating to the removal of officers for willful or corrupt misconduct in office, showed an evident attempt to state the essential facts of a crime committed by the officer in connection with the discharge of the duties of his office, it must be *held* sufficient on certiorari, where it is claimed that the judgment of removal is void on its face.

10. OFFICERS ⊜66—REMOVED FOR MISCONDUCT SHORT OF CRIME.

An officer may be removed under Pen. Code, § 758 et seq., although the act alleged to constitute the willful misconduct charged falls short of the commission of a crime.

11. OFFICERS ⊜61 — STATUTE AUTHORIZING REMOVAL FOR MISCONDUCT CONSTITUTIONAL.

Pen. Code, § 758 et seq., providing that officers may be removed for "misconduct in office" was authorized by Const. art. 4, § 18, providing that officers shall be tried for "misdemeanor in office," although the Legislature did not define what willful and corrupt misconduct was.

12. OFFICERS ⊜74—JUDGMENT OF REMOVAL OF DISTRICT ATTORNEY SUFFICIENTLY RECITED CAUSES.

A judgment of removal of a district attorney on the ground of extortion of unlawful compensation *held* sufficiently to recite the causes of the removal in compliance with Pen. Code, § 769.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

13. CERTIORARI ⟸69 — JUDGMENT NOT ANNULED IN ABSENCE OF MISCARRIAGE OF JUSTICE.

Const. art. 6, § 4½, providing that a judgment should not be reversed in the absence of a miscarriage of justice, applies to an application for a writ of certiorari after trial of a case.

Application for certiorari by John S. Reid to review a judgment and order of the Superior Court of the State of California in and for the County of Trinity, of which Hon. W. M. Finch was acting judge, removing the applicant from office as district attorney of said county. Writ denied, and judgment affirmed in District Court of Appeal, and hearing denied in Supreme Court.

See, also, 187 Pac. 7.

J. E. Pullen, of Sacramento, for petitioner.

H. R. Given, Dist. Atty., of Weaverville, for respondents.

PER CURIAM. On May 11, 1918, the grand jury of Trinity county presented to the clerk of the superior court of said county an accusation against John S. Reid, district attorney of said county, under section 758 of the Penal Code. Said accusation contained six specifications of willful misconduct on the part of said district attorney, but of these all were eliminated from consideration by order of the trial court except one. As finally submitted to the jury the said accusation was in the following form:

"In the Superior Court of the County of Trinity, State of California.

"Accusation.

"The People of the State of California v. John S. Reid, District Attorney of the County of Trinity, State of California.

"John S. Reid, district attorney of the county of Trinity, state of California, duly elected, acting, and qualified as such district attorney, is hereby accused by the grand jury of the county of Trinity, state of California, by this accusation of willful and corrupt misconduct in the discharge of the duties of a district attorney in and for said county of Trinity, state of California, said willful and corrupt misconduct as such district attorney consisting of the following acts, specified as follows, to wit:

"Specification 1.

"That said John S. Reid, qualified and acting district attorney of said Trinity county, at Weaverville, in said county of Trinity, on or about the 6th day of January, 1916, unlawfully, willfully, corruptly, and feloniously, and under color of official right, did extort and obtain of and from one O. H. Meredith the sum of $156, lawful money of the United States of America, as and for a fee due to the said John S. Reid, as such officer as aforesaid, for instituting criminal proceedings before a magistrate for the arrest of M. A. Brady and D. M. Brady for the alleged larceny of cattle belonging to said O. H. Meredith, while in truth and in fact no fee whatever was then due from the said O. H. Meredith to the said John S. Reid as such officer, as aforesaid, for such services, and as the said John S. Reid then and there well knew. * * * Wherefore, the said grand jury of Trinity county, Cal., presents this accusation against the said John S. Reid, as district attorney in and for said Trinity county, Cal., and accuses him of willful and corrupt misconduct in office, and asks that he be removed from the said office of district attorney in and for said Trinity county, Cal., and that the judge of the superior court of said Trinity county take the necessary steps as by law provided for the removal of the said John S. Reid from such office of district attorney in and for said county of Trinity, state of California. A. C. Meckel,

"Foreman of the Grand Jury.

"Dated Weaverville, California, May 11, 1918."

Within the time required by law the said John S. Reid filed in said court written objections or a demurrer to the legal sufficiency of the accusation and the specifications thereof. His objection to the last three charges was sustained, but was overruled as to the first three. Charge No. 2 and charge No. 3 were afterwards, however, dismissed on motion. A jury was regularly impaneled to try the defendant on the 3d day of August, 1918, and found him guilty as charged in said first count. The defendant, thereupon, in open court waived time for pronouncing judgment, and the court, after reciting the various steps taken in the proceedings, concluded its judgment as follows:

"It is ordered, adjudged, and decreed that you, the said John S. Reid, be, and you, the said John S. Reid are, hereby removed from office as such district attorney of the county of Trinity, state of California, and said office of district attorney in and for Trinity county, state of California, be, and the same is hereby declared vacant."

Thereafter, on the 9th day of May, 1919, upon petition therefor, an order was made by this court for the issuance of a writ of certiorari, "commanding said superior court to certify and return to this court * * * a transcript of the record and proceedings in the action aforesaid, with all things touching the same as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by the District Court of Appeal." Such return was duly made, and by stipulation of the parties the time for filing briefs was extended, and the matter has been recently submitted for determination.

[1, 2] At the outset attention is directed to the fact that the application for this writ was made more than nine months after the said judgment of dismissal, and that in the meantime the term of office for which said Reid was elected had expired. A district at-

torney is an officer of a county of the state of California. Section 4013, Pol. Code. County officers are elected at the general election at which the Governor is elected, and hold office for the same term. Section 4021, Pol. Code. A district attorney took office in said Trinity county on the 1st day of January, 1915, and that term expired on the first Monday in January, 1919. Of these facts the court will take judicial notice, because they are matters established by law. Code Civ. Proc. § 1875. It is quite apparent, therefore, that it would be impossible for this or any other court to reinstate Mr. Reid in the position which he was compelled to vacate by said order of the superior court. The situation is the same as though we were called upon to review a judgment that had been fully executed or satisfied. If the judgment of the lower court in the present case were annulled, there could be no restoration of petitioner to the office, for the reason, already stated, that his term had expired before even the application for this writ was made. It would not for a moment be contended that there could be two district attorneys at the same time in the said county, or that the one who was regularly elected at the last general election in November, 1918, and who took office on the first Monday in January of the present year, could be displaced by virtue of any order that might be made in this proceeding. The only effect of said order being to remove Mr. Reid from said office, and it being impossible to restore him at this time, the question involved herein may be said to be merely moot and academic. In this respect the case is similar to that of Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031. Therein it was held, as stated in the syllabus (143 Cal. 214):

"Where a taxpayer sues to enjoin the holding of an election to fill certain offices, and the expending of money therefor, and the judgment was against the plaintiff, and before the hearing of an appeal by him the election had been held and the money expended, and the officers elected were incumbents in place of others whose terms had expired, such appeal raises merely a moot question, and no judgment which could be entered thereupon could afford plaintiff any relief."

In its discussion of the question the court remarked:

"The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions such as this case in its present situation presents."

[3, 4] Another somewhat similar case is Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683. The plaintiff therein was removed as superintendent of the Almshouse of the City and County of San Francisco, his appointment having been made by the board of health under the general state law. He brought suit for reinstatement. While the suit was pending, the new charter of San Francisco became operative, and the control of said almshouse passed to a different board of health. The Supreme Court held that the questions presented by plaintiff's appeal from an adverse decision of the superior court were purely academic, and hence denied the appeal. As far as the practical effect of said judgment of August 3, 1918, is concerned, therefore it must be apparent that it cannot be modified or nullified by any decision of this court upon this petition for writ of certiorari. It might be contended, however, that an annulment of said judgment would amount to a moral vindication of said petitioner, and might constitute the basis for an application on the part of petitioner for his salary for the residue of the term for which he was elected. However, courts are not constituted or operated "for moral vindication," and it is quite apparent that petitioner, by reason of his delay in applying for this remedy, should not be permitted to lay the groundwork for claiming said salary. The petitioner should have applied promptly in order that, if it should be found that his application was meritorious, it could be determined before his term expired, so that the county would not be required to pay two persons for the same services. It would be manifestly unjust to the county for the applicant for the writ to delay, without excuse, his application therefor until his term had expired, and when no other similar charge of willful conduct could be made against him, and the county had already paid for the services of his successor in office. While there is no hard and fast rule by which to determine whether laches has barred the remedy by certiorari, yet under the facts as existing herein a sufficient excuse should be shown for the delay to justify the application for the writ. Reynolds v. Superior Court of the County of Los Angeles, 64 Cal. 372, 28 Pac. 121. The question is fully discussed in Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 Pac. 69. Therein it is said:

"While it is true, as counsel for the plaintiff contends, that mere lapse of time short of that prescribed by a statute of limitations in any given similar case will not in itself suffice to constitute laches so as to bar a remedy, nevertheless, if in addition it appears from all the circumstances of the case that prejudice must, or from the very nature of the case may, be reasonably expected to result, the remedy will be denied (Cahill v. Superior Court, 145 Cal. 42, 78 Pac. 467 [and cases cited]); and whenever public inconvenience might result from the annulment of the proceedings sought to be reviewed, the rule of laches relative to applications for the writ is applied and enforced with particular strictness (4 Standard Encyclopedia of Law and Procedure, 912)."

In the case at bar no excuse whatever has been shown for the delay, and we think this court would be entirely justified in denying

the writ without inquiring into the specific reasons urged herein for its issuance.

[5-9] Moreover, we are satisfied that no sufficient cause has been advanced to justify the annulment of the said order of removal. In considering the contention of the petitioner that the accusation herein does not set forth sufficient facts to constitute "willful or corrupt misconduct in office," as that term is used in said section 758, it is well to recall the nature of this proceeding and the view taken of it by the courts of this state. The procedure under said section does not require a strict application of the rules that govern civil or criminal actions. The subject is considered at length in the Matter of Burleigh, 145 Cal. 35, 78 Pac. 242. Therein an accusation is contrasted with an indictment and the court says:

"The main purpose of the accusation under section 758 is to remove a person from public office for misconduct in such office; the misconduct charged need not necessarily include an act which would itself constitute a crime, and if it does include such crime the judgment on the accusation would not be a bar to a subsequent prosecution for such crime. The judgment can go only to the extent of a removal from office."

In said decision the court held that an accusation need not conform to sections 950, 951, or 952 of the Penal Code. Said sections, though, undoubtedly apply to an indictment or an information. Again, in the Matter of Accusation of Shepard, 161 Cal. at page 174 thereof (118 Pac. at page 514) the court says:

"This is a summary proceeding regulated, as far as it is regulated at all, by a statute (Pen. Code, § 758 et seq.), which the Legislature had plenary power to pass under the authority of section 18 of article 4 of the Constitution, providing for the trial of public officers for misdemeanor in office otherwise than by impeachment. It is exempt from merely technical rules of procedure."

In this connection it may be stated that the statute itself (section 759, Penal Code) states the requirement of the pleading in the following general language:

"The accusation must state the offense charged, in ordinary and concise language, and without repetition."

The primary purpose, of course, of the form of expression is to apprise the defendant of what he is accused in order that he may be able to make his defense thereto. It may be admitted that the accusation in the present instance is open to criticism, and that the charge could have been more fully and accurately stated, but we think that no one of common understanding, especially if he be an attorney at law, would have any difficulty in concluding from said accusation that the said John S. Reid was at all times mentioned therein the duly elected, qualified, and acting district attorney of Trinity county, and that on the 6th day of January, 1916, in said county he unlawfully and willfully and corruptly, by the use of his influence as district attorney of said county and under color of said official right, extorted and obtained from one O. H. Meredith the sum of $156 to which he was not entitled. It is true there is no express averment that said Reid was the district attorney during said time, but said fact appears by necessary intendment, and that is all that is required to answer an application for a writ of certiorari. Moreover, any omission in said accusation in said matter was entirely cured by the admission of defendant's counsel in the lower court in his objection to the sufficiency of the accusation, and also in his brief in support thereof to the following effect:

"John S. Reid is now, and on and prior to the 11th day of May, 1918, was, the duly elected, qualified, and acting district attorney of the county of Trinity, state of California."

We are satisfied also that the acts constituting the charge of extortion are not required to be set forth with the same certainty and particularity as an indictment demands. One particular objection of petitioner to said accusation is that it does not appear therein that the said proceedings for the arrest of M. A. Brady and D. M. Brady were taken before a magistrate in said Trinity county. It is therefore argued that the presumption is that they were taken before a magistrate of some other county, and hence that it would not be unlawful for the said Reid to demand a fee for his services in instituting said proceedings. But, conceding for the sake of argument that such objection contains merit, it is a sufficient answer to say, as suggested by respondent, that this portion of the accusation may be treated as surplusage, and eliminated without affecting the sufficiency of the charging part of said accusation. In other words, we are satisfied the petitioner was sufficiently informed of the nature of the charge when it is declared that at a certain time and place in said county, as a public officer, to wit, the district attorney, under color of said official right, he extorted and obtained money from a certain person. Moreover, the condition of the record is such that the judgment of the lower court holding the accusation sufficient takes the case beyond the reach of certiorari. There was at least an attempt to set up a crime committed by Reid under the guise and pretense and by virtue of his official position as district attorney of the county. There is no doubt the superior court had jurisdiction to determine whether such offense was alleged in said accusation. There is no question that all the antecedent proceedings were regular and in accordance with the requirement of the statute; and, if it cannot be said that the court had jurisdiction to make a wrong as well as a right decision upon the suffi-

ciency of the accusation, then it would be difficult to find a case to which such doctrine could be applied. Of course, if it appeared affirmatively that no offense known to the law was charged, or if from the facts alleged no reasonable deduction could be drawn that a crime was committed, or that the defendant was guilty of official misconduct, the judgment of the lower court to the contrary would not be conclusive in this proceeding, and the writ of certiorari would be available. However, we have no such case, but an instance wherein there is an evident attempt—and a somewhat successful one—to state the essential facts of a crime committed by petitioner in connection with the discharge of the duties of the office of district attorney. It may be conceded that the accusation was carelessly formulated, that a skillful pleader would more fully and accurately set forth the circumstances of the alleged offense, but the existence of sufficient facts is shown upon which to base a valid judgment that petitioner was guilty of willful misconduct in office.

In the Matter of Hughes, 159 Cal. 360, 113 Pac. 684, the office of the writ of certiorari is learnedly discussed. Therein, referring to the proceedings of the lower court sought to be annulled, the Supreme Court said:

"If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it."

Furthermore, it was declared that while the lower court committed a palpable error in holding a certain judgment to be void, yet it had jurisdiction to decide the case, "it had power to determine whether the petition was good or bad, and its decision that it was good was an error of law, and not an excess of jurisdiction. A judgment based on a complaint which does not state facts sufficient to constitute a cause of action is not, for that reason, a judgment in excess of jurisdiction, or void, if the court rendering it has jurisdiction of cases of the kind which the complaint attempts to allege," the court citing a large number of cases. Among the latter is Brush v. Smith, 141 Cal. 466, 75 Pac. 55, wherein it was said:

"If the court below should hold a complaint sufficient, when as a matter of law it failed to state facts sufficient to constitute a cause of action, such ruling would be erroneous, but nevertheless the court had jurisdiction. It had jurisdiction to determine the question and to determine it wrong as well as right."

The rule in habeas corpus is stated in Ex parte McNulty, 77 Cal. 166, 19 Pac. 238, 11 Am. St. Rep. 257, as follows:

"Where the complaint, though inartificially drawn, shows an evident attempt to state the essential facts which constitute the crime sought to be charged, the defect in the statement would not warrant the discharge of the defendant. * * * But when the facts charged, or attempted to be charged, in the complaint or indictment, and proved by the evidence, do not constitute any public offense, then the defendant will, upon habeas corpus, be discharged."

This is in accordance with the doctrine enunciated in Freeman on Judgments (4th Ed.) § 622, as follows:

"If it appears from the indictment whether with technical precision or not, what acts the accused committed, and they are not criminal either because there is no law declaring them criminal, or because the law so declaring is itself void for the reason that the legislative body which attempted to enact it had no power so to do, then the prisoner should be discharged, for the judicial proceeding against him has merely established that he was guilty of an act for which no court has any power to punish him. If, on the other hand, it is apparent from the record that the grand jury or some other competent accuser has attempted to charge the petitioner with an act which is made criminal by law, and such charge has resulted in his conviction and sentence, then he should be remanded, though the charge was not made with sufficient accuracy or particularity to have withstood a demurrer thereto. In the one case there is an accusation and conviction of a noncriminal act, while in the other there is a conviction of a criminal act, based upon an accusation inaccurately, informally, or imperfectly preferred, but yet expressed in such terms that the person accused, the tribunal convicting and sentencing him, and the court or judge appealed to upon habeas corpus must know from the indictment that the act thus charged and found to have been committed was a criminal act, and, as such, punishable by law."

It is true that the application for a writ of habeas corpus involves a collateral attack, while in certiorari the judgment is directly assailed. Both, however, raise the question of jurisdiction, and the difference between them is as to how the want of jurisdiction shall be shown. That distinction, however, is of no moment here because the only contention is that it appears from the judgment roll that the judgment is void. If it so appears, then the judgment would fall when attacked either by one method or the other. But in habeas corpus it has been held, as we have seen, that the court has jurisdiction where the accuser has attempted to charge the accused with an act criminal in its nature, although the accusation is inaccurately, informally, or imperfectly preferred. Under the same circumstances the same conclusion would be necessarily reached on certiorari because the purpose of the inquiry is the same, namely, to determine whether the lower court has exceeded its jurisdiction. In the recent decision of the

Supreme Court in Christerson v. French (Sup.) 182 Pac. 27, it is said:

"The respondent contends further that the judgment is void because the complaint fails to state a cause of action. It is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether the complaint states a cause of action or not, so long as it apprises the defendant of the nature of the plaintiff's demand."

That was a civil case, but the same principle applies in determining the jurisdiction of the court in a criminal proceeding or one involving willful misconduct in office.

[10] In holding that a public offense is sufficiently set forth in the accusation to withstand an attack upon certiorari, we are not unmindful that willful misconduct in office may be shown, although it falls short of the commission of a crime (In the Matter of Burleigh, 145 Cal. 36, 78 Pac. 242; Lanterman v. Anderson, 36 Cal. App. 472, 172 Pac. 625), but we are satisfied that the accusation goes to the full extent that we have indicated.

[11] We think there is no merit in the contention that said section 758 is unconstitutional. We shall not attempt to follow closely the technical argument of petitioner in that behalf. It is sufficient to say that such legislation is authorized by article 4, section 18, of the Constitution, which provides that civil officers "shall be tried for misdemeanor in office in such manner as the Legislature may provide." It is true that the Legislature in said section has not used the expression "misdemeanor in office," but it has employed the synonymous phrase "misconduct in office." It is also true that the Legislature has not attempted to catalogue or define the acts which would constitute such misconduct; but this was unnecessary, as in the literature of the law a reasonable measure and test is found for the application of the term. The subject is discussed in Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75, wherein it is shown that the Legislature has provided for two different classes of misconduct, one willful and the other corrupt, and, that the term "misconduct" includes "any willful malfeasance, misfeasance, or nonfeasance in office." Of course, something must be left to the discretion of the court and jury in applying the section to the peculiar facts of each particular case, but in most instances there could be little difference of opinion as to whether the conduct were within the inhibition of the statute, and we think no definition of said terms is required of the Legislature in order to safeguard the rights of an accused party.

We may add that the question has been virtually adjudicated by the courts of this state. The similar act of 1853 entitled, "An act to prevent extortion in office and to enforce official duty" (St. 1853, p. 40) was upheld in Ryan v. Johnson, 5 Cal. 87, and in the Matter of Marks, 45 Cal. 199.

In the Matter of the Accusation of Shepard, supra, as we have already seen, the Supreme Court held that the Legislature has plenary power to enact such legislation as is contained in said section 758.

[12] There is no more merit in the contention that the judgment is void because it does not comply with the requirement of section 769 of the Penal Code, providing that the judgment of removal shall recite the causes of removal. As a matter of fact, the cause for the removal does clearly appear therein. Said judgment sets out the history of the case, the form of the verdict of the jury, that the defendant waived time for pronouncing judgment, and recites that—

"This being the time fixed by the court by consent of counsel for the people and the defendant for pronouncing judgment upon the verdict of the jury herein rendered, by which the defendant is found guilty as charged of willful and corrupt misconduct in office, in this, that said John S. Reid, defendant herein, being then and there the duly elected, qualified, and acting district attorney of said Trinity county at Weaverville in the said county of Trinity, on or about the 6th day of January, 1916, unlawfully, willfully, corruptly, and feloniously and under color of official right did extort and obtain of and from one O. H. Meredith the sum of $156, lawful money of the United States of America, as and for a fee due to the said John S. Reid as such officer, as aforesaid, for instituting criminal proceedings before a magistrate for the arrest of M. A. Brady and D. M. Brady for the alleged larceny of cattle belonging to the said O. H. Meredith, while in truth and in fact no fee whatever was then due from the said O. H. Meredith to the said John S. Reid, defendant herein, as such officer as aforesaid, for such services, and as the said John S. Reid then and there well knew, and that in so doing and acting as aforesaid the said John S. Reid, the defendant herein, was guilty of willful and corrupt misconduct in office.

"Wherefore, by reason of the law, the verdict of the jury hereinbefore set forth, and the reasons herein given." [Then follows the conclusion which we have hereinbefore set forth.]

There can be no possible doubt about the matter when the whole of the judgment is considered. In the Matter of Ring, 28 Cal. 252; People v. Terrill, 133 Cal. 120, 65 Pac. 303.

[13] Other points have been made and many decisions cited by petitioner, but we think they do not demand specific consideration. Even if we grant that there is some merit in the criticism of the form of the accusation or of the proceedings in the cause, still we should not annul the judgment, unless it appears that there has been a miscarriage of justice. Section 4½ of article 6 of the Constitution should apply to an ap-

plication for a writ of certiorari after trial of the case, as well as to an appeal from the judgment. Under said section no court is authorized to set aside a judgment for any error in a pleading or in the proceedings, unless after an examination of the whole record, including the evidence, such court is of the opinion that there has been a miscarriage of justice. In the present case it is not disputed that there was credible evidence of every fact constituting the crime of extortion; that it was shown that said Reid was the district attorney of said county at all times mentioned in said accusation; that he extorted said sum of money as claimed by the prosecution for instituting criminal proceedings before a magistrate in said county in connection with the discharge of the duties of his said office; and that he thereby was guilty of not only willful, but also of corrupt, misconduct in office. Under such circumstances, to attach to the asserted defects in the accusation and proceedings the significance and potency for which petitioner contends would be to set at naught the plain provisions of said section 4½ of the Constitution. The supposed defects herein cannot possibly be any more serious than the omission of the stated element from the information in the case of People v. Bonfanti, 181 Pac. 80, wherein it was held that, obeying the mandatory direction of said constitutional provision, the appellate court should not reverse the judgment, since it did not appear that there was a miscarriage of justice.

It is true that we have not the complete record before us, but the respondent has offered to produce it, under the claim that the said facts were fully disclosed. This claim is not disputed by petitioner, and we have therefore taken it for granted, and not required the production of the evidence.

After a careful consideration we are satisfied: (1) That petitioner is guilty of such laches as under the circumstances should bar him from any relief in this proceeding; (2) that by reason of the expiration of the term of office for which petitioner was elected, the question of the validity of the judgment has become moot; (3) that the accusation is sufficient to meet the requirement of section 758 of the Penal Code; (4) that at least the accusation was sufficient to give the court jurisdiction over the subject-matter, and that any error committed in the ruling on the objections thereto is not reviewable in this proceeding; (5) that the people, through the adoption of an amendment to the Constitution have required that all questions as to errors or irregularities in the trial of causes be subjected to the test of whether wrong and injustice have resulted, and under the application of that provision it cannot be said that the judgment here should be annulled.

The application is, therefore, denied and the judgment is affirmed.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. The petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Third Appellate District is denied, without regard to what is said in the opinion on the question of this being a moot case and the question of laches, the determination of neither of which is necessary to the decision, and as to which we express no opinion.

All concur.

44 Cal. App. 435

WARD et al. v. GOETTING. (Civ. 2431.)

(District Court of Appeal, Second District, Division 1, California. Nov. 24, 1919.)

1. PLEADING ⇐339—WITHDRAWAL OF CROSS-COMPLAINT AS EFFECTIVE AS OMISSION TO FILE.

Where plaintiffs, the holders of a note, under order of court, from which no appeal was taken, withdrew their cross-complaint seeking collection of the note filed in an action by the defendant maker to cancel the note for fraud, plaintiffs' status is precisely that of one omitting to file any cross-complaint.

2. SET-OFF AND COUNTERCLAIM ⇐29(1)—IN ACTION TO CANCEL NOTE CLAIM ON NOTE NOT PROPER COUNTERCLAIM.

Under Code Civ. Proc. §§ 437, 438, providing that defendant may set up a counterclaim, which must be one existing in favor of the defendant and against plaintiffs, between whom a several judgment may be had in the action, and arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, etc., the right of action to collect a note which the maker was seeking to cancel on the ground of fraud is not a counterclaim which within the terms of the statute the holders must set up under the penalty of losing their right of action under section 439.

3. DISMISSAL AND NONSUIT ⇐19(1)—PLEADING ⇐138—ANSWER CONTAINING DEFENSIVE MATTER NOT CHANGED TO COUNTERCLAIM BECAUSE OF PRAYER FOR AFFIRMATIVE RELIEF.

Where the maker of a note sued to cancel it on the ground of fraud, and the holder filed cross-complaint seeking to collect the same according to its tenor, whereupon the maker filed an answer setting up his grounds for cancellation and praying cancellation of the note such answer was not one seeking affirmative relief within Code Civ. Proc. § 581, and hence, where the holder dismissed the cross-complaint, the maker cannot defeat a subsequent action on

the note on the ground that his answer was one for affirmative relief, etc.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by S. H. Ward and another against A. A. Goetting. From a judgment for defendant, plaintiffs appeal. Reversed.

I. Henry Harris and Charles A. Bank, both of Los Angeles, for appellants.

A. S. Maloney, of San Bernardino, and Frank F. Oster, of Los Angeles, for respondent.

SHAW, J. Plaintiffs appealed from a judgment rendered in favor of defendant in an action to recover upon a promissory note made and delivered by defendant on March 17, 1915. By its terms the note was due and payable four months after its date. On April 21, 1915, defendant brought an action against plaintiffs herein, with whom others were joined as defendants, to have the note canceled and annulled on account of fraud in its procurement and want of consideration thereof. Demurrers were sustained to the original and three succeeding amended complaints; whereupon a fourth amended complaint was filed, at which time the note had matured. Thereupon the defendants in said action, who are the plaintiffs here, in addition to their answer denying the allegations of the complaint, filed a cross-complaint in the usual form for recovery upon the promissory note in accordance with the terms thereof, to which the plaintiff in said action, who is defendant here, filed an answer wherein, as a defense to recovery upon said note, he set up the same matters contained in his complaint wherein he sought the cancellation of said note, and in his answer prayed for the same relief sought in his said complaint. Upon these pleadings the parties went to trial, during which, upon an order of court permitting them so to do, cross-complainants in said action, who are plaintiffs here, without the consent of defendant, Goetting, withdrew and dismissed their cross-complaint wherein they asked for recovery upon the promissory note. Thereupon, after such withdrawal of the cross-complaint, the action was tried upon the issues presented by Goetting's complaint, together with the answer thereto, wherein the allegations of his complaint were denied, save and except the issue as to want of consideration, which issue was by leave of court withdrawn from the fourth amended complaint, as a result of which trial judgment was rendered in favor of the defendants in said action, who are plaintiffs here, the effect of which was to declare that the making and delivery of said note had not been obtained by means of the alleged fraud practiced upon the maker thereof, all of which facts, among other things, were by defendant herein set up in his answer to the complaint for recovery upon the promissory note in this action, and by reason of which he alleged this action was barred by the provisions of sections 439 and 581, Code of Civil Procedure. Upon these facts the court found that the cause of action alleged in said cross-complaint so filed in the former action by plaintiffs herein for recovery upon the note arose out of the same transaction set forth in the fourth amended complaint as the foundation of this defendant's claim for the cancellation of said promissory note, and constituted a counter claim in said action upon defendant's cause of action therein set forth, and likewise found that the same matter alleged in this defendant's answer to the cross-complaint filed by these plaintiffs in the former action as a defense thereto arose out of the same transaction set forth in the cross-complaint so filed as the foundation of plaintiffs' claim based upon the promissory note, and therefore constituted a counterclaim thereon, and as a conclusion of law found that by reason of said facts this action for recovery upon the promissory note is barred by the provisions of section 439 of the Code of Civil Procedure, which provides that—

"If the defendant omits to set up a counterclaim upon a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

[1, 2] Since plaintiffs, under an order of court from which no appeal was prosecuted, withdrew their cross-complaint filed in the former action for recovery on the note, their status was precisely that of one who had omitted to file the same. Hence the question presented for determination is whether the cause of action stated in the cross-complaint and founded upon the promissory note was, as found by the trial court, a proper subject of counterclaim. If so, the action, as adjudged by the lower court, is barred. In our opinion, however, the finding is not warranted by the facts concededly established. Under section 437, Code of Civil Procedure, the answer of the defendant may set up a counterclaim which, as provided by section 438, Code of Civil Procedure, "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of * * * the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." It thus appears that, in order to constitute a valid counterclaim, the cause of action therein stated must arise not only out of the transaction set forth in the complaint as the foundation of plaintiff's claim, but must be one existing in favor of a defendant and against a plaintiff between

whom a several judgment might be had in the action. As said in Meyer v. Quiggle, 140 Cal. 499, 74 Pac. 41, quoting with approval from National Fire Insurance Co. v. McKay, 21 N. Y. 191:

"A counterclaim, when established, must in some way qualify or defeat the judgment to which a plaintiff is otherwise entitled."

"It must be something that resists or modifies the plaintiff's claim." Leavenworth v. Packer, 52 Barb. (N. Y.) 132.

And in Mattoon v. Baker, 24 How. Prac. (N. Y.) 329, the court, in discussing the subject, says:

"A counterclaim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must, therefore, consist in a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint. It must present an answer to plaintiff's demand for relief. * * * It must, therefore, contain not only the substance of what is necessary to sustain an action in favor of defendant against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right of recovery in the action. An answer which does not meet this requirement is insufficient, whether regarded as a defense or counterclaim."

To like effect is Pomeroy's Code Remedies, § 621, and Waddell v. Darling, 51 N. Y. 327.

In the former suit plaintiff's cause of action was based upon alleged fraud practiced upon him in procuring the note, which, if true, must have necessarily destroyed the contract upon which defendants in the cross-complaint based their right to recover, and hence, on account of the cause of action set up in the cross-complaint being independent and disconnected from that stated in the complaint, there could be, as between the parties, no several judgment, and no judgment in favor of cross-complainants which (conceding the truth of the allegations of the cross-complaint) could qualify, diminish, or defeat a judgment to which the plaintiff would otherwise have been entitled.

In our opinion, the cause of action based upon the promissory note was not and could not be made the subect of a counterclaim; hence the omission of plaintiffs herein to set up a cause of action thereon in the former action brought by this defendant to cancel the note is not barred by the provisions of section 439, as found by the court.

[3] As stated, this defendant, in response to the cross-complaint filed by these plaintiffs in the former action for recovery upon the promissory note, interposed an answer thereto setting up the same facts upon which he based his demand for the cancellation of the note, followed by a prayer for such relief. Respondent, invoking the provisions of section 581 of the Code of Civil Procedure, insists that since in such answer he sought affirmative relief, the cross-complainants were not entitled to dismiss the same. Therefore, he argues, the judgment herein rendered should upon the findings be affirmed. In reply to this contention suffice it to say that "matters which are proper as a defense will not be turned into a counterclaim or cross-complaint merely by a prayer for affirmative relief." Shain v. Belvin, 79 Cal. 262, 21 Pac. 747. While the prayer of defendant's answer to the cross-complaint was for the cancellation of the note, nevertheless it was based upon matters of defense only, and not of counter action.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

182 Cal. 53

WATKINSON v. VAUGHN, City Treasurer, et al. (S. F. 8524.)

(Supreme Court of California. Jan. 8, 1920. Rehearing Denied Feb. 5, 1920.)

1. MUNICIPAL CORPORATIONS ⟸293(1)—RESOLUTION OF INTENTION IN STREET IMPROVEMENT PROCEEDINGS JURISDICTIONAL.

The resolution of intention required in street improvement proceedings by the Improvement Act of 1911 is jurisdictional.

2. CONSTITUTIONAL LAW ⟸289—MUNICIPAL CORPORATIONS ⟸290—STREET IMPROVEMENT PROCEEDINGS NOT DECLARING DISTRICT ASSESSED IS DISTRICT BENEFITED CONSTITUTES DUE PROCESS.

Express declaration in a city council's resolution of intention to improve streets under the Improvement Act of 1911, as required by section 4, that the district assessed was the district to be benefited, *held* not necessary in order that there might be due process of law, not being necessary for compliance with any other constitutional requirement or provision.

3. MUNICIPAL CORPORATIONS ⟸488, 489(6)—OBJECTION TO RESOLUTION OF INTENTION NOT TO BE MADE AFTER COMPLETION OF STREET IMPROVEMENT PROCEEDINGS AND ISSUANCE OF BONDS.

A property owner, after proceedings under the Street Improvement Act of 1911 were completed, the work was done, and bonds issued in payment, under section 16, could not object for the first time that the resolution of intention passed by the city council failed, as required by section 4, to declare expressly that the district described and to be assessed was the district benefited.

4. MUNICIPAL CORPORATIONS ⟸488, 489(5)—DELAY IN POSTING NOTICES OF STREET IMPROVEMENT WAIVED BY FAILURE TO OBJECT.

Where property owner assessed for a street improvement under the Improvement Act of 1911 did not object to the city council on the ground of delay in posting notices of improvement immediately after publication of the resolution of intention, as required by section 5 of the act, she waived the defect.

5. MUNICIPAL CORPORATIONS ⟸294(7)—STATUTORY NOTICE FIXING TIME FOR HEARING PROTESTS AGAINST STREET IMPROVEMENT SUFFICIENT NOTICE TO PROPERTY OWNERS.

Provision of Street Improvement Act of 1911, § 6, that at the next regular meeting of the city council, after the expiration of time within which protests may be made, the council shall proceed to hear and pass upon all protests, *held* to have given property owners notice of the time fixed for hearing protests at the regular meeting of the city council after time for filing them had expired, which notice was sufficient.

6. STATUTES ⟸123(5)—TITLE OF IMPROVEMENT ACT COVERING CONSTRUCTION OF SEWERS AND AUTHORIZING BONDS SUFFICIENT.

Expression in the title of the Street Improvement Act of 1911, "An act to provide for work in and upon streets, avenues, lanes, * * *" *held* broad enough to include the construction of sewers therein, so that improvement bonds representing indebtedness incurred in part for sewers were not invalid as for absence of provision in the title of the act for sewer work.

Shaw and Lennon, JJ., dissenting.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Henrietta Pierce Watkinson against I. R. Vaughn, City Treasurer of the city of Richmond, and the Ransome-Crummey Company, a corporation. From judgment for defendants, plaintiff appeals. Affirmed.

William T. Kearney, of San Francisco (Edward C. Harrison, of San Francisco, of counsel), for appellant.

Faulkner & Faulkner, T. John Butler, and Frank M. Parcells, all of San Francisco, J. B. Richardson, of Oakland, and R. M. F. Soto, of San Francisco, amici curiæ.

Snook & Church, of Oakland (Fox & Ledwich, of Oakland, of counsel), for respondents.

LAWLOR, J. This is an appeal from a judgment in favor of the defendants in an action brought by the plaintiff as the owner of some 20 lots in the city of Richmond, to quiet her title and to enjoin the defendants from proceeding to the sale of such lots to satisfy a lien thereon on account of the nonpayment of certain instalments due on a series of street improvement bonds issued by the city of Richmond to pay for the improvement of Cutting boulevard in that city. The work was done and the bonds issued pursuant to proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730). Section 4 of the act reads, in part, as follows:

"Whenever the contemplated work or improvement, in the opinion of the city council, is of more than local or ordinary public benefit, * * * the city council may make the expense of such work or improvement chargeable upon a district, which the said city council shall, in its resolution of intention, *declare to be the district benefited by said work on improvement*, and to be assessed to pay the costs and expenses thereof." (Italics ours.)

The resolution of intention passed by the city council, and under which the work was done, declared that the work was of more than local or ordinary benefit, and made the expense of the improvement chargeable on a district which was described, and which was declared to be the district to be assessed to pay the expense. The resolution, however, failed, as required by the section of the act just quoted, to declare expressly that the district described and so to be assessed was

the district benefited, and this omission is the principal defect in the proceedings relied upon to establish the invalidity of the bonds.

In view of section 82 of the act, that it should be liberally construed, and in view also of the fact that the act of the city council in assessing the cost of the work on the district very clearly implies a finding that the district described is the district to be benefited, a very serious question arises as to whether the omission of the express declaration that the district is the district benefited is a substantial defect such as would, under any circumstances, invalidate the proceedings. Passing this question, however, and assuming, without deciding, that the omission would constitute a substantial defect such as the property owner would have the right to rely upon, if advantage were taken of it at the proper time and place, the further question immediately arises as to whether this defect was not cured both by the admitted failure of the plaintiff to make objection to it pursuant to the provisions of section 16 of the act, and by the fact that the bonds in question were issued without objection by the plaintiff, and such issuance is made conclusive evidence of the regularity of the proceedings upon which the bonds are based by section 66 of the act.

Section 16 reads:

"At any time within ten days from the date of the first publication of the notice of award of contract, any owner of, or other person having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings [of which the resolution of intention is one], relating to said improvement are irregular, defective, erroneous or faulty, may file with the clerk of the city council a written notice specifying in what respect said acts and proceedings are irregular, defective, erroneous or faulty. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding occurring prior to the date of the first publication of the aforesaid notice of award, in relation to said improvement, not made in writing and in the manner and at the time aforesaid, shall be waived: Provided, the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act."

The last sentence of section 66 reads:

"Said bonds, by their issuance, shall be conclusive evidence of the regularity of all proceedings thereto under this act."

[1] It is contended by plaintiff that the resolution of intention is jurisdictional, which, of course, is true, and that, since the resolution of intention fails because of the omission in question to conform to the requirements of the act, such omission is a jurisdictional defect which cannot be cured by any failure on the part of the property owner to make objection to it, or by any provision as to a conclusive presumption of regularity.

This very question of what defects in street improvement proceedings could be cured under such provisions as those of section 16 and section 66 in the present act was considered at length in Chase v. Trout, 146 Cal. 350, 80 Pac. 81. The argument was there made that no so-called "jurisdictional defect could be thus cured." In response, however, to this argument the decision made a distinction between those so-called jurisdictional requirements which are called for by statute and those jurisdictional requirements which are necessary for a compliance with the constitutional provision that property shall not be taken without due process of law, or with other constitutional provisions, and it was held that, while a failure to comply with jurisdictional requirements of the latter class could not be cured, a failure to comply with those of the former class might be cured by action of the Legislature, since the Legislature had the right, in the first instance, to omit such requirements entirely. The discussion on this point is thus summed up in Chase v. Trout, supra, 146 Cal. 359, 80 Pac. 84:

"The correct proposition is that, as the Legislature has power to devise any scheme for the assessment and levy of taxes for local improvements, provided such scheme includes such notice and opportunity for hearing to the owner of property taxed as will be sufficient to constitute the due process of law required by the Constitution, and otherwise complies with constitutional limitations and restrictions, so the Legislature, by a curative clause in the law establishing the scheme, may provide that the issuance of a bond, or the execution of a deed, in the enforcement of such levy or assessment, shall be conclusive evidence of the regularity of the performance of all the required steps in the proceeding, excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite. As to all these other statutory steps or acts, the same power which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax and that no inquiry may be made concerning them. This is substantially the effect of the statute in question here. The conclusive evidence clause of section 4 of the Bond Act is a part of the law under which the proceeding was carried on, and its effect is the same as if it declared that, although all of these intermediate steps are directed, yet, if they are not performed as required, and the owner permits the matter to proceed until the bond is issued, he shall be thenceforth precluded from proof of such nonobservance, and the requirements shall be conclusively presumed to have been complied with, *excepting those which are necessary to comply with constitutional mandates.*" (Italics ours.)

This language has been quoted, or its substance repeated, and the principle enunciated by it applied in a number of subsequent decisions. Baird v. Monroe, 150 Cal. 568, 89 Pac. 352; Board of Education v. Hyatt, 152

Cal. 515, 93 Pac. 117; Wilcox v. Engebretsen, 160 Cal. 292, 116 Pac. 750; Schaffer v. Smith, 169 Cal. 764, 147 Pac. 976; Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 Pac. 113.

In Wilcox v. Engebretsen, supra, the statute provided that no change of grade should be made except on the petition of a majority of the property owners affected. Such petition, in other words, was a condition precedent to any action looking to a change of grade, and therefore jurisdictional in the ordinary sense of the word. Proceedings for a change of grade were attacked because of the want of such a petition. There was no curative provision in the statute under which the proceedings were taken, and because of this the proceedings were held invalid. The court, however, took occasion to discuss the nature of such a "jurisdictional" requirement, and as to it said:

"It is necessary at the outset to state some fundamental distinctions which have not always been noted and which serve to explain some of the decisions. Where a statute requires such a petition to be filed as a condition precedent to the making of such order, the board or council has no power to make the order until a sufficient petition has been filed. This is settled by the cases of Turrill v. Grattan, 52 Cal. 97, Dyer v. Miller, 58 Cal. 585, Mulligan v. Smith, 59 Cal. 206, and Kahn v. Board, 79 Cal. 396, 21 Pac. 849, and as to that point there is no dispute. But the necessity for such petition is the creature of the statute. It is not required by any constitutional guaranty. From this it follows that the statute may dispense with such requirement, or it may provide that the decision of the board or council as to its sufficiency, or any subsequent act depending upon it, such as the issuance of the bonds, shall be conclusive evidence of the fact that a sufficient petition has been filed. Such provisions will be upheld as valid. Chase v. Trout, 146 Cal. 356, 80 Pac. 81."

In Imperial Land Co. v. Imperial Irrigation District, supra, the principle here involved is stated in language so applicable to the case at bar that we venture to quote it also:

"In any proceeding designed to subject the property of an individual to the burden of tax or assessment, certain elements are essential to constitute compliance with the mandates of the state or federal Constitutions. It is agreed on all hands that no curative act can deprive a property owner of the right to resist a pretended asessment which, if enforced, would deprive him of his property without due process of law, or otherwise infringe his constitutional rights. But, short of this, there is no more reason for denying to the statute before us than to that involved in Chase v. Trout, 146 Cal. 350, 80 Pac. 81, the effect of foreclosing any attack based upon the failure to pursue regularly or at all those steps which the Legislature was not bound to make a part of the statutory procedure. As is pointed out in Chase v. Trout, supra, the applicability of curative statutes is not to be determined solely by inquiring whether the steps omitted or defectively performed were 'jurisdictional.' The term 'jurisdictional' has been used in various senses. The power to levy an assessment or impose a liability on private property is derived solely from the statute, and must be exercised in the manner laid down in the statute. In this sense the jurisdiction of the board extends only to its right to act in the manner prescribed by the Legislature. But with respect to any steps which are not constitutionally necessary the Legislature may, in the very act which requires these 'jurisdictional' steps to be taken, declare that, unless objection is made at a certain time or in a certain way, a failure to take these steps shall not affect the validity of the proceeding. This is the plain meaning of the holding in Chase v. Trout, supra, and we do not doubt that it is equally applicable here."

[2, 3] It cannot be successfully maintained that an express declaration in the resolution of intention that the district assessed is the district to be benefited is necessary in order that there be due process of law, or that it is necessary for a compliance with any other constitutional provision. This being the case, it was competent for the Legislature to provide that the failure to include such declaration in the resolution of intention might be cured by a failure on the part of the property owner to make objection to it at a suitable time and place, and that a property owner would not be permitted to sit back in silent reliance on such a defect and allow the work to go on and when completed come in and say that the proceedings were not properly taken, and that his property was therefore not subject to be called upon to pay its due proportion of the cost. Nor can it be seriously contended that it was not the intention of the Legislature by the present statute to do that very thing. The language of section 16 is specific to the effect that all objections not made in the manner and at the time prescribed shall be waived, provided only "the resolution of intention of the council to do the work, has been actually published and the notices of improvement posted as provided in this act."

It follows that the objection which the plaintiff makes here is not one which it was open for her to make for the first time after the proceedings were completed, the work was done, and the bonds issued in payment thereof.

[4] 2. The plaintiff makes the further contention that the proceedings are a nullity because the notices of improvement were not posted "immediately" as required by section 5 of the act. The resolution of intention was first published on May 13, 1914, but the posting of the notices along the line of improvement did not begin until May 26, 1914—not till after a lapse of 15 days. The plaintiff does not claim that after the notices were posted they did not stay up for the required length of time, nor is it urged that the time

for filing or hearing protests, or any other right of the property owner, was in any manner affected by the delay. The property owner received all the notice that he was entitled to and all that he could have received had the notices been posted the day after the resolution was adopted. Without deciding whether the delay of 15 days was in fact a violation of the provisions of section 5, it is sufficient to hold that, having failed to make objection to the city council on that ground, the point will be deemed to have been waived.

[5] 3. The plaintiff contends further that there is a defect in the proceedings in that neither the day nor the hour for hearing objections to the proposed work was prescribed by law, ordinance, or otherwise. It is pointed out by plaintiff that section 6 of the act provides that within 15 days after the date of the second publication of the resolution of intention, or, if the posting of the notices should be completed at a later date than the second publication, then within 15 days after the completion of the posting, any owner of the property liable to be assessed may make written protest against the proposed work or against the extent of the district to be assessed, or both. The publication and posting were set forth in affidavits on file, and hence all parties concerned were given constructive notice of the time for filing protests. Section 6 further provides:

"At the next regular meeting of the city council after the expiration of the time within which said protest may be so made, the city council shall proceed to hear and pass upon all protests so made and its decision shall be final and conclusive."

This provision gave the property owners notice of the time fixed for hearing protests, which was the regular meeting of the city council after the time for filing protests had expired, and we think this was sufficient. Stoner v. City Council of Los Angeles, 8 Cal. App. 610, 97 Pac. 692.

[6] 4. The final point urged by the plaintiff is that, since the bonds represent an indebtedness incurred in part in the construction of sewers, the bonds are invalid because there is no provision in the title of the act for sewer work. It is a sufficient answer to this contention to mention that the title of the act declares, "An act to provide for work in and upon streets, avenues, lanes. * * *" We think that the expression "work in and upon streets" is broad enough to include the construction of sewers in the public streets, avenues and lanes.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; OLNEY, J.

SHAW, J. I dissent. The question presented is whether or not, under the Street Improvement Law of 1911 (Stats. 1911, p. 730), where the council determines to improve a street and assess the cost thereof upon a district, and the resolution of intention to do so fails to declare that the district to be assessed is "the district benefited by said work or improvement," such omission is cured by the provisions of sections 16 and 66 of the same act.

The majority opinion bases its conclusion that the omission is so cured chiefly upon some statements in the introductory discussion concerning the lawful scope and effect of curative statutes in the opinion of this court in Chase v. Trout, 146 Cal. 359, 80 Pac. 84. The general rule, as there stated, is that such provisions may operate to cure the failure to follow any requirement of the prescribed procedure, "excepting those that are necessary to constitute the due process of law, or to comply with any other constitutional prerequisite." That case involved the effect of the conclusive evidence clause of the Street Bond Act of 1893 (St. 1893, p. 33) upon proceedings for street improvements prescribed by the so-called Vrooman Act (St. 1885, p. 147, as amended). The clause of the said Bond Act was in precisely the same language as the conclusive evidence clause of section 66 of the act of 1911, and the proceedings prescribed by the Vrooman Act for acquiring jurisdiction to make the proposed improvement are substantially the same as those prescribed by the act of 1911. Each of said acts requires the passage of a resolution of intention of a specified form, the publication of said resolution, the giving of notice of the time and place wherein property owners or others interested may file protests or objections to the proposed work or the extent of the district, and provides that, if at such time no protests or objections are filed, or if such as have been filed are overruled or denied, "the city council shall be deemed to have acquired jurisdiction to order the proposed improvements." Referring to these provisions, the opinion in Chase v. Trout proceeds to say that "this part of the proceeding constitutes 'due process of law' and satisfies the constitutional requirement." The complaint under consideration in that case alleged a number of asserted defects in the proceedings occurring after the acquisition of jurisdiction in the manner above set forth, and another alleged defect in the resolution of intention, consisting of the supposed failure thereof to "describe the work," as required by section 3 of the Vrooman Act. The opinion discusses the alleged defects occurring subsequently to the acquisition of jurisdiction and holds that they are all of a character which the Legislature might have dispensed with, and consequently that the noncompliance therewith, if it occurred, could be and was cured by the conclusive evidence clause. The opinion, in paragraph 5 at page

366 of 146 Cal., at page 87 of 80 Pac., then takes up the question of the claimed defect in the resolution of intention. Upon this subject the opinion contains this passage:

"The appellant in answer to this claim contends that the curative clause of the Bond Act covers these defects, if such they are. The resolution of intention is the first step in the proceeding. It is to be published, and it is by means of such publication, and the notice thereafter given, which refers to it for particulars, that the council acquires jurisdiction. It is a part of the 'due process of law' required by the Constitution, the want of which cannot be cured or waived by the Legislature. There must be a substantial compliance with the provisions of the act in regard to this preliminary process."

This express declaration that the resolution of intention must substantially comply with the requirements of the statute, and that its failure in that respect is not cured or waived by the conclusive evidence clause, was apparently overlooked in the preparation of the majority opinion, and it is contrary to the conclusion stated therein. That it was considered important to the decision in Chase v. Trout is shown by the fact that the opinion proceeds elaborately to show that the resolution was not defective and that it did sufficiently describe the work. If such defect could have been cured, the point could have been disposed of in a few words to that effect.

The final acts which result in the acquisition of jurisdiction by the council to order the work done, under the act of 1911, are the publication of the resolution of intention for the period prescribed, and the posting of notices of the time and place of filing protests and objections as provided in section 5 of the act, together with the denial of protests or objections if any are filed. Section 7. Although the supposed curative provisions of section 16 refer in general terms to any objections to the proceeding prior to the date of publishing the notice of the award of contract, yet, in view of the final clause of the section and the previous provisions of the act, it is clear that it was not intended thereby to render it unnecessary for the council to follow the steps prescribed as necessary to acquire jurisdiction. The final clause declares that objections on account of any defect, irregularity, error, or fault in the previous proceedings, not made in writing within ten days after notice of the award of the contract, shall be considered as waived, "provided, the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in the act." This, of course, does not refer to the protests or objections to be made at the hearing provided for in sections 5 and 6; for those must be acted on and denied before jurisdiction to order the work done and advertise for bids can be acquired. Section 16 must therefore refer exclusively to other objections; that is to say, to those which arise from proceedings subsequent to the acquisition of jurisdiction. In view of the decision aforesaid in Chase v. Trout and that in Ramish v. Hartwell, 126 Cal. 448, 58 Pac. 920, to the effect that material defects in the jurisdictional part of the proceeding cannot be cured, of which it must be presumed the Legislature was aware, it could not reasonably be supposed that section 16 was intended to provide for a waiver of any jurisdictional step in the proceeding; certainly not of those made mandatory by the language used.

It may be conceded that the Legislature, if it had been so minded, could have expressly declared that the failure to state in the resolution of intention that the district described was the district benefited by the work should not invalidate the proceedings. But in view of the fact that the evident purpose of the provision was to compel the council to put itself on record on the subject, and that it is one of the jurisdictional prerequisites prescribed by the act, nothing less than an express declaration that it should not be necessary should be considered as having that effect. The provisions of section 16 fall far short of such declaration.

I concur: LENNON, J.

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LARSEN v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 8201.)

(Supreme Court of California. Jan. 5, 1920. Rehearing Denied Feb. 2, 1920.)

1. MUNICIPAL CORPORATIONS ⊂=513(6)—OFFICERS BEING BOUND BY JUDGMENT AGAINST CITY NEED NOT BE MADE PARTIES IN CONTEST OF PUBLIC IMPROVEMENT ASSESSMENT.

The mayor of the city and county and the clerk of the board of supervisors will be officially bound by any judgment against the municipal corporation, even if not parties to the action, and, it not being claimed that either of them has done or threatens any unofficial act to plaintiff's prejudice, they are not necessary parties in an action to contest an assessment for public improvement.

2. MUNICIPAL CORPORATIONS ⊂=303(1)—CHARTER PROVISIONS AS TO PROCEDURE FOR CONSTRUCTION OF TUNNEL AND SECURING RIGHT OF WAY AND APPROACHES NOT EXCLUSIVE.

Under San Francisco Charter, art. 6, c. 8, empowering the board of supervisors to order and construct a tunnel and levy the expenses therefor upon private property "in the manner and under the procedure" of chapter 2 of said article, but further providing that such shall not be exclusive, and authorizing ordinance providing different procedure, the board of super-

visors may by ordinance adopt a procedure wholly different from that provided by such chapter 2, for acquiring right of way and approaches to such tunnel and for the levy of assessments on private property therefor.

3. MUNICIPAL CORPORATIONS ⟸273—CHARTER PROVISIONS DO NOT GIVE CITY EXCLUSIVE RIGHT TO USE OF STREET CAR LINES THROUGH CITY TUNNEL.

Under the terms of San Francisco Charter, art. 6, c. 8, § 5, and chapter 2, the city and county has and can have no exclusive right to the use of the Twin Peaks tunnel constructed by the city, the object of constructing the tunnel being to provide a way for rapid transit between the two sections of the city for one or more street car lines.

4. MUNICIPAL CORPORATIONS ⟸439—ASSESSMENT FOR TUNNEL CONSTRUCTION HELD NOT TO EXCEED BENEFITS TO ASSESSED LAND.

Where the construction of a tunnel appears especially beneficial to some of the property assessed therefor, and the special benefit to property about one entrance of the tunnel is not so easily demonstrated, but conditions are such that city authorities might reasonably conclude that there was special benefit, the court cannot set aside the assessment on the ground that it exceeds the benefits received from the improvement.

5. MUNICIPAL CORPORATIONS ⟸273—TUNNEL USED ONLY FOR STREET CAR TRAVEL IS A PUBLIC USE FOR PUBLIC BENEFIT.

A tunnel between two parts of a city is a public improvement for the public benefit and is a public use, although not open to all modes of travel; it being open to the general public for travel over one or more street car lines operated through the tunnel.

6. MUNICIPAL CORPORATIONS ⟸412—ASSESSMENT FOR TUNNEL CONSTRUCTED FOR PUBLIC "USE" NOT INVALID BECAUSE ORDINANCE AUTHORIZED PUBLIC USES.

The contention that the assessment proceeding for construction of a tunnel is invalid because the tunnel constitutes a single public use, whereas the tunnel procedure ordinance authorizes the construction of a tunnel "for public uses," is without merit, since "the singular number includes the plural and the plural the singular." Civ. Code, § 14.

7. MUNICIPAL CORPORATIONS ⟸273—CHARTER PERMITS CITY'S ACQUIRING EASEMENT FOR TUNNEL AND FOR THE TUNNEL CONSTRUCTION IN SAME PROCEEDING.

San Francisco Charter, art. 6, c. 8, §§ 1, 2, 3, and 6, authorize the construction of a tunnel if the city does not already have the property necessary therefor, so that the city can acquire necessary property and provide for carrying on the construction of the tunnel in a single proceeding, and is not limited to construction through land in which it previously had an easement.

8. MUNICIPAL CORPORATIONS ⟸293(3) — NECESSITY SHOWN OF 90-FOOT STRIP ADDITION TO STREET FOR TUNNEL CONSTRUCTION.

Where the resolution of intention for constructing a tunnel shows that a part of a 90-foot strip was acquired as an addition to the width of a street a part of which was taken for the tunnel and thereby made unfit for street purposes, such strip must be deemed necessary and convenient for the tunnel's construction, in view of San Francisco Charter, art. 6, c. 8, § 2.

9. MUNICIPAL CORPORATIONS ⟸513(9)—BURDEN ON PLAINTIFF TO SHOW THAT WHOLE STRIP TAKEN FOR TUNNEL WAS NOT NECESSARY UPON OBJECTION TO ASSESSMENT.

In a proceeding to set aside an assessment for construction of a municipal tunnel, the burden rested upon plaintiff to show errors in the decision except as shown on the face of the record; and, in the absence of contrary evidence, the plans and maps not being included in the record, where the original resolution stated that the main bore of the tunnel should be 24 feet, without stating that no part should be wider, it must be presumed that the plans adopted called for the acquisition and use of the entire 90-foot strip secured for tunnel construction.

10. MUNICIPAL CORPORATIONS ⟸513(1)—SUPERVISORS' DECISION AS TO PROPERTY BENEFITED AND AMOUNT OF ASSESSMENT FOR TUNNEL CONSTRUCTION CONCLUSIVE EXCEPT FOR FRAUD OR MISTAKE.

Where owners of property assessed were given, by the ordinance for constructing a tunnel, the right to object, and the assessments were reviewed upon final hearing of the board of supervisors after required notice, and the boundaries of the assessment district were subject to change upon such hearing, the decision of the supervisors as to the property benefited and the amount to be assessed is conclusive, unless attacked for fraud or mistake.

11. MUNICIPAL CORPORATIONS ⟸513(7)—SUPERVISORS ARE ULTIMATE AUTHORITY TO DETERMINE LANDS BENEFITED AND THE AMOUNT OF BENEFITS FROM TUNNEL CONSTRUCTION.

The board of supervisors is the ultimate authority in finally determining what lands are benefited and what amount of benefits shall be assessed against the several parcels benefited by the construction of a municipal tunnel, and the court will not declare an assessment void unless it can plainly see from the face of the record or from facts judicially known that the assessment so finally confirmed is not proportional to benefits, or that no benefits could accrue to property assessed, where no evidence was offered to show that lots within the district not assessed for improvement were benefited thereby.

12. MUNICIPAL CORPORATIONS ⟸513(1) — PLAINTIFF HAS NO RIGHT TO CONTEST IMPROVEMENT ASSESSMENT BECAUSE OTHER LOTS THAN PLAINTIFF'S WERE IMPROPERLY ASSESSED.

Procedure ordinance for construction of a tunnel construed not to provide that plaintiff, seeking to set aside the assessment therefor, could inquire into all the particulars of each lot's assessment, and have the same set aside if a different apportionment would be more just and equitable, or that some not assessed were benefited, since if owners of each of the

16,000 parcels assessed brought such suits the litigation would be unending.

13. CONSTITUTIONAL LAW ⊂290(3)—MUNICIPAL CORPORATIONS ⊂455 — TWENTY DAYS AFTER PUBLICATION OF PUBLIC WORKS REPORT IN WHICH TO OBJECT TO TUNNEL ASSESSMENT NOT UNREASONABLE.

An assessment ordinance for tunnel construction is not invalid because allowing interested persons only 20 days for filing protest after publication of notice of filing of report of public works; for, although to constitute due process necessary to jurisdiction such persons must have notice of the time and place of the hearing for a reasonable period prior thereto, it cannot be said that 20 days is unreasonable.

14. MUNICIPAL CORPORATIONS ⊂513(7)—EVIDENCE OF SUPERVISORS' METHOD OF DETERMINING BENEFITS TO LOTS ASSESSED FOR TUNNEL INCOMPETENT TO IMPEACH ASSESSMENT.

It was not error upon trial of a proceeding to contest ordinance assessing benefits upon lots for tunnel construction to exclude evidence as to how the board of supervisors proceeded in estimating what the benefit assessment should be upon the different blocks within the assessed district, since such evidence was incompetent to impeach the assessment finally made by the supervisors upon the hearing.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by Carl G. Larsen against the City and County of San Francisco and others, to contest the validity of an assessment for public improvement. Judgment for defendants, and plaintiff appeals. Affirmed.

Edward C. Harrison and Maurice E. Harrison, both of San Francisco (James A. Cooper, of San Francisco, of counsel), for appellant.

Percy V. Long, City Atty., and George Lull, Asst. City Atty., both of San Francisco (Theodore J. Savage, of San Francisco, of counsel), for respondents.

SHAW, J. The Twin Peaks tunnel pierces the high ridge which separates the more densely populated portion of San Francisco from the large and comparatively level region lying west of the said ridge and constituting the watershed of Lake Merced. The length of the tunnel is 11,200 feet. It was constructed by the city and county of San Francisco under the authority of chapter 8, article 6, of the San Francisco Charter, and under the procedure provided by an ordinance passed by the board of supervisors of San Francisco, pursuant to authority given in said chapter, on October 20, 1913. For the cost of making the tunnel an assessment was levied by the city in said proceeding, covering lands near both ends of the tunnel, including certain lands of the plaintiff. The present action was begun by the plaintiff under section 12 of the ordinance above mentioned, for the purpose of contesting the validity of the assessment and to quiet plaintiff's title to the said lands against the claims of the city of San Francisco thereunder. Judgment was given in favor of the defendant. The plaintiff appeals therefrom.

[1] The mayor of the city and county and the clerk of the board of supervisors are made parties defendant. With regard to their acts and conduct under color of their said offices they will be bound by a judgment against the municipal corporation, even if they are not parties to the action. It is not claimed that either of them has done or threatens to do any unofficial act to the prejudice of the plaintiff. Consequently no good reason appears for their presence as parties, and we need not notice the fact further.

[2] An ordinance similar to the tunnel procedure ordinance of October 20, 1913, aforesaid, was under consideration by this court in Mardis v. McCarthy, 162 Cal. 94, 121 Pac. 389, and again in Hayne v. San Francisco, 174 Cal. 185, 162 Pac. 625. In each of these cases the objections there urged against the validity of that ordinance were held to be untenable. In the present action the appellant advances certain other reasons against the validity of the ordinance of 1913. He also claims that, even if the ordinance is valid, the assessment is void because of other objections and defects which we will state in detail as we proceed.

1. The ordinance was adopted under the power conferred upon the city by chapter 8 of article 6 of the charter. This chapter empowers the board of supervisors to order the construction of and construct a tunnel and levy the damage, cost, and expenses thereof upon private property "in the manner and under the procedure and powers in chapter 2 of this article provided for street work and street improvement." It further provides that the method of procedure in chapter 2 shall not be exclusive, but that the board of supervisors may adopt an ordinance "providing a method of procedure for such improvement, work and assessment and for the ascertainment and payment of damages and for the manner in which protests against such assessments and damages awarded may be heard and determined, and for the manner in which such assessment may be collected and paid," and for fully and completely exercising the powers conferred by the section. In said chapter 2, after giving the city power to make street improvements, other provisions follow, prescribing the procedure to be followed in

exercising the power. An application of property owners to the board of public works must be made in order to start the proceeding, "except where otherwise provided." The board must then pass a resolution of its intention to recommend the doing of the work, and must recommend the same to the supervisors, before the improvement is ordered. The appellant insists that these provisions of chapter 2 are limitations upon the power therein conferred, and that by the reference aforesaid, in chapter 8, they are carried into and become limitations upon the power to construct tunnels, and also upon the power to adopt, by ordinance, the procedure to be observed in the construction of tunnels, that, consequently, such ordinance must also provide for an application of owners and a resolution and recommendation by the board of public works, as a condition precedent to ordering the tunnel construction, and that as this ordinance does not do so, it is void. To this we cannot agree. The provisions of chapter 8 differentiate clearly between methods of procedure and the grant of power, and between the grant of power to construct tunnels and the grant of power to provide the procedure therefor. The two grants are independent of each other. It is true that proceedings for assessing the cost of public improvements upon private property are to be strictly followed, and that, as is often said, "The mode is the measure of the power," so that in doing street work under chapter 2 the method of initiating the proceeding must be followed in order to make a valid exercise of the power there conferred. But to hold that the reference to chapter 2, contained in chapter 8, imports into the latter chapter all of the provisions for procedure provided in chapter 2, as limitations upon the power conferred in chapter 8, including the power to adopt an ordinance prescribing the procedure, would, in effect, entirely destroy the power given in chapter 8 to adopt a method of procedure. Such an absurd result cannot be allowed unless positively necessary. Such a construction is not imperative. It is more reasonable to suppose that the reference in chapter 8 to the procedure and powers provided in chapter 2 for street work had reference to procedure alone, and did not incorporate such procedure into chapter 8, as limitations upon the power to construct tunnels and to adopt ordinances of procedure therefor, but left the board of supervisors at liberty to adopt a procedure wholly different from that provided in chapter 2. This we believe to be the true construction of the charter in this particular.

The same reasons apply with equal force to the contention that the power given in chapter 8 to adopt an ordinance of procedure for the acquisition of property for a right of way and approaches for such tunnel and for levying an assessment on private property for the cost and damages must conform to the procedure prescribed in chapter 2 of said article. The provisions in that respect are in the same form as those relating to the construction of tunnels.

[3] 2. The resolution in question states that the public interest and convenience require the construction of the Twin Peaks tunnel "for public uses," but do not specify or describe the particular public use or uses to which it is to be devoted. It appears from the evidence, however, that no way is provided for passage through the tunnel by persons traveling on foot or in vehicles, or otherwise than in street cars. It is conceded by the respondents that as it exists it cannot be used except as a way upon which to lay tracks for street car lines and for the passage of persons through it while in such cars, and that no other use was intended. The charter provides that two or more street car lines, operated under different managements, may use a tunnel constructed under the power given in chapter 8, and that the city and county may use it for a municipal street car line, either singly or jointly with another street car line, but that no exclusive right to its use by a street car line shall ever be given. Article 6, c. 8, § 5. It also appears that since its completion the tunnel has been used exclusively as a passageway for cars on a branch of the street car system operated by the city and county. It is manifest from the terms of the charter just stated that the city and county has, and can have, no exclusive right to such use, and that the object to be accomplished in making this tunnel was to provide a way for rapid transit between the two sections of the city aforementioned for one or more street car lines.

The appellant contends that no assessment for the cost of a tunnel for such purposes can be made upon private property; that such a railroad must be the property of a private corporation or of a municipal corporation acting in its proprietary capacity; that if it belongs to a private corporation the tunnel would not be for the public benefit, but would be for the benefit of such corporation, which is a purpose for which a special assessment upon private property cannot lawfully be made, while if the railroad belongs to the municipal corporation, the tunnel would be for the general benefit of the municipality, and the expense thereof could lawfully be met in no other way than by a general ad valorem tax upon all property within the city.

[4] It has been said that the power to levy a special assessment upon private property for public purposes "is not a power to tax property generally founded upon the benefits supposed to be derived from the organization of a government for the protec-

tion of life, liberty, and property, but a power to tax specific property founded upon the benefit supposed to be derived by the property itself from the expenditure of the tax in its immediate vicinity. Hence property not benefited by the improvement cannot be subjected to the burden imposed for that purpose." Taylor v. Palmer, 31 Cal. 254. In Lent v. Tillson, 72 Cal. 428, 14 Pac. 81, speaking of the right to levy local assessments for public improvements, the court says that, where it can plainly see that the tax is not for the benefit of the property, but wholly for the private advantage of an individual, it would declare the assessment void, and it proceeds to say:

"Still the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the Constitution, or by its own nature and purposes. Within these limits the Legislature is the sole judge of when and to what extent the power shall be used."

In another case the court said:

"While it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the taxpayer." In re Madera Irrigation District, 92 Cal. 326, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

It is not necessary here to determine whether the power to levy a local assessment for the expenses of a public improvement is limited to cases where a special benefit is conferred thereby upon the assessed property or not. It must be conceded that, where there is a peculiar benefit from a public improvement to the property assessed, the power to levy a special assessment for its cost exists. We are satisfied that the construction of the tunnel here involved is specially beneficial to the property upon which the assessment is levied, to the extent necessary to justify the assessment. The districts assessed, as before stated, include a large area southwesterly of the Twin Peaks ridge, and another, but a more limited, area in the neighborhood of the easterly extremity of the tunnel. Without the making of such tunnel the inhabitants of the more remote district could not reach the city by means of street cars, except by a circuitous route involving considerable delay, and means of access to the city was confined to such street car lines and to travel by vehicles and on foot over steep hills. By reason of the construction of this tunnel, and the operation of a street car line through it, they have a ready and speedy means of access to the city, and the resulting benefit to their property is apparent. While the special benefit to the property about the easterly entrance is not so easily demonstrated, it is obvious that the conditions are such that the legislative authorities of the city might reasonably conclude that there was such special benefit. That being the case, the court cannot set aside the assessment on the ground that it exceeds the benefits received from the improvement. Lent v. Tillson, supra; Duncan v. Ramish, 142 Cal. 692, 76 Pac. 661. This sufficiently meets the argument on this point.

[5, 6] It cannot be successfully contended that such a tunnel is not a public improvement, or that its use is not for the benefit of the public, or that it is not a public use. A public way is for the general public benefit, although not open to all modes of travel, provided it is open to the general public for travel thereon in the manner to which it is adapted. There is no merit in the claim that the proceeding is invalid because the tunnel constitutes a single public use, whereas the tunnel procedure ordinance authorizes the construction of a tunnel "for public uses." "The singular number includes the plural, and the plural the singular." Civ. Code, § 14. This is a rule of general application where the context does not limit the meaning. Furthermore, if we were disposed to be technical, it could be said that, as the charter devotes the tunnel to the use of two or more separately owned street railroads, it is in fact constructed for "public uses."

[7] 3. It is claimed that the charter confers no power upon the city and county to make a tunnel, except in or under a public street, or under land belonging to it or in which it may have an easement, and that, as this tunnel runs in part through land which is not a public street and in which the city then had no easement, and which it did not own at the time the proceeding was begun, the assessment was beyond the power given, and is therefore invalid. We think this is not the true effect of the charter. Chapter 8 consists of six sections. Section 1 gives the board of supervisors power to construct any tunnel under any "open public street in the city and county," or under "Any other land of the city and county," or under any land or water "in which and where the city and county may then have an easement or right of way therefor." Section 2 empowers the board to acquire for the municipality, by purchase or condemnation, any and all land, or easement therein, or any property necessary or convenient for such tunnel, and to raise the money for such acquisition by means of an assessment upon private property; also to adopt ordinances providing a procedure to that end. Section 3 authorizes the board to accomplish in a single proceeding both the acquisition of the property for a tunnel and the construction

of the tunnel itself, and to pass the ordinances necessary to allow such consolidation of the two purposes in such single proceeding. The ordinance adopted provides for such consolidated proceeding. Section 6 authorizes two or more tunnels to be constructed in pursuance of one general plan under one proceeding, and any or all acquisitions of lands, easements, or rights of way and property necessary and convenient for the same in the same proceeding, and that the property benefited may be assessed for the costs, damages, and expenses of the entire proceeding.

These provisions could have been adopted upon no other theory than that, if the city and county did not already have the property necessary for the proposed tunnel, or tunnels, it could acquire such property and order and carry on the construction of the tunnel in a single proceeding including both purposes. The phrases, "any other land of the city and county," and "in which and where the city and county may then have an easement" in section 1, must, in view of the subsequent provisions of the chapter, be taken to refer to any period of time antecedent to the actual construction of the tunnel, or, possibly, antecedent to the letting of the contract therefor or the beginning of the work thereon, and not to require that the city shall own the property or easement necessary for the tunnel before or at the time when the proceeding to construct it is initiated. Any other construction of section 1 would render the provisions of sections 2 and 3 inoperative and unnecessary so far as they authorize the combination of the two purposes in a single proceeding. These provisions, therefore, point the meaning of the language of section 1 as above stated. The several sections, when considered together, show an intention to authorize the construction of a tunnel through land to be acquired in a consolidated proceeding, including both the acquisition and the construction.

[8] 4. The proceedings included the acquisition, at a cost of $514,935, of a strip of land about 90 feet wide and 1,900 feet long, at the eastern end of the tunnel at the end of Market street. Appellant claims that the assessment is void because this strip constitutes an extension of Market street, and because a strip of land 90 feet wide cannot be necessary for a tunnel only 24 feet wide in the clear, exclusive of the walls or casings. The only evidence to support this contention was the original resolution of intention and the testimony of a witness, who said he was a civil engineer, that he had examined the plans, and that it was not necessary to have the strip of land 90 feet wide in order to construct the tunnel as planned. The record shows that the strip in question was acquired because it was necessary and convenient for the construction of the tunnel. No mention is made therein of Market street or of any extension thereof. This is conclusive on that point. The testimony of said witness is literally true, for the resolution of intention shows that a part of the 90-foot strip was acquired as an addition to the width of Seventeenth street, a part of which was taken for the tunnel and thereby made unfit for a street. The charter authorizes this, and declares that land taken for such purpose shall be deemed necessary for the construction of such tunnel. Article 6, c. 8, § 2. This answers the objection with respect to that part of said 90-foot strip.

[9] The procedure ordinance provides that the board of public works shall make and report to the supervisors plans for the tunnel, an estimate of the costs and expenses thereof, a map showing the assessment district proposed, with a statement of the damages to lands affected by the tunnel and the benefits to the lands in such assessment district. Thereupon there is to be a public hearing, upon notice, after which the supervisors may modify, confirm, or reject the report, or modify it and confirm it as modified. Elaborate plans were made by the board and reported to the supervisors. The required notice was given, protests were filed, and there was a hearing of the matter. At that hearing the report was modified, and confirmed as modified. This was the equivalent of a decision by the board of supervisors that the protests were not well founded; that all of the proceedings up to that point had been correctly taken; and that all the lands proposed to be taken were necessary for the construction of the proposed tunnel. This determination is presumed to be correct. The burden of proof rested upon the plaintiff to show errors in the decision, except in so far as they are shown upon the face of the record. The report to the supervisors, including the plans and maps, were introduced in evidence. They are not included in the record before us. While the original resolution stated that the main bore of the tunnel was to be 24 feet in the clear, it does not state that no part of it is to be wider. The plans would show the size and width of all parts of it. In the absence of evidence to the contrary, we must presume that the plans adopted call for the acquisition and use of the entire strip for tunnel construction. Appeal of Piper, 32 Cal. 538.

[10] 5. The next objection of the plaintiff is that the entire assessment is void because it appears upon its face that the apportionment of the cost is not proportional or uniform. This objection is founded upon the facts that the assessment shows upon its face that certain lots included within the assessment districts are not assessed at all, and that of lots which plaintiff claims are similarly situated some are assessed at one-eighth of a cent per square foot, and others

at a much higher rate, varying from 1¾ cents to 3½ cents per square foot. No extrinsic evidence was given tending to prove that the lots not assessed were in fact benefited by the tunnel.

The provisions of the procedure ordinance show that the district and the lands to be assessed were not finally fixed in advance by the supervisors in the resolution of intention. It is the order of confirmation of the report of the board of public works, as modified by the supervisors upon the hearing of protests, that fixes the exact limits of the assessment district and the precise parcels of land to be assessed. The ordinance declares that the resolution of intention to order the construction of the tunnel must "specify the exterior boundaries of the district or districts of land to be benefited by such construction and to be assessed to pay the damages, costs and expenses thereof." Section 2. But this is not the final decision on the subject. Upon receiving this resolution, the board of public works, after first determining the amount of damages that will be sustained by persons claiming damages, must estimate the total amount of costs of construction, including the costs of acquiring the necessary land and the damages sustained, and assess the total sum "upon the several lots of land benefited within the district or districts of assessment, so that each of the lots shall be assessed in accordance with its benefits caused by such tunnel construction." Section 5. This necessarily implies that no benefits shall be assessed against any parcel which said board may find is not benefited. The said board must thereupon prepare and report to the supervisors a map of the districts as specified in the resolution of intention, showing the subdivisions of property therein as shown by the assessment maps of the city and county assessor, giving each subdivision a separate number, a list showing the names of the persons to whom each parcel is assessed, "and an estimate of the benefits which each of the respective subdivisions or parcels will receive, from and by the construction of such tunnel." Section 6, subds. 3, 4. This also implies discretion to estimate that some parcel will receive no benefit. Any person interested may object to the extent of the districts declared to be benefited in the resolution of intention, or to the amount of benefits fixed by the said board in its report, or to any other act, determination, or proceeding of the board of public works or of the supervisors in the proceeding, and may file a written statement of his objections, and on those grounds protest against the confirmation of said reported assessment. Section 8. This implies the right to protest against the omission to assess benefits upon any parcel not reported as benefited by the board of public works. All these objections, and the accuracy and propriety of the several assessments reported to the supervisors, come in review upon the final hearing before the supervisors, after the giving of the required notice. Upon such hearing the boundaries of the district and the amounts of the several assessments of benefits may be changed and corrected as the supervisors, upon the evidence then taken, shall deem proper. It is the report as thus changed, the assessment district as then defined, and the parcels of land then determined to have been benefited by the work that "shall constitute the assessment made and levied for defraying the damages, costs and expenses of such tunnel construction, and the amount of the benefits set opposite each parcel of land shall constitute the amount of the assessment thereon." Section 10.

Under the principles established in this state and elsewhere, this final decision of the supervisors as to the property benefited and the amount to be assessed is conclusive, unless attacked on the ground of fraud or mistake.

[11] There is a distinction between the power of the board making the assessment in cases where the Legislature has itself fixed the limits of the assessment district and designated the land which is benefited and which is to be assessed for the expense of a public improvement, and cases where a local legislative body has authority to levy the expenses upon a district to be fixed by itself and to determine what property is benefited and is to be assessed for the improvement. The ordinary case of a front-foot assessment is an example of the first alternative. There the Legislature has declared what property shall be assessed, and its declaration is a determination that the property to be assessed is also the property benefited. In a case of that character the board which levies the assessment cannot depart from the legislative determination, and if it omits from the assessment any parcel of the land which the Legislature has thus declared is benefited and is to be assessed for the improvement, the assessment is void. People v. Lynch, 51 Cal. 15, 21 Am. Rep. 677; Dyer v. Harrison, 63 Cal. 447; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373.

It is obvious that these decisions do not apply to cases like the one at bar. The board of supervisors is the ultimate authority which is empowered to finally determine what lands are benefited and what amount of benefits shall be assessed against the several parcels benefited by the construction of the tunnel. This determination is made after a full hearing accorded to all persons interested to make such objection as they see fit. In such a case the court will not declare the assessment void unless it can plainly see from the face of the record or from facts judicially known that the assessment

so finally confirmed is not proportional to the benefits, or that no benefits could accrue to the property assessed. Duncan v. Ramish, supra, 142 Cal. 692, 76 Pac. 661; Lent v. Tillson, supra, 72 Cal. 429, 14 Pac. 71. In Duncan v. Ramish the validity of a street assessment upon a district benefited was involved. The plaintiff sought to prove that benefits accruing to his lots from the improvement were less than the assessment against them. The court said:

"It is true that local assessments are said to be imposed on the theory that the property adjacent to the improvement receives special benefit therefrom. But this is a matter which is for the determination of the legislative authority of the state, acting through its established agencies for the government of political subdivisions, or directly by the Legislature of the state, as that body may see fit. It is enough for the local property owner that he has a right to be heard before the city council upon the question, by filing a petition of remonstrance in the proceeding prescribed by law, setting forth his reasons why the improvement should not be made. Upon this the council must decide the question, and its decision is final."

The plaintiff there also claimed that the district, as fixed by the council, did not include all the property fronting on the streets improved, that is to say, that property benefited was not assessed. The statute gave power to the council to make the assessment upon a district, instead of upon the frontage plan, and, as before stated, it gave the property owners the right to object to the boundaries and to a hearing before the council upon that subject. The court said, referring to the passage above quoted:

"Upon the same principles and authorities heretofore referred to in reference to the question of benefits, it must be held that the property owner, having this right, must avail himself of it, or be concluded by the decision of the council. It does not appear that any objection was made to the boundaries of the district, and hence it must be held that the decision of the council as to its extent was correct. There is nothing in the law which requires the assessment district fixed by the council to include all the property fronting on the streets. The court cannot say that it might not be possible that some of the property fronting on the streets would not be benefited by the improvement." 142 Cal. 696, 76 Pac. 665.

In Haughawout v. Raymond, 148 Cal. 313, 83 Pac. 54, the court said:

"The contention that benefited property was omitted from the assessment, and the whole assessment is therefore invalid, is disposed of by the case of Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661."

There is a statement in Davies v. Los Angeles, 86 Cal. 49, 24 Pac. 771, to the effect that where the property in an assessment district is not all assessed, the assessment is invalid. There is no discussion of the question, and the matter of the finality of the determination of the board after a hearing is not even suggested. The plaintiff also cites Moulton v. Parks, 64 Cal. 181, 30 Pac. 613. There is a declaration in that decision that a board of supervisors, which has power to create an assessment district determining that certain lands and none other is benefited by a proposed improvement, cannot afterwards amend its order by including lands outside of said district. The point actually decided was that the board of supervisors of Sutter county had no power to establish a levee district in an adjoining county. The declaration made in that case seems to have no bearing upon the question before this court, and neither that nor the Davies Case should prevail against the later decisions of the court above cited.

Section 12 of the ordinance provides that any property owner aggrieved at any assessment levied may commence an action to contest his assessment, levied under the terms of the ordinance, but that such action must be begun within 30 days after the adoption of the resolution of the supervisors, finally modifying and confirming the assessment reported by the board of public works. This action was begun under that authority. The plaintiff insists that in such an action he may review all the proceedings of the supervisors, including its determination as to the property benefited and the amount of benefits to be assessed.

Even if this were conceded, it must be also conceded that the determination of the supervisors is at least prima facie correct, and that it could not be set aside except upon evidence showing that the decision was not sustained by the facts existing. No evidence was offered or given to show that the particular lots not assessed for the improvement were in fact benefited thereby. In the absence of such evidence it is obvious that the decision of the supervisors could not be declared invalid.

[12] But we do not think the procedure ordinance intends or provides that in such action the plaintiff can inquire into the particulars of each assessment and have the court revise it and set aside if it shall find that a different apportionment would be more just or equitable, or that some of the lots not assessed were benefited by the tunnel. The section does not so provide, and the circumstances and conditions forbid such implication from the mere provision that an action may be begun by any person aggrieved to contest the validity of his assessment. There were more than 16,000 parcels of land assessed. If the owner of each of these parcels could separately maintain an action and therein reopen the entire question of benefits received and the proportion to be charged against the respective parcels, it is plain that any proceeding of such magnitude,

or even of far less extent, could, and probably would, be effectually blocked by unending litigation. Such construction is not to be indulged if it produces such absurd consequences.

The reasons above given also answer the objection urged in this connection that the assessment was not made according to the benefits. The determination of the supervisors is conclusive on that subject also. We find no ground on which these objections can be sustained.

[13] 6. There is no merit in the point that the ordinance must be held invalid because, after the first publication of the notice of the filing of the report of the board of public works with the supervisors, it allows the persons interested only 20 days' time within which to file a protest in the proceeding. The argument is that, where there are 16,000 parcels of land assessed, it cannot reasonably be supposed that all of the owners would receive knowledge of such filing and obtain access to the report for a sufficient period of time before the hearing to discover its defects or determine the grounds of the objections thereto. It is not claimed that the plaintiff did not have sufficient time for this purpose. In order to constitute the due process of law necessary to give jurisdiction of a proceeding of this character, the interested persons must have notice of the time and place of the hearing for a reasonable period before it is to be held. Davies v. Los Angeles, supra, 86 Cal. 46, 24 Pac. 711. But we cannot say that the 20 days allowed by this ordinance is unreasonable. In Bellingham Bay, etc., Co. v. New Whatcom, 172 U. S. 319, 19 Sup. Ct. 205, 43 L. Ed. 460, a local improvement case, the period was 10 days after the first publication, and the court held that it could not be declared an unreasonably short time. In this state there are many local improvement statutes in force, of similar character, in which the time of the notice prescribed to give jurisdiction varies from 10 to 20 days. In view of these numerous statutes, all of which have long been considered valid in this respect, it is obvious that 20 days cannot be said to be unreasonable.

[14] 7. Plaintiff urges that there was error at the trial in refusing to admit certain evidence offered by him.

A member of the board of public works was asked to state what rule that board adopted in apportioning the benefits in the district; whether he, personally, went upon the land to make the assessment; whether he took part in making the estimate of the benefits; whether the board had the land viewed by any person for its information, and what information the board had as to such benefits and from whom it was derived. He was then asked to state why a different rate of assessment was placed upon different blocks which, it was claimed, were not assessed at the same amount. These questions all related to the action of the board of public works in making up its estimate prior to the filing of its report with the supervisors. The authorities already cited, especially the quotations from Duncan v. Ramish, supra, sufficiently answer the objections to the rulings excluding this evidence. They were incompetent as evidence to impeach the assessment finally made by the supervisors upon the hearing. The other objections to evidence are too trivial to deserve notice.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

182 Cal. 66

AMARANTH LAND CO. v. COREY et ux.
(L. A. 5289.)

(Supreme Court of California. Jan. 8, 1920.)

1. VENDOR AND PURCHASER ⊂=301—VENDOR RETAINING TITLE AS SECURITY MAY SUE FOR DEBT.

A vendor retaining legal title to land sold may waive his security and bring an action at law for the debt.

2. VENDOR AND PURCHASER ⊂=302—ALLEGATION AND FINDING AS TO FAIRNESS OF PRICE UNNECESSARY IN VENDOR'S ACTION THEREFOR.

Where vendor, who retained title to land as security for payment of purchase price, waives security and brings action at law for the debt, it is unnecessary for the vendor to allege, or for the court to find, that the consideration was fair and adequate.

Department 2.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by the Amaranth Land Company against Frank W. Corey and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

F. E. Davis, of Los Angeles, for appellants.

R. T. Quinn, of Los Angeles, for respondent.

LENNON, J. This is an action by an assignee of a vendor of land to compel the vendee to pay overdue installments on the purchase price and also to compel the payment of future installments by virtue of a clause in the contract of sale giving the vendor the right to declare the entire purchase price due and payable upon the vendee's default in any of the payments. The court gave judgment for the overdue installments, but found that the right to declare the entire purchase price presently due and payable had been waived.

Defendants contend that, inasmuch as the vendor retained the legal title, the action is essentially one in equity to compel specific performance, and that the findings are insufficient for the reason that they do not show that the consideration was fair and adequate. This contention is answered by the case of Sparks v. Hess, 15 Cal. 186, where, at page 194, it is said:

"* * * The vendors have retained the legal title, and evidently as security for the purchase money. Their position is, in some respects, similar to what it would have been had they executed a conveyance to the vendee and taken from him a mortgage upon the property. A mortgage is in form a conveyance of the legal title, though intended only as security for the debt. Here the title is retained by the vendors for a similar purpose of security. A mortgagee may pursue his remedy at law, or proceed in equity for a sale of the premises. A vendor retaining the title may in like manner sue at law for the balance of the purchase money, or file his bill in equity for the specific performance of the contract. * * *"

[1] The rule, thus early declared in this state, that a vendor retaining legal title to land sold may waive his security and bring an action at law for the debt, is reiterated in and supported by subsequent decisions of this court. Samuel v. Allen, 98 Cal. 406, 33 Pac. 273; Longmaid v. Coulter, 123 Cal. 208, 55 Pac. 791; North Stockton, etc., Co. v. Fischer, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438.

[2] In such an action, one at law, it is of course unnecessary for the plaintiff to allege or for the court to find that the consideration was fair and adequate. The action in the instant case was pleaded and proven and tried upon the theory that it was one at law for debt due. It follows that the findings support the judgment.

The judgment is affirmed.

We concur: WILBUR, J.; KERRIGAN, Judge pro tem.

182 Cal. 34

SUTLIFF v. SWEETWATER WATER CO. et al. (L. A. 5261.)

(Supreme Court of California. Jan. 7, 1920.)

1. APPEAL AND ERROR ⊂⊃907(3) — FINDING MUST BE TAKEN AS TRUE ON APPEAL ON JUDGMENT ROLL.

Finding that there was no negligence of defendant and that overtopping of dike of its reservoir was due to extraordinary and unprecedented flood which it could not reasonably have anticipated or foreseen is not attacked, and must be taken as true on appeal on the judgment roll alone.

2. WATERS AND WATER COURSES ⊂⊃172— OWNER OF RESERVOIR NOT LIABLE FOR BREAKING IN ABSENCE OF NEGLIGENCE.

Owner of artificial reservoir in no way constituting a nuisance, having been negligent in no respect, is not liable for injury to land below by breaking out of waters through extraordinary and unprecedented flood.

3. TRIAL ⊂⊃398—FINDINGS NOT INCONSISTENT.

Findings that the injuries to plaintiff's lands were proximately caused by an extraordinary and unprecedented flood, and that only a part thereof would have been injured but for the erection and maintenance of defendant's reservoir, are not inconsistent.

Department One.

Appeal by Superior Court, San Diego County; C. N. Andrews, Judge.

Action by M. S. Sutliff against the Sweetwater Water Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Riley & Haskett, of San Diego, and T. M. Robinson, of National City (Bordwell & Mathews, of Los Angeles, of counsel), for appellant.

Hunsaker & Britt and Le Roy M. Edwards, of Los Angeles, and E. Swift Torrance, of San Diego, for respondents.

OLNEY, J. This is an action to recover damages for injury done to the plaintiff's land by the breaking, in the winter of 1916, of the Sweetwater reservoir, owned by the defendant corporation. The individual defendants are officers of the corporation, and for simplicity we will treat the action as one against it alone, since the other defendants are certainly not liable if it is not. The cause was tried without a jury, and resulted in a judgment for the defendant, from which the plaintiff appeals upon the judgment roll.

[1] It appears from the pleadings and findings that the reservoir in question is an artificial lake created by a dam across the Sweetwater river impounding the waters of that stream. On one side of the reservoir and at a little distance from the dam there is a depression in the high land or hills surrounding the reservoir and forming its rim, and the dam was built to a height greater than the altitude of this depression, so that if the reservoir were full its waters would run through the depression unless restrained. To prevent this a secondary dam, consisting of an earth dike, was built across the depression. The plaintiff's land is situate in the valley below the depression; that is, on the other side of it from the reservoir. In January, 1916, there came a flood in the Sweetwater river of extraordinary and unprecedented size, filling the reservoir until it overtopped the earth dike across the de-

pression mentioned, washed it out, and released a large volume of water from the reservoir, which flowed over the plaintiff's land and undoubtedly damaged it substantially. The complaint alleges that the overtopping and washing out of the dike were due to the negligence of the defendant in the design of the reservoir and in the manner of its maintenance and use. The trial court found, however, that there was no negligence on the part of the defendant, and that the overtopping and washing out of the dike and consequent injury to the plaintiff's property were due to the extraordinary and unprecedented flood which the defendant could not reasonably have anticipated or foreseen. Since the appeal is upon the judgment roll alone, this finding is not attacked and must be taken as true.

[2] The chief contention of the plaintiff is that, even though the defendant were not negligent in any respect, it is still liable for any damage caused by the breaking out of control of the waters collected by its works. The plaintiff's chief reliance in this connection is the authority of Fletcher v. Rylands, decided in Exchequer Chamber (L. R. 1 Ex. 265), and affirmed on appeal by the House of Lords (L. R. 3 Eng. & Ir. App. 330). The defendant there had constructed a reservoir, the waters of which broke through the bottom into some ancient underground workings whose existence was unknown, and thence escaped into and flooded the plaintiff's colliery. For this the defendant was held liable regardless of any negligence upon its part. The leading opinion in Exchequer Chamber was delivered by Lord Blackburn, and it was referred to and quoted with approval in the House of Lords. The principle applied is thus stated by Lord Blackburn:

"We think that the true rule of law is that the person, who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

This language, if taken literally and as applying universally, would seem to cover the present case, and plaintiff contends that it should govern it. To this contention there are two replies. In the first place, a subsequent English decision makes it plain that the rule so stated should be limited in its application to cases of the nature of the one then before the court, of which the present case is not one. In Fletcher v. Rylands, as was subsequently said in Nichols v. Marsland, L. R. 10 Ex. Cas. 255:

"The defendant poured the water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it."

In other words, the very maintenance of the reservoir in the manner in which it was maintained itself involved an invasion of the plaintiff's property. For this invasion the plaintiff, of course, had a cause of action. The case was one coming directly within the maxim, "sic utere tuo ut alienum non lædas." Of this character also is Parker v. Larsen, 86 Cal. 236, 24 Pac. 989, 21 Am. St. Rep. 30, where the defendant permitted the water in a ditch which he had constructed on his land to percolate through the ground from the ditch onto his neighbor's land, saturating and injuring it. Of the same sort also are those cases where one has constructed works on his land which accumulate and discharge on his neighbor's land waters which would not otherwise go there, of which there are a number of instances in our reports, the leading one perhaps being Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213. In all of these cases the very manner of the construction, maintenance, or use of the structure constitutes or works an invasion of the neighbor's property and rights, and, as was said in Galbreath v. Hopkins, 159 Cal. 297, 302, 113 Pac. 174, is a nuisance per se.

But there is a sharp distinction between such cases and the present. The defendant's reservoir was a wholly proper and lawful thing, and its existence, maintenance, and use worked no injury to the plaintiff's land, invaded no right of his, and could not for a moment be said to be a nuisance. The proximate and immediate cause of the flooding of the plaintiff's land and its consequent injury was not the existence of the defendant's reservoir or the manner of its maintenance or use, which were wholly lawful and innocuous, but the overwhelming of the reservoir by an agency beyond the defendant's control—in fact in this case beyond human control. The distinction is clearly pointed out in Nichols v. Marsland in the decision on appeal in Exchequer Chamber (L. R. 2 Ex. Div. 1). The facts were that a series of dams constructed by the defendant were washed out by an unprecedented flood, and the volume of water so released damaged the plaintiff's property; in other words, the case is wholly similar to the one at bar. The plaintiff there, like the plaintiff here, relied for a recovery upon Fletcher v. Rylands, but it was held that the cases were not the same, that in the case before the court the proximate cause of the damage to the plaintiff was the flood, and that the defendant was not liable unless negligent. In the same case in the decision in Exchequer (L. R. 10 Ex. Cas. 255) the question is asked: What is the difference in such a case between a reservoir and a stack of chimneys, and could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or earthquake? The same question

might be asked concerning any innocuous and lawful structure on a man's land—his house, for example. Could it possibly be held that, if a man's house were set on fire by lightning or any other cause for which he was not responsible, and in turn set fire to his neighbor's house, he would be liable in damages? There is no difference between a house and a reservoir in this respect. There is, of course, a great difference in the amount of care reasonably required in the two cases. The construction, maintenance, and use of a reservoir, if it be of any size, of necessity demands a degree of care not reasonably required in the case of a house; but, if this care is used, then the question of liability is the same in one case as in the other.

The second answer to the plaintiff's contention is that the question is not an open one in this state. There are a very considerable number of cases in our reports where a reservoir or ditch has been broken by flood and suit has been brought for injuries sustained thereby. Invariably a recovery has been allowed or refused according as the defendant is found to be negligent or not. Hoffman v. Tuolumne Water Co., 10 Cal. 413, is a good illustration of these cases. There the court, in laying down the rule governing the case, said:

"The general rule is that every man may do as he chooses with his own property, provided he does not injure another's. But there is another rule as well established, which is that a man must so use his own property as not to injure his neighbor's. This last rule, however, does not make a man responsible for every injury which may arise to another from the use which the first may make of his property. It would be an intolerable hardship to hold a man responsible for unavoidable accidents which may occur to his property by fires or casualties, or acts beyond his control, though others are likewise injured."

The court then reversed a judgment against the defendant because of an instruction by the trial court which imposed too high a degree of care upon the defendant. Such reversal was, of course, wholly inconsistent with the contention of the plaintiff here that the defendant is liable no matter what care it used. To the same effect are Tenney v. Miners' Ditch Co., 7 Cal. 335; Wolf v. St. Louis, etc., Co., 10 Cal. 541; Todd v. Cochell, 17 Cal. 97; Everett v. Hydraulic, etc., Co., 23 Cal. 225; Campbell v. Bear River, etc., Co., 35 Cal. 679; Weiderkind v. Tuolumne Water Co., 65 Cal. 431, 4 Pac. 415. Moore v. San Vicente Lumber Co., 175 Cal. 212, 165 Pac. 687; Bacon v. Kearney Vineyard Syndicate, 1 Cal. App. 275, 82 Pac. 84.

It is true that in all of these cases negligence on the part of the defendant was relied upon by the plaintiff, and that the question of absolute liability on the part of the defendant was not presented to the court or discussed. Nevertheless it is repeatedly laid down that the governing rule of law is that the defendant is not liable unless he has been negligent, and the actual decisions of the cases are consistent with this rule only. Under such circumstances the rule so declared and followed must be taken to be the law, and the fact that the propriety of the rule has not been questioned or discussed is not a sufficient justification for reopening the subject.

The plaintiff contends also that, in spite of the finding of the trial court that there was no negligence on the part of the defendant, such negligence, nevertheless, appears because of the fact that the top of defendant's main dam—the one across the river—was higher than the top of the earthen dike across the depression, so that the waters of the reservoir, before raising to the top of the main dam and flowing over it, would flow over the earthen dam and wash it out. It is not at all certain that it appears from the findings that the top of the main dam was higher than the top of the earthen dike. Assuming, however, that it does appear, it does not by any means follow that there was any negligence in the design of the reservoir. It does not appear, for example, that the main dam itself was not an earthen dam, so that water overflowing it would be much more dangerous than water overflowing the shallower earthen dike. Passing this and assuming that the main dam was a solid masonry or concrete structure so protected that it would not be displaced by a large volume of water flowing over it, the question of whether its maintenance at a height greater than the top of the earthen dike was negligence would depend almost entirely upon the relation between the capacity of the spillway provided and the volume of flood reasonably to be foreseen and anticipated, and therefore to be provided for. The complaint alleges that the spillway was not adequate. Upon this point the trial court found specifically that it was adequate to carry off all waters that prior to the time of the flood in question it might reasonably have been anticipated would flow into the reservoir after it was filled. This finding completely negatives the plaintiff's contention that there was negligence in the respect claimed.

[3] The plaintiff also contends that the findings are contradictory in that it is found, on the one hand, that the injuries to appellant's property were proximately caused by an extraordinary and unprecedented flood, and, on the other hand, that none, or only a part, of appellant's land would have been injured but for the erection and maintenance of the reservoir. Plaintiff's point is that the flood of 1916, extraordinary and unprecedented as it was, would yet not have injured his property if it had not been for the existence of the reservoir. This may be true, but it

does not follow that the proximate cause of the injury was not the flood. This point is really nothing more than the contention that, because the defendant was responsible for the existence of the reservoir and because the plaintiff's land would not have been injured except for its existence, the defendant is liable regardless of negligence on his part. This is simply the point first discussed in another form.

Judgment affirmed.

We concur: LAWLOR J.; SHAW, J.

182 Cal. 41

SMITH et al. v. LIGHTSTON et al.
(S. F. 7716.)

(Supreme Court of California. Jan. 7, 1920.)

1. APPEAL AND ERROR ⊜294(1)—REVIEW OF SUFFICIENCY OF EVIDENCE WITH OR WITHOUT MOTION FOR NEW TRIAL.

Under Code Civ. Proc. §§ 939, 956, as amended in 1915, the Supreme Court has authority to consider the sufficiency of the evidence to support the verdict or findings in every case where the evidence is properly included in the record on appeal, either by a bill of exceptions or by a record prepared as prescribed in section 953a, and whether or not there has been a motion for new trial.

2. MUNICIPAL CORPORATIONS ⊜294(5)—NOTICE OF INTENTION TO IMPROVE NEED NOT BE DEPOSITED AT DWELLINGS IN CASE OF IMPROVEMENT UNDER DISTRICT PLAN.

San Jose City Charter, art. 8, c. 1, § 2, providing that when the estimated expense of any improvement under the Vrooman Act, adopted as part of the charter by section 1, exceeds $2 a front foot, the superintendent of streets on posting notices of passage of a resolution of intention to improve shall cause to be deposited on the front step of each dwelling fronting on the improvement a copy of part 1 of the Vrooman Act, does not apply to assessments made under the district plan.

3. MUNICIPAL CORPORATIONS ⊜488, 489(5)—ASSESSMENT FOR STREET IMPROVEMENT NOT INVALIDATED BY CONTRACTOR'S FAILURE TO FILE REBATE AFFIDAVIT WHERE OBJECTION IS WAIVED.

Omission of contractor for street work in city of San Jose to file with street superintendent an affidavit that he had not agreed with any person liable on assessment to make any rebate to him, as required by charter of the city, art. 8, c. 1, § 8, *held* not to invalidate the assessment, in view of the Vrooman Act, § 11, adopted as part of the charter; failure to appeal from the assessment by the street superintendent to the council, being a waiver of such defect.

4. APPEAL AND ERROR ⊜1071(3)—DISREGARD OF UNSUPPORTED FINDINGS.

Findings without support in the record must be disregarded.

5. MUNICIPAL CORPORATIONS ⊜907—GENERAT LAW AS TO STREET IMPROVEMENT BONDS APPLIES TO CITY OF SAN JOSE.

The Street Bond Act, with subsequent amendments, not being inconsistent with anything in the charter of the city of San Jose, or in the Vrooman Street Work Act, the charter containing no provisions regarding such bonds, the general law on the subject as embodied in the Bond Act applies in San Jose.

6. MUNICIPAL CORPORATIONS ⊜907—AMENDMENT OF VROOMAN STREET WORK ACT BY STREET BOND ACT.

The Street Bond Act *held*, in effect and by reason of its language, an amendment of the Vrooman Street Work Act, to which it refers, expressly declaring that bonds as provided may be issued in proceedings under the act, and expressly repealing St. 1891, p. 116, amending the Vrooman Act by adding part 4, consisting of sections 38 to 44, inclusive.

In Bank.

Appeal from Superior Court, Santa Clara County; W. A. Beasly, Judge.

Action by Mary Smith and others against Louis Lightston and others. From judgment for plaintiffs, defendants appeal. Reversed.

Hoefler & Morris and Hoefler, Cook & Snyder, all of San Francisco (L. M. Hoefler, Platt Kent, and George F. Snyder, all of San Francisco, of counsel), for appellants.

W. M. Beggs and R. C. McComish, both of San Jose, for respondents.

SHAW, J. The defendants appeal from a judgment in favor of the plaintiff in an action to quiet title.

The defendant Lightston is treasurer of the city of San Jose. The defendant City Improvement Company is the holder of bonds issued for the amount of an assesssment against the property of the plaintiffs for certain improvements to the street fronting thereon. The City Improvement Company performed the work of improvement for which the assessment was made, and it holds the bonds issued against the plaintiffs' lots. Defendant filed an answer and cross-complaint, setting forth the proceedings under which the assessment was made for which the bonds were issued. Issue was joined on the material allegations of the cross-complaint. The court below found that the assessment and bonds were void, and gave judgment quieting plaintiffs' title to the said lots.

[1] The respondent makes the preliminary objection that the question of the sufficiency of the evidence to support the findings cannot, under the amendments of 1915 to the Code of Civil Procedure, be reviewed on an appeal from the judgment, where there has been no motion for a new trial. The judgment was rendered in November, 1915, and the appeal was taken on December 9, 1915; con-

sequently the case depends on the effect of these amendments. Section 939, as enacted in 1872, and as it remained until 1915, contained this clause:

"But an exception to the decision, or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within 60 days after the entry of the judgment."

The word "decision" in this clause refers to what is commonly called the findings. Clifford v. Allman, 84 Cal. 532, 24 Pac. 292. In the amendment of 1915 this clause was omitted from the section. The plaintiffs' claim is that this omission eliminates the only authority for a consideration of the sufficiency of the evidence to support the findings where there was no motion for a new trial. There is no merit in the objection. Section 956, as amended in 1915, retains the provision previously contained therein, that "upon an appeal from a judgment the court may review the verdict or decision." This clearly gives this court authority to consider the sufficiency of the evidence to support the verdict or findings in every case where the evidence is properly included in the record on appeal, either by a bill of exceptions or by a record prepared as prescribed in section 953a, and without regard to the question of there having been a motion for a new trial. The Code originally allowed an appeal from the judgment to be taken within one year after the entry thereof. Section 956, if not qualified by other sections, would then have allowed the sufficiency of the evidence to be considered on an appeal taken at any time within the year. The above-quoted clause of section 939 did not give the right to such review, but merely put a limitation thereon, forbidding its exercise, except when the appeal was taken within 60 days. The right was given by section 956, which, in this respect, was not changed by the amendment. When the time of taking an appeal from the judgment was reduced to 60 days, by the amendment of 1915 to section 939, there remained no reason for the previous limitation, and it was very properly omitted.

1. The work was done under the Street Work Act, commonly known as the Vrooman Act (St. 1885, p. 147), and certain supplementary provisions contained in the charter of the city of San Jose (Stats. 1897, p. 615, art. 8, c. 1). Section 1 of said charter provides that the so-called Vrooman Act, approved March 18, 1885, "as since amended, and as hereafter shall be amended, is * * * adopted as a part of this charter," except where the provisions of said act conflict or are inconsistent with the charter. Section 2 of said chapter is as follows:

"When the estimated expense of any improvement being made under said act exceeds two dollars per front foot along each line of the street proposed to be improved, the superintendent of streets, at the time of posting along the street the notices of passage of the resolution of intention, shall cause to be deposited on the front doorstep of each dwelling fronting on the proposed improvement a copy of part 1 of said act"—referring to the Vrooman Act.

[2] The resolution of intention under consideration here was adopted on March 18, 1909. The court found that the superintendent of streets did not deposit on the front doorstep, as provided in section 2 of said chapter, a copy of part 1 of the Vrooman Act. The appellant insists that this finding is not sustained by the evidence. We do not find it necessary to determine this question. The resolution of intention states that the work is of more than local or ordinary public benefit, and that the expense of the improvement should be chargeable upon a district. We are of the opinion that the above-quoted section of the charter does not apply to assessments made under the district plan. The assessment here involved was the improvement of one block on Julian street and one block on Devine street, extending from the east line of Market street to the west line of First street, in San Jose. It did not include any intersections. Devine street is the next street south of Julian street. The district plan may be resorted to when the council finds that the work to be done is of more than local or ordinary public benefit, or whenever the preliminary estimate of the city engineer shows that if assessed upon the lots fronting on the work the total expense of the work would exceed one-half of the total value of the lands as shown by the current assessment for general taxes. Section 3. The front-foot plan requires the expense to be assessed upon the lots fronting upon the work in proportion to such frontage, and at a rate sufficient to cover the total expense of the work. Section 7, subd. 1. The district plan contemplates that the district may include lots not fronting on the work to be done or on any other part of the street to be improved. In this case it includes as much frontage on Market and First streets as on Julian and Devine streets. In many cases it would include lots fronting entirely on other streets, and it might include lots or parcels having no street frontage. The assessment is to be made according to area and in proportion to benefits and not in proportion to frontage. Section 7, subd. 12. The requirement of the charter that the copies in question shall be deposited on the front doorstep of each dwelling "fronting on the proposed improvement" would give the benefit of the provision to only a part of the dwellings in a district. No reason exists for this discrimination in favor of frontage on the work. If the district plan had been in mind it is not reasonable to suppose that this language would have been used. Taken as a hole, in connec-

tion with the marked differences between the frontage plan and the district plan, the language of the section plainly indicates that it was intended to apply only when the front-foot plan of assessment was used. Consequently the finding that the section was not complied with in this particular instance was immaterial to the question of the validity of the assessment.

2. The San Jose charter provides that all bids such improvement work shall have thereon an elaborate affidavit of the bidder, showing that the bid is genuine and not collusive. Article 8, c. 1, § 6, Stats. 1897, p. 616. The court found that the bid of the City Street Improvement Company for the doing of this work did not have thereon the affidavit required by said section. The appellant contends that this finding is without support in the evidence, and the respondent concedes the point.

[3] 3. The charter also provided (article 8, c. 1, § 8) that when the contractor shall have completed the work he should make out and file, in the office of the street superintendent, an affidavit that he has not entered into any private agreement with any person liable on the assessment or with any one on his behalf to make any rebate or deduction to him from the amount of the assessment, and that "no assessment shall be made until such affidavit is filed." The court found that such affidavit had not been made and filed as required by the section. It is contended that this finding is also without support in the evidence. It is not necessary to relate the evidence in detail. While it is not clear on the subject, we think there is sufficient to support the inference that the affidavit was not made or filed. But we do not think this omission was sufficient to invalidate the assessment. Section 11 of the Vrooman Act provides that, after the assessment is made, any person interested, having any objection to the correctness or regularity of the assessment, determination, or proceedings of the street superintendent, may, within 30 days after the day of the warrant, appeal to the council; that upon such appeal the council may remedy and correct any error or informality in the proceedings, and may, thereupon, if necessary, cause the street superintendent to make and issue a new assessment for the expenses of the work, and that no assessment shall be held invalid for any error, informality, or other defect in the proceedings or in the assessment which the council, upon such appeal, might have remedied and avoided. As this affidavit was not to be made until after the work was completed prior to the assessment, the defect could easily have been remedied and avoided upon such appeal by requiring the contractor then to make the affidavit and thereupon ordering a new assessment. The failure to appeal is a waiver of a defect of this character. Frick v. Morford, 87 Cal. 579, 25 Pac. 764; Perine v. Forbush, 97 Cal. 312, 32 Pac. 226; Dowling v. Conniff, 103 Cal. 77, 36 Pac. 1034; Girvin v. Simon, 116 Cal. 611, 48 Pac. 720; McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885. The provision of the charter is not jurisdictional. We think the assessment cannot be subsequently declared invalid for the want of such affidavit, unless possibly where the objecting person shall show that the contractor had been guilty of the acts denounced in the aforesaid section 8. No evidence to that effect was offered. Such misconduct cannot be presumed. Consequently the assessment cannot be declared invalid for this cause. The decision in Barber, etc., Co. v. Costa, 171 Cal. 142, 152 Pac. 296, is not contrary to this conclusion. It states that if the contractor was not guilty of fraud or collusion, the lack of the affidavit required on the completion of the work could easily have been remedied if it had been raised upon appeal. The defect held fatal in that case was the failure of the complaint to allege that the bid of the contractor had attached thereto the affidavit of noncollusion required by section 6 of said chapter of the charter.

[4] 4. We find no other defect that would be sufficient to invalidate the assessment. Findings 39, 40, 41, 44, and 45 are mere general conclusions of the court, based on the facts stated in the findings we have already considered and held contrary to the evidence or not sufficient to invalidate the assessment. Aside from this the five findings mentioned are without support in the record, and hence they must be disregarded. The suggestion that the fact that the surety on the contractor's bonds was a foreign surety company makes the assessment void is fully disposed of by the decision in Ransome-Crummey Co. v. Bennett, 177 Cal. 560, 171 Pac. 304.

[5] 5. As the case may be tried again it is proper to consider another point. The respondent contends that the act of 1893, providing for the issuance of bonds for street assessments levied under the Vrooman Act (Stats. 1893, p. 33) is not a part of or an amendment to the Vrooman Act and is not incorporated into the charter. The point is really immaterial. If it is not an amendment of the Vrooman Act it is, at all events, not inconsistent with any provision of the San Jose charter. While it is true that the manner in which proceedings to improve streets within a city shall be conducted and the expense thereof raised is a municipal affair, and that charter provisions relating thereto will prevail over general laws inconsistent therewith, yet it is also the case that general laws are operative in such affairs where the city charter is silent on the subject. The Street Bond Act of 1893, and subsequent amendments thereto are not inconsistent with anything in the charter or in the Vroo-

man Act. The charter contains no provisions regarding such bonds. Consequently the general law on that subject applies in San Jose.

[6] But we are of the opinion that the act of 1893 is in effect and, by reason of its language, an amendment of the Vrooman Act. It refers expressly to said act; it declares that bonds as therein provided may be issued in proceedings under said act, and it expressly repeals the act of 1891 (St. 1891, p. 116), amending the Vrooman Act by adding part 4, consisting of sections 38 to 44, inclusive, which sections also provided for bonds on assessments under the act. This shows that, without doubt, it was intended to be and was an amendment of the act to which it thus refers and relates.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; LENNON, J.; WILBUR, J.; KERRIGAN, Judge pro tem.

In re SHINN. (Cr. 2298.)

(Supreme Court of California. Jan. 8, 1920.)

ATTORNEY AND CLIENT ⊂=39—DISBARMENT UPON CONVICTION OF FORGERY.

Where a certified copy of the record of the superior court shows that an attorney of this court was convicted of forgery and adjudged to suffer imprisonment, and that such judgment has become final for lack of appeal, it will be ordered in accordance with Code Civ. Proc. §§ 287–289, 299, that such attorney be disbarred.

In Bank.

In the matter of C. G. Shinn, an attorney and counselor of this court. Disbarred.

PER CURIAM. It appearing from the certified copy of the record of conviction of C. G. Shinn, an attorney and counselor of this court, filed herein December 16, 1919, that the said C. G. Shinn was on the 22d day of April, 1919, in the superior court of the county of Sacramento, under a prosecution pending therein, convicted of a felony, to wit, forgery, on which conviction he was on September 30, 1919, adjudged to suffer imprisonment in the state prison, and it further appearing that no appeal from said judgment has ever been taken, and that said judgment has become final.

It is ordered and adjudged, in accord with the provisions of sections 287, 288, 289, and 299 of the Code of Civil Procedure, that the name of said C. G. Shinn be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in any and all of the courts of this state.

All concur.

182 Cal. 48

YOLO WATER & POWER CO. v. HUDSON et al. (S. F. 9087.)

(Supreme Court of California. Jan. 7, 1920.)

1. EMINENT DOMAIN ⊂=262(5)—ADMISSION OF EVIDENCE OF MARKET VALUE OF LAND NEAR THAT CONDEMNED, IF ERRONEOUS, WAS HARMLESS, IN VIEW OF VERDICT.

In a condemnation proceeding, if it was erroneous to permit a witness to testify that land situated in the vicinity of the lands involved had a market value of $1,000 per acre, it cannot be held prejudicial, where the witness testified that the lands were similar in location, productivity, and fertility to those in controversy, but the witness valued the latter lands at but $450 per acre, and the jury valued them at only $160 per acre.

2. EMINENT DOMAIN ⊂=262(6)—ADMISSION OF EVIDENCE OF VALUE OF CROP RAISED ON LAND NOT REVERSIBLE ERROR, IN VIEW OF MASS OF TESTIMONY FAVORING VERDICT.

In a condemnation proceeding, the objection that a witness was permitted to testify to the value of a crop of barley raised by him on the land of one of the respondents cannot be sustained, where the mass of testimony in favor of the verdict makes the possibility that such evidence was prejudicial so remote as to warrant the conclusion that it did not affect the award.

3. EMINENT DOMAIN ⊂=262(2)—PARTY CANNOT COMPLAIN OF AN INSTRUCTION AFTER REQUESTING ONE SUBSTANTIALLY SIMILAR.

A party cannot complain of an instruction given on the market value of land in a condemnation proceeding at the instance of his adversary, when such party has requested a substantially similar instruction.

4. EMINENT DOMAIN ⊂=262(6)—INSTRUCTION TO DISREGARD BENEFITS TO DEFENDANTS IN CONDEMNATION PROCEEDING FROM CONSTRUCTION OF RESERVOIR HARMLESS, IF ERRONEOUS, THERE BEING NO EVIDENCE OF BENEFITS.

In a proceeding to condemn land for reservoir uses, an instruction directing the jury to exclude the consideration of benefits, if any, derived by defendants from the construction of the reservoir, if error, was harmless, where the evidence showed the only possible benefit would be protection from floods which occurred very rarely, never at such times as to injure crops, and deposited rich sediments, adding to the fertility of the soil.

5. EMINENT DOMAIN ⊂=112—OWNER ENTITLED TO DAMAGES TO LAND NOT TAKEN, BUT SUBJECTED TO SEEPAGE AND FLOOD FROM USE OF LAND TAKEN FOR RESERVOIR PURPOSES.

Where the manner of use of land taken by eminent domain is such as naturally and

necessarily subjects defendants' remaining lands to damage from seepage and flood, their depreciation in value from such cause is a proper element of damage, and the defendant owners are entitled to have the jury instructed to consider such damage as a natural and necessary incident to the raising of the water in the reservoir.

6. TRIAL ⟸296(11)—ERROR IN INSTRUCTION NOT GROUND FOR REVERSAL, WHERE OMISSIONS ARE SUPPLIED BY OTHER INSTRUCTIONS.

In a condemnation proceeding, where an instruction on damages to defendants' other lands from danger of seepage and floods resulting from the use of the condemned part of their lands for reservoir purposes did not sufficiently impress upon the jury that they could only consider a danger which was a natural and necessary or reasonable incident to the raising of the waters, when viewed alone, could not be misleading to the jury, in view of other charges making such matters sufficiently clear.

7. EMINENT DOMAIN ⟸222(5)—EVIDENCE REQUIRING INSTRUCTION ON DAMAGES FROM SEEPAGE AND FLOOD TO DEFENDANTS' LANDS FROM USE OF CONDEMNED LAND FOR RESERVOIR PURPOSE.

In a proceeding to condemn parts of defendants' lands for reservoir purposes, in order to raise the level of reservoir waters, where there was evidence concerning the extent of seepage at the present level and its physical effect, and its effect on the value of the land affected, and there was evidence of the nature of the soil at and above the level at which it was proposed to keep the water, and the contour of the land between the present and proposed levels, and the jury spent a day viewing the premises, there was sufficient evidence to support an instruction on the damage to lands not taken, which were to be expected to follow naturally and reasonably from danger of seepage and flood.

8. EMINENT DOMAIN ⟸262(5)—INSTRUCTION INVITING CONSIDERATION OF ANY POSSIBLE CHANGE TO MORE PROFITABLE USE, HAD LAND NOT BEEN CONDEMNED, NOT PREJUDICIAL.

While an instruction in a condemnation proceeding that the jury were not "confined to a consideration of the uses of the land at the time of the taking, but the possibility of its change to a more profitable use had it not been taken," could be considered, while open to criticism, as permitting the jury to place special value for a peculiar purpose and to enter a field of speculative conjecture, where the burden of the charge was that any possible use for which the land might be available was to be considered only in arriving at the market value, such instruction was not prejudicial.

9. EMINENT DOMAIN ⟸150—VALUE OF CONDEMNED LAND ARISING FROM AVAILABILITY FOR USE WITH THAT NOT TAKEN AND LOSS IN VALUE OF THAT NOT TAKEN ARE SEPARATE DAMAGE ITEMS.

The value of condemned lands, arising from their availability for use in conjunction with other lands not taken, and the loss in value of lands not taken from their availability for use in conjunction with those taken, are wholly separate and independent matters, and the plaintiff was not subjected to double damages for the taking of the lands by consideration of each.

10. EMINENT DOMAIN ⟸205—DAMAGES FOR LAND CONDEMNED NOT EXCESSIVE UNDER EVIDENCE.

In a condemnation proceeding, where the knowledge of market value of both parties' witnesses compared favorably, and defendants' witnesses estimated that the land was worth $300 to $500 per acre, and severance damages to land not taken at $10 to $20 per acre, while plaintiff's witnesses placed condemned land's value at $40 to $100 per acre, an award of $160 per acre for condemned land, and $50 in case of two tracts, and $100 per acre in remaining tracts, as severance damages, is not excessive.

In Bank.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action of condemnation by the Yolo Water & Power Company against Fannie J. Hudson and others. From the judgment, plaintiff appeals. Affirmed.

Theodore A. Bell, of Oakland, Arthur C. Huston, of Woodland, and W. P. Thomas, of Ukiah, for appellant.

H. E. Witherspoon, and Ben C. Jones, both of Lakeport, and Preston & Preston, of Ukiah, for respondents.

LENNON, J. Appellant is a corporation engaged in selling water for purposes of irrigation. It obtains the water which it sells from Clear Lake, in Lake county. Appellant proposed to increase its supply of water by raising the surface of the lake by means of a dam to a height of 10 feet above the mean low-water mark. In accomplishing this purpose the various tracts of land adjoining the lake would be flooded to the 10-foot level. This action was accordingly brought for the purpose of condemning and taking in fee the lands below the proposed 10-foot level; these lands being portions of larger tracts belonging to respondents. The jury returned a verdict, finding for appellant, and awarding to respondents a sum representing the value of the lands taken and the damages accruing to the remaining lands by reason of the severance. The appeal is based upon alleged errors occurring at the trial, and upon the contention that the amounts of the awards are not justified by the evidence.

[1] The court premitted witness Rice to testify over objection that certain land known as the Mendenhall land, situated in the vicinity of the lands herein involved, had a market value of $1,000 per acre. Even if it be conceded that this was error, still it cannot be held to have been prejudicial. Although he stated that the Mendenhall lands were simi-

lar in location, productivity, and fertility to the lands in controversy, nevertheless the witness valued the latter lands at but $450 per acre. It can hardly be said with any assurance, therefore, that the ruling affected even the opinion of the witness as to the market value of the property now in suit. Moreover, when it is considered that the value placed by the jury upon the lands condemned was only $160 per acre, it cannot be said that the verdict was influenced by the ruling, or that the admission of the testimony resulted in a miscarriage of justice.

[2] Complaint is also made because the trial court, over objection, permitted witness Saylor to testify to the value of a crop of barley raised by him on the land of respondent Riffe. In view of the mass of testimony in favor of the verdict, the possibility that the evidence so admitted was prejudicial is so remote as to warrant the conclusion that it did not affect the award.

[3] Appellant claims that the trial court erred in instructing the jury at the request of respondents in the following terms:

"You are instructed that the value of the land for any special purpose may be taken into account as one of the elements to show its market value, and if these lands of defendants be specially adapted for reservoir purposes, its value for this use should be considered as one of the elements of the market value of the land sought to be condemned."

It appears, however, that appellant requested the court to give substantially the same instruction in these words:

"Evidence of value for reservoir purposes may be considered as one of the elements tending to show market value."

A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one. 14 R. C. L. 815, and cases cited.

[4] Appellant also criticizes the instruction of the court directing the jury to exclude the consideration of benefits, if any, derived by respondents from the construction of the reservoir. Conceding the error in the instruction, it was, of course, harmless, if there was no evidence from which the jury might reasonably have found that the lands of respondents would in fact be benefited by the construction of the reservoir. The only benefit which appellant could have desired the jury to consider was the benefit, if any, to be expected from a possible prevention of floods above the 10-foot level. This, of course, could only be considered a benefit in case there was danger of damage by overflow above the 10-foot level under normal or natural conditions. The evidence shows that the lands between the 10 and 12 foot levels had very rarely been inundated, and that the result of the overflow was to leave on the land small deposits of rich sediments, the effect of which was to add to the fertility of the soil. There is no evidence indicating that these rare inundations had ever occurred at a season of the year when the land was so far under cultivation that injury or damage to the crops resulted. It is clear, therefore, that the instruction could not and did not mislead the jury to the prejudice of appellant.

[5] Appellant also complains of portions of the tenth and twelfth instructions, in so far as they declared that the jury were authorized to consider, in estimating the injury to the lands not taken the "danger, if any, from underground seepage, or from floods likely to be caused by an overflow above the 10-foot level proposed by plaintiff." Where land is taken by eminent domain, and the manner of its use is such as to naturally and necessarily subject the land not taken to the danger of seepage and flood, a depreciation in the value of such remaining land, caused by such danger of seepage and flood, is a proper element of damage. See, generally, Colusa, etc., R. R. Co. v. Leonard, 176 Cal. 109, 167 Pac. 878. If, therefore, there was evidence upon which to base such an instruction, respondents were entitled to have the jury instructed to consider the damage resulting from such danger of seepage and flood as they might fairly consider a natural and necessary or reasonable incident to the raising of the water.

[6] It is objected in the first place that it was not sufficiently impressed upon the jury that the only danger which they could consider was one which was a natural and necessary or reasonable incident to the raising of the water. Torn from their context and viewed alone, it cannot be denied that the instructions in question are open to criticism on the ground stated. But it is to be noted that at the plaintiff's request the trial court instructed the jury as follows:

"The court instructs the jury that, in assessing the damages to the market value of the property not taken, you should not take into consideration anything as an element of damages, which is remote, or imaginary, or uncertain, or speculative, even though mentioned or testified about by witnesses; but the only element which you should take into consideration as tending to reduce the market value are those which are appreciable and substantial, and which will actually lessen the market value of said property."

At the request of defendants the court gave this further instruction:

"In assessing damages for land taken by eminent domain for the construction of a reservoir, all damages, present and prospective, that are the natural, necessary, or reasonable incidents to the raising of the water on the land of defendants must be assessed in your verdict, and no subsequent recovery for such injuries can be allowed."

Considering the charge of the court as a whole, and particularly the instructions quoted, we are convinced that the language employed in the instructions complained of was not such as to render it probable that the jury was misled to the prejudice of appellant.

[7] It is next contended that there was no evidence upon which to base these instructions. There was evidence concerning the extent of seepage at the present level of the lake, concerning the physical effect of such seepage, and concerning its effect on the value of the land affected. There was evidence of the nature of the soil at and above the 10-foot level, at which it was proposed to keep the water. There was also evidence of the contour of the land between the 10 and 12 foot levels. Finally, it appears that the jury spent a day in viewing the premises. We think that these items of evidence furnished to the jury all the facts requisite to a fair and rational determination of the question of damage to the lands not taken to be expected to follow naturally and reasonably from the danger of seepage and flood consequent upon keeping the water at the 10-foot level.

[8] By instruction No. 17, given at the request of the respondents, the jury were told that they were not to be—

"confined to a consideration of the uses of the land at the time of the taking, but the possibility of its change to a more profitable use had it not been taken may be taken into account."

Viewed apart from its context, the instruction may appear open to two criticisms: First, that it permitted the jury to place upon the property a special value for a peculiar purpose; and, second, that it permitted the jury to enter the field of speculative conjecture. Considering the instructions as a whole, however, we find that the entire burden of the court's charge on the question of value was that "market value" was the criterion for the jury to follow, and that any possible use for which the land in question might be available and adaptable was to be considered only in arriving at such "market value." This was a correct statement of the law. City of Santa Ana v. Harlin, 99 Cal. 538, 34 Pac. 224. While it may be said that the court ought to have restated the criterion of value to be applied in connection with instruction No. 17, we are of the opinion that its failure to do so did not have the effect of misleading the jury to the prejudice of appellant.

Again, viewing the instruction apart from its context, the use of the word "possibility" suggests that the jury may have been led to consider purely speculative and conjectural values. But, considered in the light of all of the instructions given by the court, the instruction could, we think, have conveyed no other meaning to the jury than that they were not confined to a consideration of the uses of the land at the time of the taking, but that the "substantial and appreciable" possibility of its change to a more profitable use, had it not been taken, might be taken into account, but that in so doing they were not to consider "remote," "speculative," "imaginary," "uncertain," or "conjectural" possibilities. It would have been highly commendable for the court to have repeated the caution against considering remote and conjectural possibilities of use in connection with the instruction complained of but its failure to do so did not constitute reversible error.

[9] Appellant claims that double damages were assessed against it for the reason that the jury was permitted, when assessing the value of the lands taken, to consider the value of such lands arising from their availability for use in conjunction with the lands not taken, and, on the other hand, when assessing the damage caused by severance to the lands not taken, it was permitted to consider the value of such lands arising from their availability for use in conjunction with the lands taken. Appellant's argument in this behalf is based upon the obvious fallacy that the value of the lands taken resulting from the possibility of their use with the lands not taken is identical with the value of the lands not taken resulting from the possibility of their use with the lands taken. These respective values are, however, wholly separate and independent, and appellant was not subjected to double damages by reason of the fact that the jury was allowed to consider each of these values as separate and distinct from the other. Appellant's complaint on this score is unique and original. So far as we are aware, a similar contention has never before been urged in a court of last resort.

[10] It is also claimed that the damages were excessive. The jury fixed the value of the lands and improvements proposed to be taken at the sum of $160 per acre, and fixed the severance damages to the lands not taken at $50 per acre in the case of two of the tracts of land, and at $100 per acre in the case of the remaining tracts. Respondents' witnesses estimated that the land was worth from $300 to $500 per acre, and that by reason of the severance the value of the land not taken would be reduced to from $10 to $20 per acre. Appellant's witnesses estimated that the land was worth from $40 to $100 per acre. The knowledge of values shown to be possessed by respondents' witnesses compared favorably to say the least with that shown to be possessed by appellant's witnesses. Upon this state of the record it is clearly impossible to hold that the award of damages by the jury involves an excessive

estimate of the value of the lands proposed to be taken, and of the depreciation of the value of those not to be taken as a result of the severance.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; MELVIN, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; WILBUR, J.

182 Cal. 29

ART METAL CONST. CO. v. A. F. ANDERSON CO. (L. A. 5239.)

(Supreme Court of California. Jan. 6, 1920.)

1. PLEADING ⊂=122—ALLEGATION OF COMPLIANCE WITH STATUTORY REQUIREMENTS BY FOREIGN CORPORATION MUST BE DENIED POSITIVELY.

Denial on information and belief of allegation by plaintiff foreign corporation that it had complied with the requirements of Civ. Code, §§ 405–410 (which sections, with the exception of section 407, were repealed in 1917 [St. 1917, p. 381], their provisions having been incorporated into the General Laws of 1915 [St. 1915, p. 422], amended in 1917 [St. 1917, p. 371]), and Pol. Code § 409a, *held* an admission that the statutory requirements had been complied with; a positive denial being necessary, since compliance or noncompliance with the statutes is a matter of public record.

2. PLEADING ⊂=122—DENIAL UPON INFORMATION AND BELIEF NOT SUFFICIENT WHERE FACT IS ASCERTAINABLE FROM PUBLIC RECORDS.

When the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief.

Department 1.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action of claim and delivery by the Art Metal Construction Company against the A. F. Anderson Company. Judgment for plaintiff, and defendant appeals. Affirmed.

T. K. Kase, of Los Angeles, for appellant.

Benjamin E. Page and Arthur C. Hurt, both of Los Angeles (Arthur F. Coe, of Los Angeles, of counsel), for respondent.

LAWLOR, J. This appeal is taken from a judgment entered in favor of the plaintiff and against the defendant in the total sum of $2,091.63, with interest thereon, and for the possession of certain personal property, or for its value, $564.39, in case a delivery thereof cannot be had.

The action was brought by the plaintiff upon a written contract executed by the parties to this action on March 6, 1913. Under the terms of the contract the defendant agreed to sell the banking equipment and furnishings manufactured by the plaintiff in certain counties in the southern part of the state. Provision was made in the contract whereby either party might, upon giving 60 days' notice, terminate the contract, and upon such termination by either party the plaintiff would accept, take back, and pay the purchase price thereof all goods and merchandise remaining in defendant's possession previously purchased by it from plaintiff which should be in good and serviceable condition at the time of the termination of the contract. The court found that the contract was terminated on August 26, 1915; the plaintiff having served notice of such termination on June 26, 1915.

The complaint, after alleging the corporate existence of the plaintiff "under and by virtue of the laws of the state of Massachusetts," and that it was "duly authorized under and by virtue of the laws of the state of California to transact business in this state," alleges that on or about May 12, 1915, the defendant in writing requested the plaintiff to furnish the defendant f. o. b. cars at Jamestown, N. Y., certain office and banking fixtures, furnishings, and equipment, to be used in the alteration and repair of the banking establishment of the Commercial Bank of Santa Barbara; that the defendant agreed to pay for these goods the sum of $3,995.01; that of this total amount the sum of $1,462.01 had been paid; and that there was still due and unpaid to the plaintiff the sum of $2,533.

The defendant filed an amended answer to the complaint as amended in which it denied the indebtedness as alleged in the complaint and claimed that it had paid the plaintiff in cash the sum of $1,629.05, and that it had on hand goods and merchandise, which it had bought from the plaintiff, and which the plaintiff was bound under the terms of the contract of March 6, 1913, to take back, of the value of $2,990.54, and alleged further that the defendant was ready and willing to return these goods to the plaintiff, and that the plaintiff had been so notified. The amended answer then alleged that there was due from the plaintiff to the defendant certain sums on account of storage, insurance, and the like, amounting in all to the sum of $530.16. The defendant then prayed judgment against the plaintiff in the total sum of $3,520.70.

Upon the demand of the defendant, and in support of the allegations of the complaint, the plaintiff filed a bill of particulars, which showed that the total indebtedness arising under the contract of March 6, 1913, amounted to $4,148.10, that a credit of $1,625.10 had been allowed the defendant, and that there was still due and unpaid to plaintiff the sum of $2,523, which is $10 less than the amount alleged by plaintiff in its complaint to be due

on the Santa Barbara contract at the time this action was commenced. The amended bill of particulars shows a credit to the defendant of $10 on account of a clerical error, which accounts for the difference in amount between the bill of particulars and the complaint.

The court found that the plaintiff was a corporation organized and existing under the laws of Massachusetts and duly authorized by law to transact business in this state, as alleged in the complaint; that defendant had promised to pay the plaintiff, on account of certain goods furnished by it to be used by the defendant in the Commercial Bank of Santa Barbara, the sum of $3,995.01, "but that no part thereof has been paid except the interest thereon to the 15th day of February, 1916, and the sum of $1,477.63 on account of the principal thereof; that there is now due, owing, and wholly unpaid from the defendant to the plaintiff on account of said contract the sum of $2,517.38." It was further found that the plaintiff agreed to take back from the defendant certain goods which were of the value of $546.39, and which had not been delivered by the defendant to the plaintiff. And the court further found that the defendant was entitled to an additional credit of $13.35 on account of two items of merchandise which had been paid for by defendant and not delivered to it by the plaintiff. This left a net balance of $1,957.64 due the plaintiff, for which amount the court entered judgment, with interest thereon from February 15, 1916, at the rate of 7 per cent., making up the total sum of $2,091.63. Judgment was also entered in favor of the plaintiff for the possession of either the goods which the plaintiff had agreed to take back, but which the defendant had not delivered, or, if delivery could not be had, for the purchase price, $546.39.

Only two points are urged for reversal. Appellant's position is thus set forth in the transcript on appeal:

"The foregoing statement of the case and bill of exceptions is intended to comprehend only the two particular objections to the judgment which will be urged upon appeal, viz.: That the court should have allowed defendant an admitted credit of $1,625.10, and also that this action cannot be maintained, or a judgment entered against the defendant for any sum whatsoever, until the plaintiff complies with the Code requirements and pays the fees due the state of California in order to authorize it to do business within said state. All other objections to the judgment and to the rulings of the court on the motion for new trial are hereby expressly waived."

In other words, appellant contends: First, that the plaintiff has not complied with the requirements of sections 405–410 of the Civil Code (which sections, with the exception of section 407, were repealed in 1917 [Stats. 1917, p. 381], their provisions having been incorporated into the General Laws of 1915 [Stats. 1915, p. 422], and amended in 1917 [Stats. 1917, p. 371]), and section 409a of the Political Code, relating to foreign corporations so as to enable it to do business in this state; and, second, that the court did not allow the defendant an admitted credit of $1,625.10, to which it claimed it was entitled, but allowed it instead a credit of only $1,477.63 on account of the principal of the purchase price of the goods described in plaintiff's complaint.

1. We will consider first the objection that the plaintiff has not complied with the statutory requirements relating to foreign corporations doing business in this jurisdiction. Considerable space is devoted by both appellant and respondent to a discussion of the point whether or not the plaintiff was doing business in this jurisdiction within the contemplation of the requirements that foreign corporations file with the secretary of state a copy of the articles of incorporation, the name and address of the resident agent, and pay the required fees. But this discussion is beside the point. As we have indicated above, it was alleged in the complaint:

"That plaintiff is, and at all the times herein mentioned has been, a corporation organized and existing under and by virtue of the laws of the state of Massachusetts, and duly authorized under and by virtue of the laws of the state of California to transact business in this state."

In the answer and cross-complaint and the amended answer to the complaint as amended filed by the defendant the only denial of this allegation is as follows:

"That said defendant is not informed as to whether said plaintiff is authorized to transact business in the state of California, and has no knowledge, information, or belief sufficient to enable it to answer the allegation that said plaintiff is authorized to transact business in said state, and therefore denies the same."

[1, 2] It is thus apparent that appellant does not deny that the plaintiff is a corporation organized under the laws of the state of Massachusetts and denies that the "plaintiff is authorized to transact business in the state of California," only because it "has no knowledge, information, or belief sufficient to enable it to answer the allegation." Whether the plaintiff was entitled as a foreign corporation to transact business in the state of California within the meaning of the statutory requirements was a matter of public record, and, not being positively denied, is deemed admitted. It is well settled in this state that, when the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief. In William Wilson Co. v. Trainor, 27 Cal. App. 43, 148 Pac. 954, it is said:

"The allegation of the corporate capacity and existence of the plaintiff could not be successfully denied upon information and belief, because * * * it is well settled that, when the existence of an alleged fact may be ascertained from an inspection of a public record, its existence cannot be put in issue by a denial based solely upon information and belief."

See, also, Mulcahy v. Buckley, 100 Cal. 484, 35 Pac. 144; Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130; Brinkley-Douglas Fruit Co. v. Silman, 33 Cal. App. 643, 166 Pac. 371.

2. There is no merit in the contention of appellant that the trial court allowed it a credit of only $1,477.63 when the plaintiff's bill of particulars admitted a credit of $1,625.10. The bill of particulars did admit a credit to the defendant, but as a credit against which there were chargeable not only the price of the articles delivered for installation in the Santa Barbara bank, but also certain other items totaling $153.09. From these latter items the court deducted in favor of the defendant $5.62, leaving as their balance $147.47. The $1,625.10 of total credits to the defendant was then applied by the court, $147.47 to the discharge of the items mentioned, and the balance, $1,477.63, on the purchase price of the goods for the bank. This application of the credit to the defendant was a proper one and was an allowance to the defendant of the full amount of the credit of $1,625.10 admitted by the bill of particulars.

The judgment is affirmed.

We concur: OLNEY, J.; SHAW, J.

182 Cal. 19

MERRALLS v. SOUTHERN PAC. CO.
(S. F. 8333.)

(Supreme Court of California. Jan. 6, 1920.)

1. APPEAL AND ERROR ⊂=977(1)—NEW TRIAL ⊂=6—GRANT OR REFUSAL DISCRETIONARY; NO REVERSAL EXCEPT FOR ABUSE.

The granting or refusing of a new trial is a matter largely within the discretion of the trial court, and will not be reversed by the appellate court except for abuse.

2. NEW TRIAL ⊂=29—ALLOWANCE IN DEATH ACTION FOR MISCONDUCT OF COUNSEL IN BRINGING BEFORE JURY IMPROPER MATTER NOT ABUSE OF DISCRETION.

In a death action it was not error for the trial court to grant plaintiff a new trial for misconduct of counsel for defendant in persisting, after the testimony was closed, in bringing to the court's attention, in the jury's presence, an amendment of the original complaint, which statements reflected discredit on plaintiff's counsel and his witnesses.

3. APPEAL AND ERROR ⊂=207—GRANT OF NEW TRIAL WILL NOT BE REVERSED FOR FAILURE TO REQUEST ADMONITORY INSTRUCTIONS WHERE SUCH INSTRUCTIONS ACTUALLY GIVEN.

On an appeal from an allowance of a new trial in a death action on the ground of misconduct of counsel in commenting on an amendment to the complaint in a manner to discredit counsel for the defendant and his witnesses, the order will not be reversed merely because plaintiff failed to request the court to admonish the jury to disregard such statements; the court having repeatedly of its own motion given such admonitions.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Temperance L. Merralls, administratrix of the estate of William Augustus Merralls, deceased, against the Southern Pacific Company, a corporation. Judgment for defendant, a new trial was granted, and defendant appeals. Affirmed.

A. A. Moore and Stanley Moore, both of San Francisco (Elliott Johnson, of San Francisco, of counsel), for appellant.

Lane, White & Elliott, Edward Elliott, and E. A. Bridgford, all of San Francisco, for respondent.

LAWLOR, J. The appeal is from an order granting a new trial to the plaintiff. The action was brought by the plaintiff, as administratrix of the estate of William Augustus Merralls, deceased, for damages against defendant, in behalf of the heirs of the deceased, for the death of the said Merralls, who was killed by an electric train owned and operated by the defendant in the city of Alameda.

The fatal accident occurred on the night of September 2, 1914. On that evening Mr. Merralls and a Mrs. Christina Nourse and a Mrs. Annie Wilson had made a social call in Alameda and were intending to take a train back to San Francisco. There was no question about the decedent having gone upon the track ahead of the train. The only conflict in the testimony was as to the speed of the train and the ringing of the bell. The witnesses, who testified on these points, were the motorman and conductor of the train, called called by the defendant, and Mrs. Nourse and Mrs. Wilson, called on behalf of the plaintiff. According to the motorman, he rang the bell as the train approached the crossing where the accident occurred, and the speed of the car was not more than 20 miles an hour. The conductor did not testify as to the speed of the train, but did testify that he heard the ringing of the bell as the car was being brought to an emergency stop. Both witnesses for the plaintiff testified that they

heard no bell sounded or other warning given. As to the matter of speed Mrs. Nourse testified:

"When I became aware of the train, it was right on us and moving at a high rate of speed, I would say 35 miles an hour."

And on the same matter Mrs. Wilson testified:

"It was moving very rapidly. I can safely say at least 35 miles an hour. It was going very swift."

The jury returned a verdict for the defendant, judgment was entered accordingly, the plaintiff moved for a new trial, which motion was granted, and from the order granting the new trial this appeal is taken by the defendant.

The notice of intention to move for a new trial specified several grounds upon which the motion would be made, which were as follows:

"(1) Irregularity in the proceedings of the court; irregularity in the proceedings of the adverse party, to wit, the defendant by and through its attorneys, by which the plaintiff was prevented from having a fair trial.

"(2) Insufficiency of the evidence to justify the verdict of the jury.

"(3) Errors in law occurring at the trial and excepted to by plaintiff."

In support of the motion for a new trial, an affidavit was filed by the plaintiff setting out a portion of the record containing what was alleged to be the misconduct of "the defendant by and through its attorneys." The alleged misconduct consisted, in brief, of the attorney for the defendant persisting, after the testimony was closed, in bringing to the attention of the court, in the presence of the jury, and later in his argument to the jury, an amendment that had been made in the original complaint three days before the trial by the addition of the expression "more than" between the words "of" and "25" in the phrase "at a speed of 25 miles an hour," referring to the speed of the train at the time of the accident. The statements of counsel for defendant in this behalf, as alleged in such affidavit, were of such a nature, with regard to the circumstances and purpose of the amendment, as well as to the amendment itself, as to reflect discredit on counsel for plaintiff and upon two of plaintiff's material witnesses, whose testimony was vital to her cause. The whole matter was entirely foreign to the issues to be determined by the jury, and there is reasonable ground for concluding that the jury was probably influenced thereby, notwithstanding that the trial court, of its own motion, repeatedly admonished the jury in regard thereto.

The court, in granting the motion for a new trial, specifically finds that the evidence was sufficient to sustain the verdict. The order reads as follows:

"The motion for a new trial in behalf of plaintiff in the above-entitled case, coming on regularly to be heard, and said motion having been submitted to the court for decision, and the court having fully considered the motion and the points and authorities submitted by the respective counsel, now orders that said motion be, and the same is, hereby granted.

"On the question of the sufficiency of the evidence, the court finds that the evidence was sufficient to warrant a verdict either in favor of plaintiff or in favor of defendant."

No errors of law excepted to by the plaintiff are found in the record, and no objections were made and called to the attention of the court save the alleged errors set out in the affidavit. The record contains no rulings on the admission or rejection of evidence, nor is there any assignment of error in the giving of the instructions to the jury.

With the order granting the new trial in such terms, the question raised by the respondent as to the sufficiency of the evidence to sustain the verdict cannot enter into the discussion. There being no other errors of law called to the attention of the court, it must be concluded that the sole ground upon which the trial court based its order granting a new trial is that of irregularity in the proceedings, namely, the misconduct of counsel for defendant. The disposition of this appeal depends, therefore, upon whether there was an abuse of discretion on the part of the trial court in making the order granting plaintiff's motion for a new trial on that ground.

[1] The rule is well settled by a long line of decisions in this state that the granting or refusing of a new trial is a matter largely within the discretion of the trial court, and it is only when this discretion has been abused that the appellate court will reverse the order. Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Cole v. Wilcox, 99 Cal. 552, 34 Pac. 114; Brooks v. San Francisco, etc., Ry. Co., 110 Cal. 178, 42 Pac. 510; Von Schroeder v. Spreckels, 147 Cal. 187, 81 Pac. 515; Piercy v. Piercy, 149 Cal. 163, 86 Pac. 507; Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 155 Pac. 86; Tweedale v. Barnett, 172 Cal. 271, 156 Pac. 483. In Piercy v. Piercy, supra, which was a case involving the granting of a new trial on the ground of misconduct of one of the parties, it was said:

"The question as to whether this materially affected the substantial rights of plaintiff and prevented her from having a fair trial was peculiarly one which was addressed to the discretion of the trial court, for the same reasons that a motion for a new trial upon the ground of newly discovered evidence is so addressed, as has been repeatedly held. *The trial court having heard and seen the witnesses on the trial, and having knowledge as to those circumstances of a case which cannot be reproduced in the printed record, is in a better position than is the appellate court to determine as to the ef-*

fect of the shown irregularity upon the result of the trial.

"It is certainly enough to justify the affirmance of an order granting a new trial upon such ground that the irregularity found upon sufficient evidence by the trial court to have existed was of such a nature that it may, under the circumstances of the case, as shown by the record, have affected the substantial rights of the aggrieved party and prevented a fair trial." (Italics ours.)

[2] We perceive no ground for the contention in the instant case that the trial court abused its discretion in granting a motion for a new trial. The court may well have concluded that the misconduct of counsel was such that the effect thereof was not removed by the admonitory instructions, and that the only way to obviate any resulting prejudice to the rights of the plaintiff was to grant a new trial. The record plainly shows that the court was keenly alive to a sense of its own duties in the premises, and, considering the point in all its aspects, we cannot say that the granting of a new trial because of such misconduct constituted an abuse of discretion.

But it is urged by the defendant that—

"Even if it were conceded for the purpose of the argument that counsel for the defendant had no right to refer in his argument to the amendment having been made or to make any comment thereon, nevertheless, no ruling having been invoked by the counsel for the plaintiff and no suggestion or request having been made by the court to counsel for the defendant, no new trial should be granted."

What counsel for the plaintiff did in the premises was this: As soon as it became evident that counsel for defendant intended to discuss the amended complaint, counsel for plaintiff stated that he wanted to object to any reference to the amended complaint being made, but opposing counsel was allowed to finish his statement. At frequent intervals counsel for plaintiff vigorously protested against the conduct of counsel for the defendant. After counsel for plaintiff had been sworn to testify about the amendment in question, his associate stated to the court: "I think the jury should be dismissed. I think the jury should be excused." The court ruled that "if this is evidence the jury must hear it."

[3] It is not true, therefore, that counsel for plaintiff did not invoke the rulings of the court in respect to the incident, for many objections were interposed by them. It is true, however, that no exceptions were taken by counsel for the plaintiff to such rulings as the court made, nor was the court requested to admonish the jury to disregard the references to the amendment. And as no point is made over the failure to take such exceptions we will confine our consideration to the absence of a request for admonitory instructions. We think the failure of the court to make any suggestion to or request of counsel for defendant during the discussion does not call for consideration.

It is proper to point out that the cases relied on by the defendant in support of this contention are cases wherein the appeal was from a judgment or an order "denying" a motion for a new trial and a reversal was urged on the ground of misconduct of counsel where no request was made to admonish the jury to disregard it nor an exception taken to the action of the court. The appeal herein, however, is from an order "granting" a new trial, and the question before us is whether the court abused its discretion. No case has been called to our attention in which the rule here sought to be invoked has been applied to the "granting" of a new trial on such a ground. But even if the rule is to be applied in such a case as this, we think there is no merit in the contention of defendant on the point.

Discussing the alleged misconduct of the plaintiff before the jury in the recent case of Scott v. Times-Mirror Co., 184 Pac. 672, this court said (page 682):

"In no case was the court requested to instruct the jury that the conduct objected to was improper and that it was to be disregarded by them. Where the action of the trial court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof. People v. Shears, 133 Cal. 154, 65 Pac. 295; People v. Babcock, 160 Cal. 537, 117 Pac. 549; Grossetti v. Sweasey, 176 Cal. 793, 169 Pac. 687."

The only course left open to counsel for the plaintiff here to have the effect of such misconduct removed, or at least mitigated, was to request the court to censure the offending counsel and to admonish the jury. The court, as we have seen, of its own motion, did one of these things—it repeatedly admonished the jury. Thus the purpose of the rule requiring that the court be requested to admonish the jury was fully served, for even if the request had been made the court could have done no more than it did in that behalf.

The order is affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; SHAW, J.

44 Cal. App. 440

LAWRENCE v. GOODWILL. (Civ. 2000.)

(District Court of Appeals, Third District, California. Nov. 24, 1919. Hearing Denied by Supreme Court Jan. 22, 1920.)

1. HIGHWAYS ⊜175(1)—ROAD JOINING, BUT NOT CROSSING, ANOTHER AN "INTERSECTING HIGHWAY."

Under the direct provisions of Motor Vehicle Act, § 1, subd. 14, a highway joining, but not crossing, another is an "intersecting highway."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intersect.]

2. HIGHWAYS ⊜184(2) — EVIDENCE SUFFICIENT TO SUSTAIN VERDICT FOR DEFENDANT IN AUTOMOBILE COLLISION.

Where automobiles collided at intersection of two highways, evidence regarding circumstances under which defendant turned onto left-hand or wrong side of the main highway, on which plaintiff was driving toward him on the right-hand side, *held* to sustain a verdict for defendant.

3. HIGHWAYS ⊜184(2)—DRIVING ON WRONG SIDE ONLY PRIMA FACIE EVIDENCE OF NEGLIGENCE.

The fact that the driver of a vehicle has taken the wrong side of a highway when meeting or overtaking another is not conclusive, but only prima facie, evidence of negligence.

4. NEGLIGENCE ⊜83—BASIS OF LAST CLEAR OPPORTUNITY RULE STATED.

The last clear opportunity rule assumes the negligence of both parties, but that the negligence of one party proximately caused the damage, since he had a clear opportunity of avoiding the accident by exercising reasonable care.

5. HIGHWAYS ⊜184(3)—AUTOMOBILE DRIVER'S LIABILITY UNDER LAST CLEAR OPPORTUNITY RULE A JURY QUESTION.

Where automobiles collided at the intersection of two highways, evidence on the issue whether defendant could have avoided the accident under the last clear opportunity rule, after seeing plaintiff, *held* to make a jury question.

6. TRIAL ⊜237(6)—INSTRUCTION ON PREPONDERANCE OF EVIDENCE CRITICIZED; "SATISFIES."

An instruction that plaintiff had the burden of proving his case by preponderance of the evidence, which meant a greater weight of the evidence, which "satisfies" or carries conviction, is subject to criticism, since the word "satisfies" means convincing or removing all doubt or uncertainty from the jury's mind.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Satisfy.]

7. TRIAL ⊜296(7)—ERRONEOUS INSTRUCTION NOT PREJUDICIAL, IN VIEW OF OTHER INSTRUCTIONS.

In automobile collision case, instruction erroneously defining preponderance of the evidence as that which satisfies or carries conviction, *held* not so prejudicial, in view of other instructions, as to justify reversal under Const. art. 6, § 4½, confining reversal to cases where a miscarriage of justice has probably resulted.

8. TRIAL ⊜296(4, 5) — INSTRUCTION NOT PREJUDICIAL IN VIEW OF OTHER INSTRUCTION.

In an automobile collision case, an instruction to find for defendant if plaintiff approached an intersecting highway above a certain speed did not erroneously preclude the jury from considering the surrounding circumstances, or whether the last clear doctrine applied, or whether plaintiff's negligence proximately caused the collision, where such matters were covered in other portions of the charge.

9. TRIAL ⊜295(1)—INSTRUCTIONS CONSIDERED AS A WHOLE.

Instructions which state the law fairly and clearly when considered as a whole are unobjectionable, although isolated passages from single instructions may be subject to just criticism.

10. HIGHWAYS ⊜175(1)—TRAVELER COMING INTO ROAD FROM RIGHT HAS RIGHT OF WAY.

Automobile driver, entering a state highway from an intersecting road to the right of plaintiff automobile driver, has the right of way in crossing the highway.

11. HIGHWAYS ⊜184(4) — INSTRUCTION ON YIELDING RIGHT OF WAY NOT ERRONEOUS.

In an automobile collision case, an instruction that plaintiff was negligent if he did not yield the right of way on a highway to defendant, and requiring a verdict for defendant if such negligence proximately caused the accident, etc., *held* not reversible error, where another part of the instruction stated that all the surrounding facts and circumstances should be considered in determining whether plaintiff's failure to yield the right of way was negligence.

12. HIGHWAYS ⊜175(1)—"INTERSECTION OF PUBLIC HIGHWAY" DEFINED.

Under the direct provisions of Motor Vehicle Act, § 1, subd. 14, and section 22a, the term "intersection of public highway" means all space made by the junction of highways, and the space where one highway comes into another, although the highways do not cross.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Intersect.]

13. HIGHWAYS ⊜184(2)—EXCEEDING SPEED LIMIT CONCLUSIVE EVIDENCE OF NEGLIGENCE.

The fact that an automobile driver exceeded the statutory speed limit on a public highway constitutes conclusive evidence of negligence, but does not establish that such negligence proximately caused the accident.

14. TRIAL ⊜253(4)—INSTRUCTION NOT IGNORING LAST CLEAR CHANCE ISSUE.

In an automobile collision case, an instruction that plaintiff was conclusively presumed to have been negligent if he exceeded the statutory speed limit in approaching an intersecting highway is not erroneous, because ignoring the last clear opportunity rule, where the

court stated that the defendant would be entitled to a verdict only if plaintiff's negligence directly caused the collision.

15. APPEAL AND ERROR ⟹1064(4)—INSTRUCTION REGARDING "WILLFULLY" IN AUTOMOBILE COLLISION CASE NOT PREJUDICAL ERROR.

In an automobile collision case, an instruction authorizing a verdict for defendant unless defendant, after realizing the dangerous situation, acted recklessly or willfully, and defining "willfully" to mean designedly or purposely, etc., *held* not reversible error, although the word "willfully" means only a failure to exercise ordinary care in negligence cases.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willfully.]

16. HIGHWAYS ⟹175(1) — WHERE SPEED SHOULD BE DECREASED IN "APPROACHING" INTERSECTING ROAD A JURY QUESTION.

Under Motor Vehicle Act, § 22b, requiring automobile drivers, approaching intersecting highways where the view is obstructed, to reduce their speed to 10 miles per hour, the words "approach" and "approaching" mean to draw near, etc., and the distance from the intersecting highway at which the driver should reduce his speed is a jury question.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Approaching.]

17. APPEAL AND ERROR ⟹1067—REFUSAL OF INSTRUCTION NOT REVERSIBLE ERROR.

In an automobile collision case, the refusal of a requested instruction that the jury should determine at what point a plaintiff approaching an intersecting highway with an obstructed view should reduce his speed to 10 miles per hour, as required by Motor Vehicle Act, § 22b, was not reversible error, although the requested instruction might well have been given, especially where the evidence did not indicate that plaintiff at any time reduced his speed to the statutory limit.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by C. L. Lawrence against T. M. Goodwill. Judgment for defendant, and plaintiff appeals. Affirmed.

F. G. Ostrander, of Oakland, for appellant.
Edward Bickmore, of Fallon, Nev., for respondent.

HART, J. On the 23d of November, 1916, a collision occurred between an automobile driven by plaintiff and one driven by defendant, on the state highway, about 3 miles north of Atwater in Merced county. Plaintiff was seriously injured and brought this action to recover damages, alleging that the collision occurred because of the negligence of defendant. A jury found in favor of defendant, and judgment was entered in his favor for costs. From this judgment plaintiff appeals.

At the time of the accident there was a paved state highway running easterly from Livingston to Atwater, in said county of Merced. This highway was 60 feet wide, the paved center thereof being 15 feet wide. The distance from each edge of the pavement to the extreme edge of the right of way is 22½ feet. At the point where the collision occurred, a public highway from the north, 40 feet in width, called the Cressey road, intersected the state highway at right angles. It was an oiled road, and did not cross the state highway; but when within about 40 feet thereof the oiled portion divided, one portion going towards Atwater and the other towards Livingston. Between these two branches and the paved portion of the highway the unpaved portion was sandy. On the east of the Cressey road and up to the highway was a dense grove of eucalyptus trees, which effectually prevented any one coming from the direction of Atwater from seeing the Cressey road.

On the day of the accident plaintiff was driving westerly along the state highway on the right-hand side of the road. The only time he had been on the highway before was two days previously, when he had driven to Fresno. He said he did not know there was a road behind the eucalyptus trees. Defendant was driving on the Cressey road southerly toward the highway. When he came to the point where the road forked, he proceeded on the left-hand branch, which would bring him into the highway headed easterly toward Atwater. Plaintiff's version of what then happened is as follows:

"I first saw the defendant's machine as it came from this intersecting road; there was a little grove of eucalyptus trees that were an obstruction, and prevented me from seeing it before that. I had no glimpse of the machine at all before it emerged onto the state highway. As I saw his car I was somewhat startled; as it was coming on, it was apparently coming right towards me. I made an effort to avoid the accident by swerving to the left. I did not get much of a chance to swerve to the left any distance, very little. I sought to apply the brake, and his car struck into mine. His right front wheel struck my right front wheel and turned it. * * * It jerked my steering wheel at once, and almost strained my thumb; of course, took it away from me. * * * I had never driven upon the Cressey road and did not know of its existence."

On cross-examination, the witness testified:

"After the collision I was taken to Modesto; to the best of my knowledge I was unconscious immediately after the collision; I don't know how long. * * * I did not make any attempt to slow up my car previous to seeing Mr. Goodwill. After I saw Mr. Goodwill, I made an attempt to stop my car, I think mechanically, instantaneously, you might say. I do not think, if I had put on my brake immediately upon see-

ing him, I might have stopped in time to avoid the accident. After I saw Mr. Goodwill, I would assume that I traveled 50 or 60 feet—50 feet, probably—before the collision occurred. At the time of the collision I was traveling on the right of the highway—that is, the concrete highway—and Goodwill was coming in from my right in off the intersecting highway."

He said that he was traveling about 20 or 22 miles per hour.

The defendant testified that when the collision occurred he was driving at the rate of 9 or 10 miles an hour. He said:

"As I approached the road I put on, I went on low, and put my brakes, my foot on the brake, in making the turn. When I made that turn, I was going very slowly at that time. I was not going any speed at all, you might say. When I was making that turn, it was probably less than half the speed I was coming down. I am pretty sure I was not going over half speed, 5 miles an hour. * * * Dr. Lawrence's machine was running very fast; it was running tremendously fast. I estimate the rate of speed it was making—I believe he was going over 30 miles an hour. * * * When I seen the other machine coming, I realized that I could not pass in front of him, and I turned in the other way; I put my foot on the brake, and put the machine in low, and turned in on the wrong side, you might say; that is, on the left-hand side."

He said the collision occurred after he had gone 6 or 8 feet. The right front wheel of the defendant's car was torn off as a result of the collision, and, while the defendant's machine was stopped suddenly from the force of the impact, and remained standing at the point where the collision occurred, the plaintiff's car passed on for a distance of some 25 or 30 feet and toppled over on its side.

Section 22, subd. b, of the act of the Legislature whereby the use and the operation of vehicles upon the public highways of the state are regulated (Stats. 1915, pp. 397, 409), at the time this accident occurred, provided, among other things, that no person should operate or drive a motor or other vehicle on any public highway—

"at a greater rate of speed than ten miles an hour where the operator's or chauffeur's view of the road traffic is obstructed either upon approaching an intersecting way, or in traversing a crossing or intersection of ways, or in approaching or traversing a bridge, dam, trestle, causeway or viaduct, or in going around corners or a curve in a street or highway."

[1] Section 1, subdivision 14, of the same act, defines an "intersecting highway" as "any highway which joins another at an angle, whether or not it crosses the other." That the Cressey road is an "intersecting highway," within the above statutory description of such a highway, there can, of course, be no doubt. Indeed, the cases and authorities so hold as to a road which, like the Cressey highway, joins another at an angle. See opinion of Supreme Court, denying a hearing in the case of Muther v. Capps, 177 Pac. 882, after judgment in the District Court of Appeal of the First District. See, also, Berry, Automobiles, pp. 234, 235; Manly v. Abernathy, 167 N. C. 220, 83 S. E. 343; Commonwealth v. Cassidy, 209 Mass. 24, 95 N. E. 214; Hayes v. State, 11 Ga. App. 371, 75 S. E. 523.

[2, 3] The plaintiff contends that, notwithstanding his negligence, if any he was guilty of, the defendant himself was guilty of negligence which was the proximate and efficient cause of the collision and its consequences in failing to observe the law regarding the manner in which the operator of an automobile shall enter upon a highway from an intersecting highway, and further by failing to exercise ordinary care to avoid a collision after getting on the state highway and observing the approach of the plaintiff towards the intersection. The first of these propositions involves the charge that the defendant was guilty of an affirmative act of culpable negligence, and the second the doctrine known and designated in the cases and the books as the "last clear opportunity." The argument in support of the first is that, in entering the state highway, the defendant should have done so at right angles from the Cressey road across the center of the concrete portion of the state highway, and then have turned his machine to his left in proceeding toward Atwater or Merced, in which direction it was his purpose to go, and from which direction the plaintiff was at the time of the accident traveling. The answer to this proposition is that the jury impliedly found, upon evidence sufficient to sustain their conclusion, that the defendant was not negligent in proceeding as he did.

Adverting briefly to the evidence bearing upon the act of the defendant in entering upon the state highway as it is admitted that he did, it is first to be observed that he took the course in driving upon the state highway which the direction over the latter thoroughfare he intended to take would naturally suggest. In the second place, there is evidence which shows that, had he taken the course which counsel for plaintiff insist that it was his duty to take—that is, at right angles from the Cressey road, or the right of the two branches or forks of that road at the state highway, he would necessarily have been led into the soft sand on the southerly side of the concrete portion of the state highway. In the third place, there is evidence from which the jury could well have concluded, as presumptively they did so find, that had the defendant attempted, under the circumstances, to cross the center of the state highway, the plaintiff's machine would have struck his (defendant's) machine in the center. In other words, the jury were well within the record evidence in finding, as their verdict implies that they did find, that, con-

sidering the distance of plaintiff's car from the intersecting way and the rate of speed at which the latter was driving at the point of time when the defendant emerged from the Cressey road and entered upon the state highway, the defendant could not with safety have crossed or attempted to cross the center of the state highway. At any rate, the jury could well have found that, under the circumstances which so suddenly and unexpectedly surrounded the defendant, and which were of such a character as to afford little opportunity for the average person to determine what course of conduct was the best and safest to pursue, the defendant rather than being guilty of culpable negligence in entering upon the state highway from the left-hand branch or fork of the Cressey road and swerving his machine to the left on the state highway as he observed the near and rapid approach of the plaintiff's machine, merely failed to exercise what ordinarily might be his better judgment.

Common experience tells us that instances often occur in which appalling circumstances of imminent danger or peril so suddenly and unexpectedly confront persons of ordinarily cool and calm temperament and judgment that they for the time lose their presence of mind, or so find themselves in a position in which they are required to make up their minds as to the best or safest course to adopt to avoid the disaster which such circumstances threaten commensurately with the suddenness with which they arise. This appears to be one of such cases; and the courts have uniformly held that in such cases, in which damage or injury has directly resulted from the exercise of an erroneous judgment in attempting to meet or overcome the peril of such circumstances, the party whose act has thus caused the injury will not be held actionably responsible or liable for any injury or damage so caused. Or, as this proposition is stated as follows, in Tousley v. Pac. Elec. Ry. Co., 166 Cal. 457, 137 Pac. 31, quoting the syllabus:

"A person in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances."

See, also, Shearman & Redfield on Negligence, § 89; Schneider v. Market St. Ry. Co., 134 Cal. 490, 66 Pac. 734; Stapp v. Madera Canal & Irrigation Co., 34 Cal. App. 41, 166 Pac. 823; Ellis v. Central Traction Co., 174 Pac. 407, 411.

Moreover, while it is true that one who violates the law of the road by driving on the wrong side thereof assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road, still the rule requiring drivers on highways to keep to the right when meeting other vehicles, or in overtaking another vehicle, whether statutory, of common-law origin, or contained in a municipal ordinance, is not a hard and fast rule, to be adhered to in all circumstances.

"Circumstances may confront a person, and often do, when care would require him to avoid or relinquish the side of the highway to which he would otherwise be entitled. In such case he would be required to exercise such due care, and, if he failed to do so, he would be liable for negligence, even though he had planted himself upon the side to which he would ordinarily be entitled. In all cases the ultimate question is: What was required by due care, under all the circumstances confronting the driver at the time?" Berry, Automobiles, pp. 205, 206; Bauhofer v. Crawford, 16 Cal. App. 676, 117 Pac. 931; Needy v. Littlejohn, 137 Iowa, 704, 115 N. W. 483; Herdman v. Zwart, 167 Iowa, 500, 149 N. W. 631.

In other words, the fact that the driver of a vehicle has taken the wrong side of the highway when meeting or in overtaking another, where damage occurs, is not conclusive, but only prima facie, evidence of negligence, which may either stand as proof of the fact or be overcome or rebutted by the circumstances of the particular case.

It follows from the foregoing considerations that the question whether the defendant was negligent in entering upon the state highway, and in turning to his left upon said highway on observing the approach of the plaintiff's machine towards the point at which he entered upon the highway, was peculiarly one for the determination of the jury, and, of course, the verdict, so far as that question is concerned, is conclusive upon this court.

[4, 5] As to the doctrine of the "last clear opportunity," invoked by plaintiff against defendant, we first remark that it is, to our minds, very doubtful whether the evidence is such as to make the application of that rule pertinent to this case. We have seen that the plaintiff, on his own admission, when first observed by the defendant after the latter had left the Cressey road and entered upon the state highway, was a distance approximately of between 50 and 60 feet only from the intersection of the two roads, and that he was then traveling at the rate, approximately, of from 20 to 22 miles per hour, according to his own admission, and about 30 miles per hour, according to the defendant's testimony. Even accepting the plaintiff's estimate of the rate at which he was then traveling, his machine was going at the rate, approximately, of more than 30 feet per second, or the 60 feet, the approximate distance he was from defendant at the point of time when the latter entered upon the state highway, in two seconds, approximately; hence both the plaintiff and the defendant were limited to that exceedingly brief period of time within which to make up their

minds what course of conduct either should pursue. Manifestly, if the plaintiff was not thus afforded sufficient time within which to determine what ought to be done to avoid a collision, then it can hardly be said that the defendant was afforded sufficient time to have exercised such care as would have avoided the accident, or, in other words, have had available to him the time to form a reasonably rational conclusion as to what was the safest course for him to adopt. The doctrine of the "last clear opportunity" proceeds upon the assumption or the concession that the party invoking it was himself guilty of negligence, but that the negligence of the other party was the proximate and efficient cause of the damage, because, having a clear opportunity of avoiding the accident or collision by the exercise of reasonable or ordinary care, his conduct, therefore, amounts to a willful, reckless, and wanton disregard of the duty which the circumstances of the case cast upon him. But the doctrine means precisely what its judicial designation implies—that there must be a clear opportunity to avoid the accident by the exercise of ordinary care, and where there is no such opportunity present in a case, then the doctrine obviously does not apply. As above suggested, we seriously doubt its application to the facts of this case. But, conceding that there is some room for its application, then the question whether it does in fact apply here, and the further question whether the defendant did or did not do all that he could reasonably have been expected to do to avoid the collision, were solely for the jury's determination. We cannot, in other words, say upon the evidence that, as a matter of law, the defendant was afforded a clear opportunity, by the exercise of the proper degree of care, to have avoided the collision, nor that he did not do so.

[6, 7] The plaintiff next complains of the action of the court in giving and refusing to give certain instructions. It is first contended in this particular that the instruction defining the meaning of the phrase "preponderance of evidence," as applied to civil cases is erroneous and operated prejudicially upon the rights of the plaintiff. The instruction reads, in part, as follows:

"By the preponderance of evidence is meant greater and superior weight of evidence which satisfies your mind. By a preponderance of evidence is not necessarily meant a greater number of witnesses, but if the plaintiff has proven the material allegations of his complaint by such evidence as satisfies and produces conviction in the minds of the jury, then he may be said to have proven his case by a preponderance of evidence. When you are satisfied that the truth lies with a single witness or with any number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds."

It is said that an instruction very much similar to the foregoing was condemned in People v. Miller, 171 Cal. 649, 154 Pac. 468. The instruction in that case defined "preponderance of evidence" in this language:

"Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or, in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds."

It will be observed that there is considerable difference between the instruction challenged here and the instruction given in the Miller Case. The latter instruction, in attempting to define the meaning of the phrase, "preponderance of evidence," plainly describes or defines the rule as to the degree of proof essential to the conviction of a defendant in a criminal case and was clearly erroneous. The two instructions are, as stated, noticeably dissimilar. Still, we think the instruction here goes too far, or, rather, falls short of stating correctly the rule as to the preponderance of the evidence which applies in civil cases. As we understand that rule, it does not mean that the evidence shall be such as to *satisfy and produce conviction* in the minds of the jury, but, as the Supreme Court says, in People v. Miller, supra, quoting from Hoffman v. Loud, 111 Mich. 156, 69 N. W. 231, it means:

"Such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the *greater probability* [italics ours] is in favor of the party upon whom the burden rests."

Of course, it is correct to say of the rule as to the preponderance of the evidence that "the evidence of one party must be more weighty, convincing, and satisfactory than the proof adduced by the other party"; but this does not mean that the evidence must satisfy and produce conviction in the minds of the jury, or the court, if the case be tried before it without a jury. To "satisfy" is to free one's mind from doubt or uncertainty; to set at rest the mind upon a given proposition; to convince (Webster's Dict.); and the same authority says that "conviction" is to be convinced. In using the word "satisfied" as expressing the discharge of an obligation, we understand it to mean a full and complete termination of the transaction as to such obligation between the obligor and obligee. So, in saying that by the phrase "preponderance of evidence" it is meant that the jury or judge must be satisfied or of the conviction that the evidence establishes the affirmative of the issue, we in effect say that that proof must be such as to remove from the mind of the judge or the jury all doubt or uncertainty upon the issue to be decided. In People v. Miller, supra, the Chief Justice says:

"The party on whom rests such burden having produced sufficient evidence to support a con-

clusion in his favor, opposing evidence may also have been introduced, and then only does the question of preponderance of evidence arise. The situation may then be that in view of the opposing evidence, the jury is in doubt, and not at all satisfied or convinced. In such a situation the decision must be based on the preponderance rule. If in the opinion of the jury the testimony preponderates in favor of the one on whom the burden of proof does not lie, or is equally balanced, the decision must be in his favor, and if it preponderates ever so slightly in favor of the other party, he is entitled to a verdict."

The foregoing is a singularly clear exposition of the rule as to the preponderance of the evidence, and, viewing the instruction complained of here by the light of the rule as it is thus explained, it is very clear that it does not, as above declared, correctly define the meaning of the phrase "preponderance of evidence." But, while the instruction is justly subject to the above criticism, it is, as before stated, much less vulnerable than the one considered and condemned in the Miller Case, supra, and, we think, much less likely to produce injury than the instruction in said Miller Case; for, in the latter case, which involved a charge of public crime against the defendant, the trial court explained to the jury the degree of proof requisite to a conviction of the accused, and had correctly explained the meaning of the doctrine of reasonable doubt as applicable to criminal cases, and on top of that gave, in response to the defense of insanity set up by the defendant, the instruction referred to, which, in effect, as we have said, was not different from the rule of reasonable doubt applicable alone in criminal cases. The instruction referred to was the only one given by the court in the Miller Case on the preponderance rule. Thus readily it can be perceived that with an instruction on the preponderance rule as applied to a civil issue defined practically the same as the court had correctly defined the rule of reasonable doubt or the rule as to the degree of proof required to establish a crime against an accused, the jury could have formed and probably did form the conclusion that there was no distinction between the degree of proof necessary to justify a conviction of the defendant and the nature and extent of the burden resting upon the defendant to sustain his defense that he was insane when he committed the act with which he was charged and hence was not responsible in law for said act. Quite obviously, the situation thus produced was such that no other conclusion could follow than that the effect of the instruction on the preponderance rule was to prejudice the rights of the defendant in that case. But in this case the instruction does say that by "preponderance of evidence" is meant "the greater and superior weight of evidence," and that superior or greater weight is not to be tested or determined by the fact that the greater number of witnesses may be found on one side, but such weight of the evidence as "satisfies your minds." In other words, that language of the instruction might justly be construed to mean (and we cannot say that the jury did not so understand it, since there was not given, as was necessarily done in the Miller Case, an instruction on the degree of proof essential to a conviction in a criminal case) that the jury must be satisfied of the conviction from the evidence, not that the truth was on the side of the party holding the laboring oar, but that the greater weight of the evidence was on his side.

Besides the foregoing observations relative to the point in hand, we may also consider that, at the request of the plaintiff, the court instructed the jury upon the degree of the burden resting upon him as follows:

"In civil cases the affirmative of the issue must be proven; the affirmative being upon the plaintiff, upon him therefore rests the burden of proof and he must establish his case by a preponderance of the evidence; that is to say, by the greater weight of the evidence."

This is a correct abstract statement of the rule, and, considered with that portion of the criticized instruction that the weight of the evidence is not alone or necessarily determinable according to the greater number of witnesses on the one side or the other, it must be said that the jury, assuming, as we must, that they were men of ordinarily fair intelligence, must thus have been made to understand that the rule as to the preponderance of the evidence as applied to civil cases does not measure up to the greater requirements of the rule in criminal cases as to the degree of proof which will alone justify a conviction. Thus it will readily be perceived that the situation here with respect to the instruction now in question is altogether different from that which existed in the case of People v. Miller, supra. Furthermore, while it might be that a verdict for the plaintiff might be upheld on appeal under the rule by which the appellate courts are always to be guided in considering questions of fact, still the evidence appears clearly to justify the verdict here. There is nothing in the character of the evidence on its face which justifies us in holding otherwise. Hence we cannot say that, even with the imperfections of the criticized instruction, the plaintiff was prejudiced by it. In fact, we find a situation here where we are precluded from declaring, after a full and careful review of the entire record, including the evidence, that a miscarriage of justice resulted from the giving of the instruction complained of. Const. art. 6, § 4½.

[8, 9] The appellant insists that the court practically took the case out of the hands of the jury by instructing them that, if they

found that the plaintiff was driving his machine as he was approaching the intersection at a greater rate of speed than 10 miles per hour, and that a collision occurred between the plaintiff's and the defendant's machines, and that the defendant was not guilty of contributory negligence at the time of the collision, it would be their duty to find for the defendant, not only on the complaint of the plaintiff, but also upon the cross-complaint of the defendant, for such damages as the evidence might show that the defendant had sustained by reason of such collision. The instruction is said by appellant to be erroneous because it did not permit the jury to consider the distance plaintiff's automobile was from the intersection of the two highways at the time of the collision, nor permit the jury to consider the question whether the doctrine of the "last clear chance" applied, or whether the negligence of plaintiff in driving at a greater rate of speed than 10 miles per hour proximately caused the collision. The charge of the court contained specific instructions as to all the matters which counsel declare were not included within the instruction under review. On the doctrine of the last clear chance or opportunity, and upon the question whether the negligence of the plaintiff, if any, was the proximate cause of the collision, the court gave specific instructions. The instruction complained of must be viewed by the light of the facts as disclosed by the evidence and considered as a part only of the charge of the court. A court, in charging a jury, is not required to state the case hypothetically in any one instruction, or embrace therein all the conditions or qualifications necessary to a correct statement of the law covering all the evidential features of the case. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole unobjectionable, even though, by selecting isolated passages from single instructions, they may in some respects be amenable to just criticism.

[10, 11] The next instruction assailed by the appellant reads:

"By the term 'intersection of public highway' is meant all space made by the junction of highways, and the space where one highway comes into another, although these highways do not cross. And you are instructed that if you find from the evidence adduced in this case that plaintiff, Lawrence, at the time of the collision in question, was approaching or crossing an intersecting highway, and that the defendant, Goodwill, was coming onto or crossing the highway on which plaintiff was traveling from an intersecting highway, and from the right of plaintiff, then, in that event, defendant, Goodwill, was entitled to the right of way of crossing, or coming upon said highway. And if the plaintiff did not yield the right of way to the defendant, the plaintiff was guilty of negligence in so operating his said automobile and in not yielding the right of way to the defendant, and if such negligence was the proximate or direct cause of the collision of the automobiles of plaintiff and defendant, and the defendant suffered injury by reason of said collision, and was not guilty of contributory negligence himself, then your verdict should be for the defendant, not only upon the complaint of plaintiff, but also upon the cross-complaint of the defendant, for such damages as the evidence shows was suffered by the defendant by reason of such collision."

The court, it is conceded by appellant, elsewhere gave in its charge a proper instruction as to the question of "right of way"; but it is claimed that the instruction here criticized is in conflict with the proper instruction, and therefore does not state the law correctly. We do not think so. It states, in effect, that if, from the evidence the jury found that the defendant entered upon the state highway to the right of plaintiff then the defendant was entitled to the right of way of the crossing, "or crossing on said highway." So far the instruction clearly states the law. But it proceeded to say, unqualifiedly, that, if in such case the plaintiff did not yield the right of way to the defendant, "the plaintiff was guilty of negligence in so operating his automobile and in not yielding the right of way to the defendant," and then declares that if the collision was proximately caused by such negligence, and the defendant suffered injury by reason of said collision, and was himself not guilty of contributory negligence, then the verdict should be for the defendant, both upon the complaint of the plaintiff and the cross-complaint of the defendant. Of course, taken alone, the latter part of the instruction would not be broad enough or sufficiently explicit. Whether in such case as is stated by that part of the instruction the plaintiff would be culpable in law and the defendant entitled to damages would depend upon the circumstances of the case. It is not in all cases that the failure of the party to yield the right of way to another on the road constitutes actionable negligence. As in this case, the circumstances of the collision might have arisen so suddenly as not to afford to a driver an opportunity to make up his mind which would be the better course to adopt to avoid what might appear to be an impending collision, or the exigencies of the situation might appear to a driver to be such as to require him to take the left of the road. And this very proposition was explained by the court in the instruction referred to as stating correctly the law as to the right of way over highways. The court therein said to the jury, in part:

"While the law gives to the operators of vehicles on the right what is generally termed the 'right of way,' still it does not follow as a matter of law that upon the happening of a collision between two vehicles at the intersection of two public highways that the operator

of the vehicle on the left is necessarily guilty of negligence. *All the facts and circumstances surrounding the happening of the accident must be considered in determining whether such operator was in fact negligent.* (Italics ours.) In other words, the law governing the operation of vehicles must be applied to the facts and circumstances of the case, and the law which gives to the operator of a vehicle on the right the so-called 'right of way' also contemplates that such operator of such vehicle is himself operating his vehicle in a careful and prudent manner, and with due regard to the safety of others."

The foregoing involves a clear and correct statement of the rule and fully supplies the shortcoming of the criticized instruction, as to which, it is further to be remarked, as we observed in considering above another challenged instruction, that it must be viewed and considered, not singly or alone, but in connection with the entire charge of the court. That the instruction is pertinent enough to the evidence is borne out by the testimony of the defendant that he entered the state highway with the intention of crossing the center thereof to the right; but, on seeing the plaintiff's machine and observing the rapid rate at which it was traveling and its near proximity to the point of intersection, he suddenly swerved his machine to the left, believing that course to be the surest way of preventing a collision.

[12] Nor does the instruction contain an erroneous description of an intersection of two highways or an intersecting way. The definition given by the instruction of an intersection or intersecting way conforms to that given by section 1, subdivision 14, of the Motor Vehicle Act, and also section 22a of the same act prescribing the rates of speed to which drivers of vehicles are limited in traveling over public highways under the several different conditions therein given or prescribed. See, also, the cases above cited on this proposition.

[13] The appellant earnestly objects to instruction No. 45 given by the court, claiming that it does not embrace a correct statement of the law and that its effect was seriously to injure his rights at the trial. The instruction first told the jury that if they should find that the plaintiff—

"at or immediately before the collision in question, was approaching the intersection of ways, and that his view of the traffic on the intersecting way was obscured, and that he was traveling at a rate of speed in excess of 10 miles per hour, then, and in that event, the plaintiff is conclusively presumed to have been guilty of negligence at the time of the collision."

Counsel in substance declare that that part of the instruction is faulty, because it omits to state the qualification that such negligence is not "the determining factor unless it proximately caused or contributed to the accident in question." The rule is, as stated by the court in the instruction, that the acts of persons violating the law regulating the rate of speed at which vehicles or automobiles, under certain given circumstances, may be run on public highways constitutes conclusive evidence of negligence. Scragg v. Sallee, 24 Cal. App. 144, 140 Pac. 706, and the many cases therein named. This is not to say, of course, where a collision or some other accident has occurred, and the driver of one of the colliding automobiles or one of the machines mixed up in the accident, has violated the speed limit prescribed by the law, that the latter's negligence was or is conclusively presumed to have been the proximate cause of the collision or the other accident. Whether such negligence was the proximate cause is a question which must be determined under proper instructions by the jury. And in this case, in other parts of its charge, the court did submit that question to the jury, telling them in readily understandable language that it was for them to say, from all the facts and circumstances of the case, whether the plaintiff's negligence, if they found him to have been guilty of negligence by exceeding the speed limit, was the direct and the efficient cause of the collision.

[14, 15] Again, the same instruction is attacked upon the ground that it eliminates the "last clear chance" doctrine and is in conflict with the instruction given on that question, and that it is further defective in that it erroneously defines the degree of negligence which is involved in the omission by a person so to regulate his conduct as to avoid an accident when he has ample opportunity to do so. The part of the instruction now referred to declares that, if the plaintiff was guilty of negligence by driving beyond the prescribed speed limit in approaching the intersection, and if such negligence was the cause of the collision, then the verdict should be in favor of the defendant on the complaint and the answer, "unless you should find from the evidence that the defendant, after perceiving the dangerous situation then and there existing, and becoming aware of the presence of the plaintiff, did recklessly or willfully or wantonly send or drive his automobile forward." Then follows a definition of the adverbs, as used in the instruction, "recklessly," "wantonly," and "willfully," to wit:

That "'recklessly' means with wanton disregard of all consequences, and is synonymous with 'wantonly'; and the adverb 'willfully' * * * means 'designedly,' 'purposely,' 'perversely,' 'with a set purpose,' or 'obstinately.'"

It will be observed that the claim that the instruction disregards the doctrine of the "last clear opportunity" is untenable. The instruction, on the contrary, expressly recognizes that doctrine by employing it as a qualification of the statement that if the negligence of the plaintiff, if he was found to have been negligent, was the direct cause of

the collision, the defendant would be entitled to a verdict.

As to the criticism of the definition ascribed in the instruction to the adverbs descriptive of the manner in which the defendant would be required to act to excuse the negligence of the plaintiff, counsel declare that the instruction, in defining the meaning of those words, practically told the jury that the defendant could not be held responsible for his conduct unless it appeared that, having perceived the peril of the plaintiff, he intentionally ran his automobile into that of the plaintiff. Although the court defined the adverb "willfully" as it is defined in the dictionary, it is, of course, true that, in using it in an instruction explaining the doctrine of the "last clear chance," it is to be given and understood in a much more restricted sense than that given to it by the dictionary or by the law when it is used in another connection, as, for instance, when it is employed to characterize the operation of the mind of one committing a public crime. Obviously, to charge one with culpable negligence who, having a clear opportunity to do so, fails to avoid an accident and consequent injury to another, it is only necessary to show that the former failed to exercise ordinary care to prevent the accident. If it be shown that he deliberately and willfully, in the real sense of those terms, caused the accident and the injury, he would then be no less guilty of a public crime than if he had assaulted another by other means without legal cause or had likewise produced his death. While, however, the instruction complained of should have been made clearer or more explicit in the respect here considered, we do not think the jury could have understood it to mean that to render the defendant culpable his act must have been willful or designed, for, in the first place, there is no evidence indicating in the slightest degree that it was so, and, in the second place, in the absence of a motive for so foolish and so criminal an act, no one would suppose it to be probable, or even possible, that a person possessed of ordinary good sense would imperil himself or his property by deliberately or willfully running his automobile into that of another as the two were traveling at a pretty fair rate of speed in opposite directions. We therefore think that it is altogether probable that the jury were not influenced in their consideration of the case by the fact that the court defined in the instruction the words referred to as they are defined by the dictionary.

[16, 17] It is finally contended that prejudicial error was involved in the action of the court in refusing to allow an instruction, preferred by the plaintiff, declaring, in effect, that, since the Motor Vehicle Law limiting the rate of speed of automobiles when approaching an intersection, where a view of the intersecting way is obstructed, to 10 miles an hour, does not define what distance from such intersection a person, if driving at a greater rate of speed than 10 miles per hour, must reduce the speed of his machine to that number of miles per hour, it was the duty of the jury to determine what is or would be a reasonable distance from such intersection at which the driver should diminish his speed so as to conform it to the 10-mile limit by the light of all the circumstances surrounding the operation of such vehicle. The instruction further declared that the plaintiff—

"in operating his automobile, had the right to anticipate that any person operating a vehicle upon the Cressey road would, before turning to the left, proceed beyond the center of its intersection with the state highway."

That instruction could well have been given without doing harm to anybody, but we cannot say that its disallowance in any manner or degree prejudiced the case of the plaintiff. The words "approach" and "approaching" mean to "draw near; a coming or advancing near; to come near to in time or place or character." As used in the Motor Vehicle Act it speaks for itself, and obviously was intended to mean that the operator of an automobile, when going towards an intersection of two highways, a view of either of which by one traveling on either is obstructed for a short distance to the point of intersection, should, if he has been traveling at a greater rate of speed than 10 miles per hour, reduce his speed to 10 miles per hour at such distance from the point of intersection as will enable him so to regulate or control the operation of his machine as that, in case of the sudden or unexpected appearance of another automobile from the other highway on the highway on which he is traveling, he can the more readily avoid a collision between the two machines.

But, of course, in any case in which arises the question whether the operator of an automobile reduced the speed of his machine to 10 miles an hour at a reasonable or proper distance from an intersection, it is for the jury to determine that issue from the general situation of the surroundings of the intersection and upon the circumstance of whether the intersecting way is or is not ordinarily subject to heavy traffic. And the question is one largely of argument by counsel based upon all the facts and circumstances. Without being told by the court that it was their duty to do so, the jury would know, if they knew enough to act as jurors, that, before they could reach a just conclusion upon the question whether the operator was guilty of negligence in not reducing the speed of his machine to the limit prescribed on approaching an intersection, they would have to determine, from all the circumstances of the case and the conditions surrounding the intersecting way, whether he

diminished his speed to the required rate at a safe and proper distance from the point of intersection. There is, however, another consideration which rendered the act of refusing to give the instruction harmless, and that is in the fact that there is no evidence satisfactorily showing that the plaintiff at any time before the collision reduced the speed of his machine to 10 miles per hour. He said that he attempted to do so, but did not say that he succeeded.

As to the latter part of the refused instruction, it is to be observed that it is true, of course, that the plaintiff had the right to assume that any person approaching the state highway from the Cressey road would, upon entering upon the highway, proceed "beyond the center of the intersection with the state highway" before turning to the left; but the fact that he had the right so to assume did not give him the right to proceed in approaching the intersection when as near as 50 or 60 feet therefrom at the rate of 30 miles per hour, or, even as he himself admitted, at the rate of 22 miles per hour. If there had been evidence tending to show that the plaintiff had reduced the speed of his automobile to 10 miles per hour before the defendant appeared on the state highway, then, undoubtedly, such an instruction as we are now considering should have been given; but to tell the jury, as the proposed instruction might well have been understood to mean, that the plaintiff had the right to proceed at the rate of 22 or 30 miles per hour as he approached the intersection, upon the assumption that the operator of an automobile entering the state highway from the Cressey road would do so in strict accord with the regulations prescribed by the law in that particular, would have been misleading, and, if so understood, probably productive of an erroneous result.

We have now considered all the objections made by the appellant to the charge of the court, and have done so because of the manifest earnestness with which counsel have endeavored in their briefs to support their view that the several instructions complained of, not only involve erroneous statements of the principles which they were designed to enunciate, but must have had the effect of prejudicing the rights of the plaintiff. It may be added, generally, that the instructions referred to are not, as we have tried to show, so vulnerable but that it can justly be said as to all of them, as we have already said of one of them, that after a full and fair consideration of the record, including the evidence, we cannot hold that a miscarriage of justice has resulted in this case from any inaccuracies which they may contain.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 496

Ex parte TODD (Cr. 487.)

(District Court of Appeal, Third District, California. Dec. 1, 1919.)

1. HABEAS CORPUS ⟹94—JURISDICTION ONLY QUESTION DETERMINABLE IN COLLATERAL ATTACK ON JUDGMENT IN CRIMINAL CASE.

Proceeding on habeas corpus involves a collateral attack on the judgment in a criminal case, where the prisoner thus seeks release from personal restraint after conviction and sentence, and the single question reviewable and determinable is one of jurisdiction.

2. HABEAS CORPUS ⟹92(1)—JUDGMENT ROLL ONLY REVIEWABLE ON COLLATERAL ATTACK ON JUDGMENT IN CRIMINAL CASE.

On habeas corpus by a prisoner seeking release from restraint after conviction and sentence, thus a collateral attack on judgment in a criminal case, in determination of the question whether the tribunal had jurisdiction of the subject-matter or the person, or had for legal reason lost jurisdiction, the court asked for habeas corpus, generally speaking, is limited solely to consideration of the judgment roll, or, as Pen. Code, § 1207, defines it, the record of the action; an exception being that in a certain class of cases the Supreme Court of the United States, or the state courts, will ascertain whether the prisoner has been deprived of some fundamental right guaranteed by the laws of the land.

3. HABEAS CORPUS ⟹111(1)—NO DISCHARGE FROM CUSTODY FOR LACK OF JURISDICTION IN CONVICTING COURT IN ABSENCE OF PROPER SHOWING THEREOF.

On habeas corpus for the release of one convicted of and sentenced for rape in the absence of proper showing that the prisoner applied to the court in which information was pending and trial had for dismissal of the action, because he was not brought to trial within 60 days after the information was filed, as required by Pen. Code, § 1382, subd. 2, the prisoner cannot be discharged on such ground.

4. HABEAS CORPUS ⟹4—FAILURE TO APPEAL WAIVES RIGHT TO DISCHARGE FOR FAILURE TO GIVE SPEEDY TRIAL.

Where one charged with rape was not brought to trial within 60 days after information was filed, as required by Pen. Code, § 1382, subd. 2, his sole remedy lay in an appeal, assuming that he moved to dismiss the prosecution, the motion being denied, and failure to appeal waived the point though involving a jurisdictional question which otherwise might be inquired into in a habeas corpus proceeding.

5. HABEAS CORPUS ⟹4—NONCOMPLIANCE WITH STATUTES AS TO TIME OF SENTENCE IS ERROR OF LAW REVIEWABLE ONLY ON APPEAL.

Noncompliance with the provisions of Pen. Code, §§ 1191, 1202, prescribing the time for passing judgment of sentence upon one convicted of an offense, involves error of law reviewable solely on appeal and not on habeas corpus.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

6. CONSTITUTIONAL LAW ⟸250—RAPE ⟸64—STATUTE DENYING RIGHT TO HAVE JURY DETERMINE PLACE OF IMPRISONMENT FOR RAPE ON FEMALE UNDER SIXTEEN NOT DENIAL OF EQUAL PROTECTION.

In view of the nature of the offense of rape and the classification of Pen. Code, § 261, defining it, section 264, denying to a party charged with rape on a female under 16 the right to have the jury determine as in cases where the female is over 16 and under 18 whether imprisonment shall be in the county jail or state prison, is not violative of Const. U. S. Amend. 14, § 1, prohibiting any state from making or enforcing any law denying to any person equal protection of the laws.

In the matter of the petition of Katherine B. Todd for writ of habeas corpus on behalf of William A. Todd. Writ discharged, and prisoner remanded.

George D. Collins, Jr., of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

HART, J. On the 13th day of February, 1914, William A. Todd, in whose behalf a writ of habeas corpus is herein prayed for, was sentenced to a term of 25 years in the state prison at San Quentin upon a conviction of the crime of rape, alleged to have been committed in the county of Alameda on the 24th day of August, 1913, upon a female of the age of 12 years, not his wife.

The information charging said crime against the prisoner was founded on subdivision 1 of section 261 of the Penal Code. That section, in its entirety, reads:

"Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:

"(1) Where the female is under the age of eighteen years;

"(2) Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent;

"(3) Where she resists, but her resistance is overcome by force or violence;

"(4) Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anesthetic, substance, administered by or with the privity of the accused;

"(5) Where she is at the time unconscious of the nature of the act, and this is known to the accused;

"(6) Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief."

Section 264 of the same Code prescribes the punishment for the crime of rape and authorizes different penalties for said offense, such differentiation being based upon the distinction in the circumstances under which the crime may be committed. The section says:

"Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision one of section two hundred and sixty-one of the Penal Code and the female is over the age of sixteen years and under the age of eighteen years in which case the punishment shall be by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall determine by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison."

By the writ herein asked for, the prisoner claims that he is entitled to his release from the custody of the state prison officials for these reasons, viz.: (1) That, in so far as it denies to a person convicted of rape under subdivision 1 of section 261 of the Penal Code the right to have it determined by the jury whether he shall be imprisoned in the county jail or in the state prison, section 264 is in conflict with the first section of the fourteenth amendment to the federal Constitution and section 1977 of the Revised Statutes of the United States (U. S. Comp. St. § 3925), in that by said section 264 of our Code he is denied "the equal protection of the laws"; (2) that the superior court lost jurisdiction of the case by reason of the asserted fact that, in the absence of an application by him for a postponement, he was not brought to trial within 60 days after the filing of the information charging him with the offense for which he is now suffering imprisonment (Pen. Code, § 1382, subd. 2); (3) that the trial court, having failed to pronounce judgment of sentence within the time specified by section 1191 of the Penal Code, should have granted him a new trial, to which a convicted defendant is entitled in such case according to the mandatory terms of section 1202 of said Code, it being further contended that the failure to grant him a new trial on said ground entitles him to be released from his restraint on habeas corpus, since, as counsel insists is true, the judgment under which he is undergoing punishment is absolutely void.

[1, 2] A proceeding on habeas corpus involves a collateral attack upon the judgment in a criminal case, where the prisoner thus seeks his release from personal restraint after judgment of conviction and sentence, and the single question reviewable and determinable therein is one of jurisdiction. Therefore in the determination in such case of the question whether a judicial tribunal was without jurisdiction of the subject-matter of the proceeding thus sought to be reviewed or of the person of the party whose liberty is under restraint by virtue of such proceeding, or whether such tribunal, once having it, had for any legal reason lost jurisdiction to hear

the proceeding or to pass judgment therein, the court to which the application is addressed is, generally speaking, limited solely to the consideration of the judgment roll, or, as our Code defines it (Pen. Code, § 1207), "the record of the action." In saying "generally speaking," we have in mind some exceptions to the rule as it is above stated. Some of the exceptional instances in which the courts will, on habeas corpus, go beyond the face of the judgment to determine whether there is a want of jurisdiction to hear and determine the proceeding culminating in the judgment so challenged are referred to in Church on Habeas Corpus (2d Ed.) §§ 151 and 170. There are numerous decisions by the United States Supreme Court which point out and apply the exceptions. It is sufficient to examine herein one of those cases (Matter of Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118), cited by the petitioner here, where two different indictments were found against the appellant in the then territory of Utah, charging him with two different and distinct offenses, to wit: (1) That, for a certain specified period of time prior to the finding of the indictment, the appellant, contrary to the provisions of an act of Congress, did, in said territory, unlawfully claim, live, and cohabit with more than one woman as his wives; (2) that said Nielson (appellant there) did, on the 14th day of May, 1889, in the same territory, unlawfully and feloniously commit adultery with one Caroline Nielson (one of the alleged wives named in the first indictment), he being a married man and having a lawful wife, and not being married to said Caroline. To the first indictment, Nielson, on being arraigned, pleaded guilty, and was later sentenced to three months' imprisonment and to pay a fine. Upon his release he was arraigned upon the second indictment and pleaded not guilty thereto, and in addition to that plea, set up the plea of autrefois convict, in which he alleged the fact of his prior conviction or plea of guilty and in detail the facts in relation to that charge. The government demurred to the special plea of former conviction, the demurrer was sustained, and Nielson was tried, convicted, and sentenced under said second indictment. Nielson, having been thereupon delivered to the marshal, petitioned the court before which he was tried for a writ of habeas corpus, setting forth all the proceedings of the trial, including the first indictment, the facts upon which he based his plea of former conviction, under which he had suffered punishment, and claiming that the court had no jurisdiction to pass judgment against him upon more than one of the indictments, and that he was being punished twice for one and the same offense. The court, being of the opinion that if the petition for the writ were granted the petitioner would not be discharged from custody, disallowed the writ. An appeal was taken from said order, the United States statutes authorizing appeals from orders by territorial or inferior federal courts refusing to grant a writ of habeas corpus. The contention on appeal before the United States Supreme Court was that the judgment attacked was a regular judgment of conviction before a court of competent jurisdiction, having lawful jurisdiction of the subject-matter and of the defendant, and that the question whether the appellant's plea of autrefois convict was or was not good could not be inquired into in a collateral proceeding. The court held that, on habeas corpus, it was within the power of the court to examine the record of the case if it was necessary to do so to determine whether the prisoner was illegally restrained of his liberty. In that case it appeared from the record that the petitioner was twice convicted of and about to be made to suffer twice for the same offense. The facts appeared in the plea of former conviction by the petitioner as was also the demurrer to that plea, which was also a part of the record, and, of course, the averments of the plea were under the demurrer to be taken as true. The court in effect said that where upon habeas corpus facts appeared anywhere in the record showing that the prisoner was condemned without authority of law the courts should look into the facts and discharge the prisoner if they were true upon their face. "It is difficult to see," declared the court, "why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law." In that case the petitioner was asking for the preservation to him of a fundamental right, protected by a constitutional provision that no person's personal liberty shall twice be put in jeopardy or be punished twice for the same offense. The situation there, as the court declared did not present "a case of mere error in law, but a case of denying to a person a constitutional right."

We may add the suggestion that, under our state practice, the facts reviewed by the court in the Nielson Case, and upon which the prisoner was discharged, included one of the legally recognized pleas in criminal cases, and would be a part of the judgment roll in the case and, of course, it could be determined in such case from the judgment roll itself whether the prisoner's constitutional right had been invaded by the second conviction and punishment. Parenthetically, we may observe that we have not taken the pains to learn what papers and documents constitute the judgment roll in a criminal action under the federal practice. Nor is it necessary to the decision of the points urged for the release of the prisoner here that we should know. It is sufficient that we be convinced, as we are convinced, that, even though in a certain class of cases the Supreme Court of the United States or the state courts will go behind the judgment to ascertain whether a citizen is suffering under restraint of his personal liberty through the invasion of some

fundamental right guaranteed to him by the laws of the land, the case before us does not come within the class authorizing an investigation which will carry us beyond the judgment or the judgment roll. None of the courts, either federal or state, has ever held that the writ of habeas corpus may be so extended in its scope as to convert it practically into a writ of error. The prisoner here having been tried, convicted, and sentenced, his right to be discharged from custody must appear from or on the face of the judgment. And his right to be discharged, we may say in the outset, is not made so to appear.

[3] Taking up for consideration first the point that the court which tried and pronounced judgment of sentence upon the prisoner lost jurisdiction of the case because he was not brought to trial within 60 days after the information upon which he was tried and convicted was filed, a sufficient answer thereto is that there is no proper showing here that the petitioner made an application to the court in which the information was pending and his trial was had for a dismissal of the action upon the ground stated. Ex parte Fennessy, 54 Cal. 101. Section 1382 of the Penal Code provides that the court, unless good cause to the contrary is shown, must order the prosecution to be dismissed "if a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information." As is said in Ex parte Fennessy, supra:

"It is manifest that the prisoner must first resort to the court where the prosecution * * * is pending. When he shall do so, that court will determine whether 'good cause' exists for his detention; otherwise it will permit him to depart."

From anything that is disclosed to us here, we cannot tell whether the petitioner objected to going to trial on the ground that jurisdiction in the trial court to try him had been lost by reason of his not having been brought to trial within the 60 days' limitation.

[4] But there is even another and a conclusive answer to the point under consideration, and that is that the prisoner having been tried, convicted, and sentenced, his sole remedy lay in an appeal, assuming that he moved to dismiss the prosecution in the court below, the motion being denied. As stated, the point involves an error of law reviewable on appeal, and the right to raise the point in the trial court may be waived, although it involves a jurisdictional question which undoubtedly may be inquired into before his trial in a proceeding upon habeas corpus or perhaps in a proceeding to prevent the court from proceeding with the trial on the ground that it had lost jurisdiction to try the accused for the reason stated, or maybe by mandate to compel the court to dismiss the action. But, where a defendant has made his motion to dismiss the prosecution on the ground specified in section 1382, subd. 2, of the Penal Code, and the same has been denied and he has thereafter been tried, convicted, and sentenced, his sole remedy then is by way of appeal, and if he takes an appeal and fails thereon to raise the point, he will be deemed to have waived it and will not be permitted to raise it again in some other or collateral proceeding. Of course, it is not to be understood by these observations that we mean or intend to hold that there are not questions of jurisdiction which may not be inquired into and determined at any time and in any proceeding appropriate to the testing of such questions; but, as we have said, the right to raise the question of jurisdiction now being considered is one that may be waived by the defendant. And it is not so much in such a case a waiver of jurisdiction as a waiver of the right to raise the question, for the right, like the defense of the statute of limitations in civil cases, involves merely a personal privilege or right accorded to a defendant in a criminal case which he may or may not avail himself of the benefit of, according as he may elect.

[5] The third point in the order in which the points are above stated we will next consider. It involves the claim that the court, having lost jurisdiction to pass judgment of sentence upon the prisoner because such judgment was not pronounced within the time prescribed by section 1191 of the Penal Code should have granted him a new trial under the provisions of section 1202 of said Code. Section 1191 provides:

"After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, or once in jeopardy, the court must appoint a time for pronouncing judgment which must not be less than two, nor more than five days after the verdict or plea of guilty; provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial, or in arrest of judgment; and provided, further, that the court may extend the time not more than twenty days in any case where the question of probation is considered in accordance with section twelve hundred and three of this Code; provided, however, that upon the request of the defendant such time may be further extended not more than ninety days additional. * * *"

Section 1202 of the Penal Code reads as follows:

"If no sufficient cause is alleged or appears to the court at the time fixed for pronouncing judgment, as provided in section eleven hundred and ninety-one of this Code, why judgment should not be pronounced, it must thereupon be rendered; and if not rendered or pronounced within the time so fixed or to which it is continued under the provisions of section eleven hundred and ninety-one of this Code, then the defendant shall be entitled to a new trial. If the court shall refuse to hear a defendant's

motion for a new trial or when made shall neglect to determine such motion within the time fixed for pronouncing judgment, or within the time to which the same is continued under the provisions of section eleven hundred and ninety-one of this Code then the defendant shall be entitled to a new trial."

Both the above sections have been held to be mandatory. But noncompliance with their provisions involves error of law, reviewable solely by appeal. In the first place, it is to be observed that, even if the point were reviewable on habeas corpus, there is no record before us in this proceeding showing that any objection was made by the prisoner to the pronouncement of judgment of sentence on the ground set forth in section 1202 of the Penal Code, or, if such point was raised, that the court was deprived of jurisdiction to pass sentence. All we know about the matter is what we glean from the petition for this writ, and it is therein merely stated that the verdict against the prisoner was rendered on the 16th day of April, 1914, but that he was not sentenced until the 25th day of April, 1914, more than five days after the rendition of the verdict; "that no order of said superior court was made or entered in said action continuing the matter of said sentence to the said 25th day of April, 1914, nor extending the time for sentence to said date." The last allegation we do not understand, unless it is thereby meant that an order extending the time for passing sentence was not entered in the minutes of the court. It is not material, though, whether the order was so entered or not. We must assume, in this proceeding, that there was an order postponing the matter of the pronouncement of sentence to the date mentioned. At any rate, there is no proper showing here that the postponement was not made for the purpose of considering a motion for a new trial or the question of probation. But an irrefutable answer to the point is, as stated above, that it is not reviewable in a proceeding on habeas corpus. The provision of section 1202 is, as will be noticed, that if the court fails to pass sentence within any of the times mentioned in section 1191, then, in that event, the defendant is entitled to a new trial. This is as much as he is entitled to in such case, and it can be awarded to him only as the statute very clearly implies that it may be done. The writ of habeas corpus is most certainly not the proper remedy in such case, because there is in such a proceeding no power in the court to grant the defendant a new trial. The writ prayed for here proceeds upon the hypothesis that the party asking for it is unlawfully restrained of his personal liberty, and, if found to be illegally held in the custody of the law, he must be discharged. If, after his conviction of a crime, he be granted a new trial for some legal reason, he is not entitled by reason thereof to be freed from the charge of which he was convicted. The law is in such case still authorized to hold him until he is duly or in the regular way acquitted of the charge, or the prosecution be dismissed.

[6] We now come to the proposition that section 264 of the Penal Code, in denying to a party charged with the crime of rape upon a female under the age of sixteen years the right to have the jury determine, as in cases of rape where the female is over the age of 16 years and under the age of eighteen years, whether the punishment, in case of conviction, shall be in the county jail or state prison, is violative of the first section of the fourteenth amendment of the federal Constitution, prohibiting any state from making or enforcing any law denying to any person within its jurisdiction the equal protection of the laws.

There is nothing in section 264 of the Penal Code which offends the amendment of the federal Constitution above mentioned. Section 264, although not accomplishing the purpose by express language, practically divides the crime of rape, for the purpose of punishment, into two classes, founded in a distinction inhering in the different circumstances under whch the act of rape may be committed. In the first is embraced the crime of rape committed under the circumstances indicated in subdivisions 2, 3, 4, 5, and 6 of section 261 and the crime committed under subdivision 1, where it is committed on a female under the age of 16 years, and for the crime committed under any of those circumstances the Legislature has, by section 264 of the Penal Code, itself fixed the maximum term up to which the court, or, as now, the prison directors in cases of felonies, may measure out the punishment, thus leaving, formerly to the courts, but now to the directors, a wide discretion in determining, upon the circumstances of the particular case, what punishment would be just and proper. The evident theory upon which the Legislature has vested in the jury the right, where the crime of rape is committed upon a female between the ages of 16 and 18 years, to determine whether the imprisonment shall be in the county jail or the state prison, and denies that right to the jury in other cases of rape as defined by section 261 of the Penal Code, is, as suggested, that there is a wide difference in the character of the varying circumstances under which the crime may be committed. When the crime is committed under the circumstances indicated in the subdivisions above named and upon a female under the age of 16 years, the act is then inherently characterized by circumstances of the most shocking fiendishness and wickedness. The circumstances themselves in cases of rape as defined in said subdivisions, or in the case of a female under 16 years of age, furnish a general standard by which the sentencing board may be so governed in fixing the punishment as to do it wisely and justly in each particular case. In the second class—that is, where

the crime is committed upon a female between the ages of 16 and 18 years— the Legislature has committed to the jury the right to determine whether the punishment shall be in the county jail or in the state prison, leaving to the sentencing board the right, as exercisable by it in all other felony cases, to determine the extent of the punishment which should be imposed. It will require but little reflection to perceive the reason prompting the Legislature in thus making, as to the mode and the extent of the punishment and leaving it to the jury to determine the mode in the one class, a distinction between those cases where the female is between the ages of 16 and 18 years and those where the female is under the age of 16 years or arise under the subdivisions of section 264 other than subdivision 1. As we have pointed out, and as is obviously true, the manner in which, or the means by which, the crime of rape, as defined by subdivisions 2, 3, 4, 5, and 6, is perpetrated upon a female itself stamps the crime as one of the most atrocious character. It may be that the discrimination in its application to cases arising under the first subdivision of section 261 may, on first blush, appear to be arbitrary. But this is not so. A female under the age of 16 years is still a mere infant. The average child of that age is without that mature judgment and that experience in the common affairs of life to enable it to form a proper conception of the significance or scope of acts or deeds, whether of a moral or immoral character. A child under that age is, as a rule, without that strength of will or volition which is ordinarily the product of developed and matured judgment, and the average female child under that age, although probably having a general but vague or unsettled notion that acts of illicit intercourse are wrongful, is incapable of forming a proper degree of appreciation of the appalling consequences entailed upon her and her future life by the commission of such acts by or upon her. Hence, she is the more likely than one her senior in years and experience to yield to the artful machinations of a licentious male and so become an easy victim of his treachery and his lechery. In such a case the law wisely declares that legally the female shall be held to be incapable of giving her consent to such acts, and this is upon the theory that she is not competent, by reason of her immature years, to form a correct appreciation of the inherent atrocity of such acts and the terrible consequences inevitably following therefrom to her.

On the other hand, a female who has advanced beyond the age of 16 years, or is in near approach to that of 18 years, may justly be supposed to have acquired a broader experience and developed a more mature judgment, and therefore possessed of greater strength of self-will or volition. To her, therefore, may justly be imputed power fully to know and appreciate the intrinsic wrongfulness of illicit sexual relations between the sexes. And, in those cases, too, the Legislature has said that the female cannot legally give her consent to such act; but this is due more to a policy which the Legislature designed to establish in such cases that no female under the age of 18 years should be subjected to temptations by the licentious which, if yielded to, would cause her to depart from the path of virtue or righteousness. When, therefore, actual consent is given to the commission of such acts by a female between the ages of 16 and 18 years—an age at which it may justly be assumed that she has developed such judgment and acquired such experience as will enable her fully to understand and know the wrongfulness and sinfulness of such illicit acts and likewise to realize the pernicious consequences which must follow to a young woman committing them—it must then be assumed that such consent was given by her with a full knowledge of their wrongfulness and a like appreciation of their effect upon her character and life. And it is often true that such acts are committed with the actual consent of the female or even, either in subtle ways or openly and without reserve, invited by her. All these considerations the Legislature undoubtedly took into account in providing in section 264 of the Penal Code a ground for discriminating in the matter of the mode and the extent of the punishment and leaving it to the jury to determine the mode in certain cases arising under the first subdivision of section 261, finding, from common experience, as we may assume, that in cases of rape upon females between the ages of 16 and 18 years the act might be perpetrated with the actual consent of the female under circumstances which should go in mitigation of the punishment, a question which it was eminently proper and wise to commit to the determination of the jury upon the circumstances of the case, and that in the case of the commission of such an act upon or with a female under the age of sixteen years, whether with or without her actual consent, there could be found no possible ground for excuse for the act or any possible circumstances extenuating in any degree the crime, since, as above pointed out, such a female is a mere child and the perpetration of such an act upon her involves a fiendish imposition upon childish innocence —upon one, in other words, without the ability or judgment to see that the inevitable tendency of such practices by a female of her years is to lead to a life of unutterable depravity, sinfulness, and misery.

Thus viewing section 264 of the Penal Code, it is plainly manifest that it in no way impinges upon or opposes the fourteenth amendment to the federal Constitution. The distinction is not an arbitrary one, but is founded in a classification intrinsically or naturally arising from the varying circumstances under which the crime of rape may be commit-

ted. The provision giving the jury the right to determine the mode of punishment or the question whether the punishment shall be in the county jail or state prison applies alike to all of a class established upon circumstances which may arise in such a case and which cannot arise either in any of the cases of rape under the other subdivisions of section 261 or in the case of the commission of the crime upon and with a female under the age of 16 years. The case of the prisoner here does not come within that provision of the Code. He does not belong to the class to which the provision alone applies, and he was tried and sentenced just as any other person must be who is charged with committing rape upon a female under the age of 16 years.

It will not, of course, be denied that it is within the power of the Legislature to fix the penalty for a crime according to its inherent nature, or the nature of the circumstances under which it may be committed. "There can be no doubt," says Mr. Justice Lennon, in Selowsky v. Superior Court, 181 Pac. 652, "that the Legislature has power to classify with respect to the penalty to be imposed not only upon the basis of the inherent nature of the offense, but also upon the basis of the nature of the circumstances attending the commission of the offense considered in their relation to the public welfare." See People v. Finley, 153 Cal. 59, 94 Pac. 248; People v. Carson, 155 Cal. 164, 99 Pac. 970; People v. Barbieri, 33 Cal. App. 770, 166 Pac. 812; People v. Casa, 35 Cal. App. 194, 169 Pac. 454; Ex parte Selowsky, 177 Pac. 301.

We have now considered all the points urged against the legal integrity of the judgment under which the prisoner here is suffering imprisonment, and, as is manifest from the foregoing discussion, have found in them no merit or force.

The writ is discharged and the prisoner remanded.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 695

McMULLEN et al. v. DAVENPORT.

(Civ. 3123.)

(District Court of Appeal, First District, Division 2, California. Dec. 10, 1919. Hearing Denied by Supreme Court Feb. 5, 1920.)

MUNICIPAL CORPORATIONS ⊂=706(7) — CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN HIT BY AUTOMOBILE A JURY QUESTION.

Evidence regarding the circumstances under which a pedestrian, attempting to cross a street, was hit by an automobile which emerged from behind a street car at a speed of some 20 miles an hour, *held* to make the pedestrian's contributory negligence a jury question.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by J. C. McMullen and Catherine McMullen against L. M. Davenport. From a judgment for plaintiff Catherine McMullen, defendant appeals. Affirmed.

M. M. Meyers and L. E. Clawson, both of Los Angeles, for appellant.

Davis, Kemp & Post, of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $1,250 in an action for damages sustained by reason of personal injuries suffered by Catherine McMullen. The injuries were caused by being struck by an automobile driven by the defendant. The automobile was being driven along East Fourth street, in the city of Los Angeles, at its intersection with Mott street, at about 7 o'clock in the evening. The plaintiffs, husband and wife, were walking on the easterly sidewalk of Mott street going south. About the time the plaintiffs reached the northerly side of East Fourth street, a street car approached from the west, coming easterly along the southerly track (the track farthest from the plaintiffs) of the street car line on East Fourth street, and defendant approached Mott street, coming in the same direction on the southerly side of the street and on the southerly side of the street car track. East Fourth street, it is stipulated, is at that point about 80 feet wide, including the sidewalks on each side, and Mott street is about 50 feet wide. There was a light at the intersection of the streets, and it was sufficiently light to see clearly. It appears that the automobile was hidden from the view of the plaintiffs up to the time the car stopped on the west side of Mott street, and at that point the automobile passed the car and crossed the street.

The main question argued by the appellant is that the plaintiff Catherine McMullen was guilty of contributory negligence as a matter of law. The answer to this question also disposes of several of the objections of the appellant in regard to instructions, as well as the objection that the evidence is insufficient to sustain the verdict. It is stated by appellant that the testimony shows that Catherine McMullen was looking at the street car to see whether or not it would stop; that she never looked for automobiles; that she recklessly and carelessly took several steps forward from the center of the street car track, where she was standing when the gong on the street car was sounded for it to start, without looking for automobiles. It is argued that, under these circumstances, Catherine McMullen was guilty of contributory negligence as a matter of law, and the question of negligence was not one for the

jury. But we think the testimony is susceptible of a different construction, which the jury was justified in giving it. The defendant testified that his automobile passed the street car just as it came to a stop on the west side of Mott street, and it is urged that, if Catherine McMullen had looked for an automobile, she would have seen the defendant's car before she stepped off of the street car track. But the plaintiffs both testified that they looked in the direction from which the automobile came before starting across the street, and also when they were in the middle of the street car track, and that they did not see the automobile driven by the defendant. Defendant admits that he did not sound a gong or give any warning signal. He testified that he saw the plaintiffs when they were approaching, but thought there was no danger, and did not sound any warning. The testimony was that the automobile was very close to the car track, probably only about 2 feet away. The jury found that it was going at a speed in excess of 20 miles an hour. According to the defendant's own testimony, the automobile could not have been seen by the plaintiffs until about the time the street car stopped on the west side of Mott street. The testimony of the two passengers upon the street car was that the automobile passed where they were sitting on the front end of the street car at the same instant that the motorman rang his gong as a signal for the car to start. It was at this instant, according to the plaintiffs' testimony, that Mrs. McMullen, seeing no danger, stepped off the track to continue her way across the street. When the automobile emerged to view at that time, there was but a distance of less than 50 feet to be covered before it struck the plaintiff. Going at a rate of 20 miles an hour (and the jury found it was going at a greater speed than that), that distance would be covered in about two seconds. In that instant of time plaintiff would have to observe the automobile, realize her danger, think, and act upon the thought in stepping back.

Appellant seems to take the position that it was necessary for the plaintiffs to keep their eyes fixed in the direction of the street car, even after they had looked in that direction and had ascertained that apparently there was no danger. After looking to the west and seeing no danger, it was not negligence on the part of Catherine McMullen to turn and look ahead of her as she proceeded across the street. Indeed, this was but the natural thing for her to do. She had a right to expect that an automobile would not suddenly emerge from a concealed position within 50 feet of her, going at a speed of over 20 miles an hour, and without sounding any warning, strike her within less than 50 feet from the point where it emerged into view. The language quoted by appellant from the case of Niosi v. Empire Steam Laundry, 117 Cal. 257, 49 Pac. 185, to the effect that a pedestrian crossing the street in a busy section of the city must look in both directions to ascertain if vehicles are approaching, is not at variance with our position here. If a pedestrian is to look in both directions, he must necessarily, after ascertaining the apparent absence of danger in one direction, shift his gaze. According to the view of the testimony most favorable to appellant, this was what occurred in the present case. The testimony of the plaintiffs is that they looked in the direction of the street car and saw no automobile. They were in the middle of the street car track when they last looked in the direction from which the automobile came, and they naturally concluded to continue across the street. The jury was justified in concluding, from the testimony of the plaintiffs and from the testimony of the passengers on the street car, that the automobile appeared in sight after the plaintiffs had looked in the direction from which it came, and, seeing no apparent danger, had decided to continue their course. The admitted physical facts and the testimony of the plaintiffs were sufficient, we think, to warrant the jury in finding that there was no contributory negligence upon the part of Catherine McMullen.

Our conclusion that the facts here do not establish negligence as a matter of law, but that the question was one for the jury under all the circumstances in evidence, disposes of several assignments of error made by the appellant with reference to instructions refused by the court. The other objections of the appellant we consider to be without merit.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

44 Cal. App. 482

GRAHAM v. DURNBAUGH et al. (two cases.) (Civ. 2443, 2446.)

(District Court of Appeal, Second District, Division 1. California. Nov. 29, 1919. Rehearing Denied Dec. 26, 1919.)

1. MORTGAGES ⟸283(1), 284 — MORTGAGOR MAY PROCEED AS SURETY AGAINST SUCCESSORS IN TITLE BOUND TO PAY MORTGAGE AFTER HAVING SATISFIED THE DEBT.

Any rights of plaintiff mortgagor to require the mortgagee to proceed against mortgagor's successors by purchase under Civ. Code, § 2854, upon mortgage foreclosure proceedings, or under section 2846 to compel such successors to perform the obligations assumed, are not exclusive remedies, since under section 2847, mortgagor, having satisfied the excess judgment, was entitled to proceed against his successors in title for reimbursement, his position being that of surety.

2. LIMITATION OF ACTIONS ⟸56(3) — MORTGAGOR'S SUIT AGAINST IMMEDIATE SUCCESSOR IN TITLE, AGREEING TO PAY MORTGAGE WITHIN TWO YEARS AFTER PAYMENT, NOT BARRED.

A mortgagor paying an excess judgment upon mortgage foreclosure was a surety for his immediate successor in title, who had bound himself to pay the same, had a cause of action against him as principal for reimbursement arising upon making such payment, and where his action was instituted within two years thereafter it was not barred by the statute.

3. SUBROGATION ⟸18—MORTGAGOR, PAYING EXCESS JUDGMENT ON FORECLOSURE AGAINST SUCCESSORS IN TITLE, ENTITLED TO SUBROGATION.

While mortgagor was liable to mortgagee as maker of notes, by payment of excess of foreclosure judgment, he acquired a right of action against his successors in title, who had agreed to pay the same, they being primarily liable, the mortgagee having the right to enforce collection from them, and hence the mortgagor was entitled to recover under the doctrine of subrogation.

4. SUBROGATION ⟸1—DOCTRINE DEFINED.

Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

5. PLEADING ⟸205(2)—INCONSISTENCY OF ALLEGATIONS OF ASSUMPTION OF MORTGAGE BY PURCHASER NOT REACHED BY GENERAL DEMURRER.

In mortgagor's action against his grantee, assuming mortgage to recover the amount of the mortgage which mortgagor had been obliged to pay, where no demurrer for uncertainty based on inconsistent allegations was interposed to the complaint, the direct allegation that defendant assumed and agreed to pay the mortgage debt was not, as against general demurrer, open to the objection that it was inconsistent with and governed by the specific allegation that the conveyance recited that the premises were subject to the mortgage "which the grantor herein assumes and agrees to pay," followed by the allegation that the use of the word "grantor," instead of "grantee," in the deed was a clerical error, and that, since no facts were alleged warranting a decree of reformation of the stipulation, no recovery could be had against the defendant; since, for all that appeared, the obligation first directly alleged to have been assumed might have been expressed in a document separate from the deed, for the very purpose of covering the alleged mistake in the deed.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Actions by Alexander R. Graham against M. Durnbaugh and others. Judgments for defendants in each case, and plaintiff appeals. Judgment in each case reversed.

Dunning, Downing & Beggs and H. G. Redwine, all of Los Angeles, for appellant.

Williams & Rutan, of Santa Ana, and A. L. Abrahams and C. E. McDowell, both of Los Angeles, for respondents.

SHAW, J. As appears from the complaints in both cases, the actions are founded upon the following facts: On August 31, 1909, plaintiff made and delivered his promissory note, due three years from date, to one Cox, together with a mortgage upon certain real estate to secure payment of the same. On January 21, 1911, he conveyed the real estate to the defendant Durnbaugh by deed, wherein the grantee, as part of the consideration therefor, assumed and agreed to pay the amount of said indebtedness so secured by mortgage. On December 23, 1911, Durnbaugh conveyed the property to D. W. Honn, with a like provision in the deed whereby Honn assumed and agreed, as part of the consideration therefor, to pay the debt secured by the mortgage; and on May 29, 1912, Honn conveyed to H. O. Kaiser upon a like assumption of obligation, though not expressed in the deed, for payment of said note and mortgage. On March 24, 1916, default having been made in the payment of the note, and Kaiser holding the legal title to the property, Cox as mortgagee instituted a suit to foreclose the mortgage, making Graham, the plaintiff herein, and Kaiser, the legal owner of the property, sole defendants therein. On July 5, 1916, the property was sold under a decree and a return made of a deficiency of $956.30, which, in accordance with plaintiff's demand in said action, was entered against Graham only. Thereafter, on October 2, 1916, Graham paid the deficiency judgment, and on November 1, 1916, instituted action No. 2443

to recover the same. While Honn and Kaiser were joined as defendants therein, no service was had upon or appearance made by them; hence on the appeal in No. 2443 we are not concerned with any ruling of the court other than as between plaintiff and defendant Durnbaugh.

Upon these facts the court sustained a demurrer interposed by Durnbaugh upon the ground that the cause of action was barred by the statute of limitations, and, plaintiff declining to amend, judgment followed for defendant, from which plaintiff prosecutes this appeal.

Thereafter, plaintiff, on April 11, 1917, upon the same cause of action, by a complaint in like form, sued the same parties in the superior court of Los Angeles county, in which all of the defendants appeared and interposed demurrers upon the ground that the complaint did not state a cause of action, and that the action was barred by the statute of limitations. All of the demurrers were, by a general order of the court, sustained, and, plaintiff declining to amend, judgment followed in accordance with the ruling, from which plaintiff has prosecuted an appeal.

[1] In sustaining the demurrer of Durnbaugh in No. 2443 and the demurrers of all the defendants in No. 2466, in so far as they were based upon the statute of limitations, it is apparent that the rulings of the court were founded upon the contention of respondents, who insist that at the maturity of the note on August 31, 1912, a cause of action existed in plaintiff's favor upon which he might have compelled defendants to pay the debt, and later, in the foreclosure suit, might have insisted that they be made parties defendant and have had a personal judgment in favor of the mortgagee entered against them for the deficiency. Hence it is argued that, since payment was made by plaintiff after the expiration of four years from the time when the note matured, any cause of action arising in his favor was barred. In brief, that all rights of this plaintiff against defendants were barred at the expiration of four years from the maturity of the note. Conceding, but (since unnecessary to a consideration of the question before us) not so deciding, that plaintiff might, under section 2854, Civil Code, have required the mortgagee to proceed against Durnbaugh and his codefendants, and under section 2846, Civil Code, have compelled his principals to perform the obligation assumed, nevertheless the enforcement of such rights was not his only remedy. Section 2847, Civil Code, provides that—

"If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses."

That after the making of the deed the relation of plaintiff to defendant Durnbaugh was that of surety admits of no question. Tulare County Bank v. Madden, 109 Cal. 312, 41 Pac. 1092; Tuohy v. Woods, 122 Cal. 665, 55 Pac. 683; Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868. Under the provision of the Code cited the cause of action stated in the complaint did not arise until the payment made by plaintiff by reason of which the primary obligation was extinguished (Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094), and as between the surety and his principal a new obligation upon an implied promise of indemnity (section 11, Pingrey on Suretyship and Guaranty), arose in favor of the surety for reimbursement by the principal for moneys expended, which action, since brought within two years from the date of the payment, was not barred by the statute of limitations. As stated by Mr. Pomeroy in his work on Equity Jurisprudence, second edition, section 1845, cited in Tuohy v. Woods, supra:

"The doctrines concerning suretyship must control the dealings between these * * * parties."

There is nothing said in the cases of California Bank v. Brooks, 126 Cal. 198, 59 Pac. 302; Roberts v. Fitzallen, 120 Cal. 484, 52 Pac. 818, nor in Morlan v. Loch, 95 Kan. 716, 149 Pac. 431, cited by respondents, which is in conflict with these views. The first case cited is to the effect that the grantee of a mortgagor may in a suit to foreclose the mortgage avail himself of the statute of limitations, although as to the mortgagor the running thereof has been interrupted by his absence from the state, and the only point decided in Morlan v. Loch was that the mortgagor, having granted the property to one assuming to pay the mortgage debt, might maintain an action against such grantee to recover the amount left unpaid after sale of the property on foreclosure without paying a deficiency judgment. That question, however, is not involved in the instant cases for the reason that the deficiency judgment was paid by plaintiff prior to bringing the suits.

[2] In both cases, as shown by the complaints, plaintiff was a surety for defendant Durnbaugh, whose debt he paid, at which time a cause of action arose in his favor for reimbursement by the principal, for which actions were instituted within two years thereafter; hence our conclusion is that the complaints stated causes of action against Durnbaugh which were not barred by the statute of limitations.

Since plaintiff's cause of action was not barred as to Durnbaugh, it follows, for like reason, that if a cause of action existed against defendants Honn and Kaiser, it was not barred as to them.

[3, 4] That the facts pleaded exhibited a

cause of action against these defendants we entertain no doubt; indeed, in their briefs the respondents raise no question upon that score, contenting themselves with an argument in support of their claim based upon the statute of limitations. While plaintiff as maker of the note was liable to the mortgagee, nevertheless, by assuming the payment thereof, a right of action against the defendants arose in favor of the mortgagee for the payment of which, between them and this plaintiff, they were primarily liable, and which liability the mortgagee might have enforced in an action to foreclose her mortgage. Hence, as between plaintiff and defendants, the debt was that of the latter, which plaintiff, on account of his obligation to Cox, was compelled to pay for defendants, and thus was entitled to recover from them under the doctrine of subrogation, which "is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt." Section 1, Sheldon on Subrogation; Redington v. Cornwell, 90 Cal. 49, 27 Pac. 40. In section 747a of Jones on Mortgages it is said:

"After the first grantee has covenanted to pay the mortgage debt, a like covenant in his deed to the second grantee makes the latter personally liable to pay it, in exoneration of the mortgagor, who is in equity entitled to the benefit of such undertaking, in the same manner as if it had been recited in a conveyance by him directly to the second grantee"

—in support of which the author cites Torrey v. Bank of Orleans, 9 Paige (N. Y.) 649, affirmed in 7 Hill (N. Y.) 260. As to plaintiff herein, the debt which he paid was one for which all of the defendants were primarily answerable, and which in equity and good conscience they should have discharged.

[5] As to Kaiser, the complaint alleges in direct terms that as a part of the consideration for the conveyance so made to him by defendant Honn, he assumed and agreed to pay the note secured by the mortgage, and that said deed of conveyance to him also provided therefor in the following language, to wit:

"Subject to a first mortgage of Ten Thousand Dollars ($10,000) executed by Alexander R. Graham and Eliza W. Graham, husband and wife, in favor of Elizabeth Cox, which the grantor herein assumes and agrees to pay"

—followed by an allegation that the use of the word "grantor," instead of "grantee," in said deed, was a clerical error. No facts are alleged which could warrant the court in decreeing a reformation of the stipulation, without which respondents contend that in no event could recovery be had against defendant Kaiser. We perceive no merit in this contention. No demurrer was interposed to the complaint upon the ground of uncertainty based upon inconsistent allegations, and, as against the general demurrer, we must assume the allegations of the complaint to be true. As stated, it is alleged that Kaiser assumed the payment of the note as part of the consideration for the conveyance. For aught that appears to the contrary, this obligation might have been expressed in a separate document from the deed for the very purpose of covering the alleged mutual mistake.

The judgments in favor of the defendants in both cases are reversed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 551

MORENO et al. v. LOS ANGELES TRANSFER CO. (Civ. 3023.)

(District Court of Appeal, Second District, Division 2, California. Dec. 2, 1919. Hearing Denied by Supreme Court Jan. 29, 1920.)

1. MASTER AND SERVANT ⟸389—INSURANCE CARRIER AND EMPLOYÉ MAY SUE TORT-FEASOR WITHOUT AWARD UNDER WORKMEN'S COMPENSATION.

An insurance carrier and an injured employé may jointly sue the party negligently causing the injury without a formal award of workmen's compensation, since the liability to pay the compensation is created by the act, and not by the award.

2. APPEAL AND ERROR ⟸1046(5)—QUESTION BY JUDGE NOT REVERSIBLE ERROR IN VIEW OF INSTRUCTION.

Where plaintiff was injured by a passing truck while sitting on a steam roller with his legs hanging down the side, and a witness had stated that there was nothing to prevent plaintiff from throwing his legs in front of the steam roller so as to escape being struck, the court's question whether the witness would like to ride with the roller rubbing his feet was not reversible error, especially where the court instructed the jury not to consider anything said by him as indicating his opinion.

3. MUNICIPAL CORPORATIONS ⟸705(2)—TRUCK MUST ENTIRELY CLEAR VEHICLE ATTEMPTED TO BE PASSED.

Under the Motor Vehicle Act, a truck overtaking and passing a steam roller must keep to its left, and not turn to the right again until entirely clear of the steam roller.

4. MUNICIPAL CORPORATIONS ⟸705(10)—PERSON ON STEAM ROLLER INJURED BY PASSING TRUCK NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

Plaintiff, sitting on a steam roller with his feet hanging down the side, was not guilty of contributory negligence in failing to keep a lookout to the rear, since he might assume that a truck overtaking and attempting to pass the

steam roller would keep sufficiently to the left to clear it as required by the Motor Vehicle Act.

5. NEGLIGENCE ⟸68—CONTRIBUTORY NEGLIGENCE NOT PREDICATED UPON ASSUMPTION THAT ANOTHER WILL VIOLATE LAW.

Contributory negligence cannot be predicated upon an omission to assume that another will violate the law.

6. NEGLIGENCE ⟸93(1) — NEGLIGENCE OF STEAM ROLLER DRIVER NOT IMPUTED TO HELPER.

Any negligence of the driver of a steam roller cannot be imputed to his helper, whose duties included holding horses frightened by the steam roller and assisting the driver generally, but who had nothing to do with the actual operation of the roller.

7. MUNICIPAL CORPORATIONS ⟸706(5) — TRUCK DRIVER'S NEGLIGENCE WILLFUL SO AS TO ELIMINATE CONTRIBUTORY NEGLIGENCE OF INJURED PARTY.

Evidence regarding the circumstances under which a truck driver overtook and attempted to rapidly pass near a steam roller injuring an employé who had his legs hanging over the side *held* to disclose such wilful and reckless negligence as eliminated the defense of contributory negligence.

8. APPEAL AND ERROR ⟸1004(1) — AWARD NOT DISTURBED EXCEPT FOR PARTIALITY, PREJUDICE, ETC.

An award of damages for personal injuries will not be disturbed unless so disproportionate to the injury as to indicate that the jury was influenced by passion, partiality, or prejudice, or misled by a mistaken view regarding the merits of the case.

9. DAMAGES ⟸132(6)—$10,000 FOR SHORTENED AND INJURED LEG NOT EXCESSIVE.

$10,000 damages for injuries causing a shortened and crippled leg necessitating plaintiff's use of a cane and probably preventing his return to his occupation of manual labor *held* not excessive.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Melquiades Moreno and another against the Los Angeles Transfer Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hickcox & Crenshaw and Wheaton A. Gray, all of Los Angeles, for appellant.

George J. Denis and George W. McDill, both of Los Angeles, for respondents.

THOMAS, J. In this action plaintiffs seek to recover from the defendant damages for personal injuries sustained by plaintiff Moreno by reason of the alleged negligence of an employé of defendant. The case was tried before a jury. Verdict was rendered in favor of plaintiffs for the sum of $10,000, and judgment entered accordingly. There was a motion for new trial, which was denied. The appeal is from the judgment alone.

It appears that on the day of the accident the plaintiff Moreno was employed by the Fairchild-Gilmore-Wilton Company, and had been detailed by a foreman of that company to go as a helper with one of its steam roller drivers to assist the latter in moving a heavy steam roller. As such helper his duties were to care for traffic. He road on the roller. It was his duty to get off and hold horses when they became frightened on account of the noise of the steam roller, and to assist the driver generally. He had nothing to do with the actual operation or driving of the roller, and had no control over the driver. As already intimated, at the immediate scene of the accident Moreno was riding upon the frame of the left front end of the steam roller, and just above the left end of the front roller. His legs were hanging over the side, but his face was turned toward the front; he being engrossed with the duties of his employment. The steam roller was being driven at a speed of about three miles an hour. A baggage truck of the defendant was proceeding on the same street, and in the same direction, and on the same side of the street. Witnesses testified that the driver of the baggage truck was driving at a rate of about twenty miles an hour, although the driver himself claimed that he was not going to exceed six or seven miles an hour. In attempting to pass in front of the steam roller he cut in and collided with the left front corner of the roller, severely crushing Moreno's left leg below the knee, and causing a compound comminuted fracture of the tibia and a compound fracture of the fibula; many fragments of the tibia later coming out of the leg. Moreno was confined to the hospital for several months. As a result of the accident the injured leg was left shortened about three-fourths of an inch, the shortening taking place in the tibia, and which, in relation to the fibula, caused certain other serious complications of a permanent nature—the disarrangement of the relative normal position of the ends of the two bones somewhat dislocating them and causing the fibula to press up at the top and down at the bottom, tending to turn the foot over outwardly, thereby pressing at the side of the leg, and causing pain at several places whenever the leg is used. Little weight can be put upon the foot of the injured leg; Moreno being unable to walk without the aid of a cane. The injury is permanent, and Moreno will probably never be able to do manual labor—the only kind of labor which his training permitted him to do.

Compensation under the Workmen's Compensation Act (St. 1917, p. 831) was afterwards paid to Moreno by the Commonwealth Bonding & Casualty Insurance Company, the insurance carrier of Moreno's employer, and

the action is brought jointly by Moreno and the insurance company.

Defendant's defense was a denial of negligence and a claim of contributory negligence on the part of Moreno; and, as appellant, it urges as grounds for reversal the following points: (1) That, as there had been no award against Moreno's employer by the Industrial Accident Commission at the time of the filing of the suit, there was no liability upon the employer by the assumption of which the insurance carrier could become subrogated to the cause of action, and hence it was not a proper party to the action, and also that in the joining of the insurance carrier and Moreno there was a misjoinder of parties plaintiff; (2) error and misconduct on the part of the trial court during the trial, said error consisting in its refusal to give certain instructions requested by defendant and in giving certain instructions objected to by defendant at request of plaintiff; (3) that the evidence shows Moreno guilty of contributory negligence; and (4) that the verdict is excessive.

[1] In view of the fact that the liability to pay compensation is created by the act, and not by the award of the Industrial Accident Commission, we think any discussion of the first point urged unnecessary.

As to the second point, we think it sufficient to say that we see no error in the court's refusal to grant defendant's requested instructions, for the reason that none of them were proper or material under the evidence in the case. As to the instructions given, and which were objected to by defendant, we think they were ample, and in view of all the instructions given, were as favorable to defendant as the facts disclosed by the record here would warrant.

[2] Under this heading we think it proper to dispose of defendant's objection and exception to a question propounded by the trial judge to the witness Huntoon. In response to questions of one of the attorneys for defendant, the witness had testified that there was nothing to prevent Moreno from throwing his legs around in front of the steam roller so as to escape being struck. At that juncture the court asked the following question: "Would you like to ride on there with the roller rubbing against your feet?" Appellant contends that "the above-quoted question of the court was a clear intimation to the jury that the judge did not believe that it was either necessary or feasible for the plaintiff to have shifted his position so as to have avoided personal injury," and thinks that "this question of the court was very untimely, that it injured the cause of defendant materially in the eyes of the jury, and that it ought to be sufficient ground for a reversal of the judgment." With this contention we are unable to agree. The question itself was no expression of opinion. Rather it called for a categorical answer to a question calling for a fact, not an opinion. The answer of the witness to the court's questioning was subject to motion to strike, because it was not an answer to the question, but an expression of an opinion. We find nothing in the record to indicate the court's frame of mind as to the facts at any time. As we see it, if the result of the question was harmful at all—which we do not concede—the injury was inimical to plaintiffs, rather than defendant. To guard against any such contingency, the court very properly admonished and instructed the jury to disregard anything said or done by him as judge indicating that he had any opinion in the case.

[3-7] We think the third point urged without merit. The plaintiff Moreno was not required, either under the common law or any statutory enactment of this state, to refrain from occupying a position that could only become a place of danger by reason of the negligence of another. The Motor Vehicle Act of this state (St. 1915, p. 397) required the defendant's employé, in passing, to keep to the left of the steam roller, and to not turn to the right again until entirely clear thereof. Moreno was justified in assuming that defendant's employé, and all others, would obey the law, and hence he was not negligent in failing to watch to the rear. Contributory negligence cannot be predicated upon an omission to assume that another will violate the law. Medlin v. Spazier, 23 Cal. App. 242, 137 Pac. 1078; Raymond v. Hill, 168 Cal. 473, 143 Pac. 743. The negligence of the driver of the steam roller, if any there was, cannot, under the law of this state and the evidence in this case, be imputed to the plaintiff Moreno, as there is nothing here which can by any stress be construed as a joint enterprise. So much has been written on this point that we even refrain from the citation of authorities. Regardless of the fact, however, whether the driver of the steam roller was negligent in not keeping close to the curb, the fact remains that according to the evidence here the proximate and effective cause of the injuries sustained by Moreno was the failure of the driver of defendant's truck to keep to the left until clear of the steam roller, as required by traffic regulations and the act referred to. House v. Fry, 30 Cal. App. 157, 157 Pac. 500. We are also of the opinion that the sounding of the horn under such circumstances as disclosed by the record here, in view of the great noise of the steam roller itself, is not sufficient, but that the driver of defendant's truck was required to "use every reasonable precaution to insure safety." The driver was bound, under the law as already stated, to keep clear of the steam roller, and not to turn to the right and ahead of the same until he could do so with safety. Raymond v. Hill, supra. The evidence of the driver himself is that he saw the position of

Moreno on the steam roller, and that he "would have missed the roller altogether if his legs had not been sticking over the side." This can hardly be said to be allowing sufficient space for safety. Trying to make a close pass, as was attempted in this case, on the streets of our great cities and our splendid roads and boulevards, and the serious accidents which have resulted from such careless, reckless, and negligent driving, are altogether too common occurrences to escape further notice. Such practices cannot be too severely condemned. Appellant suggests many things that Moreno might have done. We are confronted, however, with a condition, not a theory. It is unnecessary to go into the thin air of metaphysics or conjecture. The jury was concerned only with what was actually done, and have resolved that fact under the evidence and fixed the responsibility. We think the jury did their duty fully. In our opinion the record in this case discloses the negligence of defendant's driver to be so great as to bring it within the purview of the cases where no defense of contributory negligence can be urged. It seems to us "reckless, willful, and wanton." Thompson on Negligence, §§ 206, 207. Indeed, we think that on the evidence of defendant's driver alone the trial court would have been justified—as was done in the case of Catlin v. Union Oil Co., 31 Cal. App. 597, 161 Pac. 29—in directing a verdict for the plaintiffs. As we read the evidence, we cannot understand how the jury could have arrived at any other verdict than the one which they found, even although in so doing they disregarded entirely all but the evidence offered on behalf of defendant and acted upon that alone. As to this fact it is certainly clear that there should be no difference of opinion in the mind of any reasonable juror after hearing all the evidence.

[8, 9] As to the fourth point urged, we think that in view of the fact that under the law this matter is committed to the unbiased judgment of the jury, and when it appears, as we are of the opinion it does appear in this case, that that judgment has been fairly obtained, such judgment must govern, unless the damages awarded are so obviously disproportionate to the injury shown to have been sustained as to warrant the belief that the jury must have been influenced by passion, partiality, or prejudice, or misled by some mistaken view of the merits of the case, and that therefore we are without authority to disturb the same. Aldrich v. Palmer, 24 Cal. 513; Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. 601; Howland v. Oakland, etc., Ry. Co., 110 Cal. 513, 42 Pac. 983; McGrory v. Pacific Electric Ry. Co., 22 Cal. App. 671, 136 Pac. 303; Earl v. San Francisco Bridge Co., 31 Cal. App. 339, 160 Pac. 570. Applying what our own courts have said in these cases, we do not feel that we would be justified in disturbing the verdict upon the ground that it is excessive.

In view of what we have said in the discussion of the third point urged by appellant, and when the whole record is considered in the light of article 6, § 4½, of our Constitution, it cannot, we think, be successfully maintained that there has been a miscarriage of justice in this case.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

44 Cal. App. 491

McPHERSON v. GREAT WESTERN MILLING CO. (Civ. 3124.)

(District Court of Appeal, First District, Division 2, California. Dec. 1, 1919.)

1. PARTNERSHIP ⊂⊃17—NOT CREATED BY CONTRACT EXPRESSLY DISCLAIMING INTENTION TO FORM PARTNERSHIP.

A contract whereby plaintiff, furnishing teams, etc., should receive one-half of the net proceeds earned by a mercantile business, it being agreed that defendant was the owner of the business, and that "all the accounts, stocks, and supplies necessary to carry on such business are the sole property of the party of the first part [the defendant] and shall continue so throughout the length of this agreement," except rolling stock to be furnished by the plaintiff, *held* not to create a partnership.

2. ACCOUNT ⊂⊃3—NO ACCOUNTING NECESSARY IN ACTION FOR REMUNERATION CONSISTING OF SHARE OF PROFITS OF BUSINESS.

Where plaintiff furnished teams and rolling stock in connection with defendant's mercantile business, remuneration to be one-half the profits of the business, their contract expressly stating there should be no partnership, plaintiff need not bring an action for an accounting, but may sue for his compensation measured by the method agreed upon; the maxim that "that is certain which can be made certain" applying, under Civ. Code, § 3538.

3. JUDGMENT ⊂⊃249—ANY RELIEF EMBRACED WITHIN THE ISSUES MAY BE GRANTED.

Since there is but one form of action, the court may grant any relief embraced within the issues.

4. CONTRACTS ⊂⊃176(1)—INTERPRETATION FOR COURT WHERE TERMS UNDISPUTED.

The interpretation of a contract set out in a complaint and admitted by the answer was a matter solely for the court.

5. CONTRACTS ⊂⊃147(1)—PURPOSE OF RULES OF CONSTRUCTION TO ASCERTAIN INTENTION.

The sole purpose of every rule of interpretation of contracts is to ascertain the intention of the parties, under Civ. Code, § 1636.

6. JUDGMENT ⊂=255—ADMISSIONS IN ANSWER BINDING ON COURT IN INTERPRETATION OF CONTRACT.

Admission in answer as to the interpretation of a contract is binding upon the court as well as the defendant.

7. APPEAL AND ERROR ⊂=882(3)—APPELLANT CANNOT COMPLAIN ON APPEAL OF HIS OWN INTERPRETATION OF CONTRACT AT THE TRIAL.

An appellant cannot complain on appeal of an interpretation of a contract which it placed on the contract in its answer.

8. APPEAL AND ERROR ⊂=1033(9)—JUDGMENT FOR LESS THAN APPELLEE ENTITLED TO HARMLESS ERROR.

An appellant cannot complain that the judgment in favor of appellee was for less than on its computation it should have been.

9. APPEAL AND ERROR ⊂=1010(1)—FINDINGS BASED ON EVIDENCE NOT DISTURBED.

Findings of the trial court, supported by sufficient evidence, are conclusive on appeal.

10. EVIDENCE ⊂=354(14)—SUMMARY TAKEN FROM BOOKS ADMISSIBLE.

In an action for one-half the profits of a corporation, the court, under Code Civ. Proc. § 1855, subd. 5, properly permitted an auditor to introduce in evidence a summary, taken from the corporate books, in possession of defendant.

11. TRIAL ⊂=84(3)—SUMMARY FROM BOOKS PROPERLY ADMITTED ON OBJECTION CORRECTNESS OF BOOKS WAS NOT SHOWN.

In an action for half the profits of a corporation, a summary from the corporate books by plaintiff's witness was properly admitted against the objection that witness had not shown that the records on which the data were based were correct; the books being in court, but not placed in evidence, and there being no objection that the summary was incorrect.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by S. E. McPherson against the Great Western Milling Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Homer G. Ames, of Anaheim, and A. M. Norton and Chas. Greenberg, both of Los Angeles, for appellant.

F. C. Drum, of Orange, and H C. Head, of Santa Ana, for respondent.

BRITTAIN, J. The defendant appeals from the whole of a judgment against it for $2,049.04. The complaint was upon seven distinct causes of action. The last six were for rentals of real property, the selling price of specific personal property, and the use of other personal property. A portion of the judgment was for interest and for various sums found to be due under the last six counts. In its briefs the appellant attacks only that part of the judgment, amounting to $1,062, found to be due under the first count, which, therefore, alone need be considered.

A contract, dated June 21, 1915, between the parties, was set out by exhibit, and it was alleged that the contractual relationship of the parties was dissolved by mutual consent on December 31, 1915. It was further alleged that at that time the defendant had promised to pay the plaintiff one-half of the profits of the business to which the contract related, amounting, as the plaintiff was informed and believed, to $1,327.32, no part of which had been paid. A demurrer to the complaint was overruled. The defendant answered, denying only the allegations concerning the promise to pay and the fact of the debt, and alleged the plaintiff owed it $1,166.31, which it was further alleged, "is in excess of one-half of the net earnings of said business for the years 1914 and 1915, which became due to the defendant and cross-complainant under the terms of said agreement." This affirmative allegation was in the answer. There was also a cross-complaint, but no question is presented concerning it.

In the contract the appellant corporation was the party of the first part and the respondent the other party. It recited that the respondent, for about two years, had been operating for the appellant a business belonging to the appellant in the sale of merchandise; "said party of the second part having received remuneration for his services therein one-half of the net proceeds earned by said business, said party of the second part having furnished his entire time and in addition thereto three wagons and five horses, and it is hereby desired by both parties hereto that an agreement be entered into in writing, so that there may be no possibility of a misunderstanding and all verbal agreements heretofore are void and this agreement is to be final." It was then agreed that the appellant corporation was the owner of the business, and that "all accounts, stocks, and supplies necessary to carry on said business are the sole property of the party of the first part, and shall continue so throughout the length of this agreement," except rolling stock to be furnished by the respondent. It was further agreed that "party of the second part agrees to accept as full compensation for his services one-half of the net proceeds after all expenses and costs of materials and everything necessary to the operating of said business shall have been deducted and that the same is to be paid to him in lieu of any salary, but that he is not to be considered as a partner in said business and that he has no interest whatsoever in anything but the net profits before mentioned." Then followed conditions of an extremely stringent nature in favor of the appellant, among others, one which permitted it to terminate the agreement at any time, though the contract was

entirely silent in regard to either its term or the right of the respondent to withdraw.

The appellant advances six propositions against the judgment, as follows:

[1, 2] That "the relation existing between the parties hereto being in the nature of a partnership, the action should have been for an accounting, and not an action at law for breach of contract." This does violence to the plain language of the contract. The plaintiff claimed no interest in the property. He sued for the amount due him as compensation, measured by the method agreed upon. 1 Cyc. 407, par. (d). As to the amount recoverable, the case is a proper one for the application of the maxim that that is certain which can be made certain. Civ. Code, § 3538.

[3] 2. That "the complaint does not state facts sufficient to constitute a cause of action, because it is an action at law, and should have been an equitable action for an accounting." This is but a restatement of the first contention, and of no greater force. In this state there is but one form of action. The demurrer is general. The court could grant any relief embraced within the issues. Hurlbutt v. Spaulding Saw Co., 93 Cal. 57, 28 Pac. 795; Coward v. Clanton, 122 Cal. 451, 55 Pac. 147; San Pedro, etc., Co. v. Reynolds, 121 Cal. 74, 53 Pac. 410; Fox v. Hall, 164 Cal. 287, 128 Pac. 749.

[4-7] 3. That "there was no issue framed by the pleadings to justify the finding that it was the intention of the parties that the contract was retroactive." The contract was set out in the complaint and admitted in the answer. Its interpretation was to be made by the court. The sole purpose of every rule of interpretation is to ascertain the intention of the parties. Civ. Code, § 1636. The affirmative allegation of the answer concerning the half of the net earnings "for the years 1914 and 1915, which *became due to the defendant * * * under the terms of said agreement*," amounted to an admission of the interpretation of the contract binding upon the court as well as the appellant. If the appellant became entitled to half the earnings *under the contract* for 1914 and 1915, the respondent must have been entitled to the other half for the same period under the contract. The appellant cannot complain on appeal of an interpretation which it placed on the contract in its answer. There is no claim made that the appellant ever settled with the respondent for services rendered in 1914 and 1915, and the evidence clearly shows the respondent never actually received payment of the remuneration equal to one-half of the profits the contract recited he had received. It was a credit only of which the appellant seeks to avoid payment.

4. That "evidence of the transactions which occurred prior to the date of the contract should have been excluded." This is simply a restatement of the third proposition. No argument is made upon it. It is unworthy of consideration.

[8, 9] 5. That "finding No. 7 is not supported by the evidence, for the reason that there was no proof advanced at the trial to show that the sum of $1,062 was due the plaintiff and respondent." The appellant argues that the balance due the plaintiff should have been computed solely on a statement dated January 1, 1916, which on its face purported to cover only the transactions for the year 1915. From this statement alone the appellant figures the respondent's credit should have been $309.58. The statement of December 31, 1914, for the transactions of that year showed the respondent's half of the net profits was then $1,057.14. If the appellant's conceded credit of $309.58 for 1915 is added to the 1914 earnings, it would appear the judgment should have been for some $300 more than it was. The appellant cannot complain that the judgment was for less than on its computation it might have been. The trial court considered all the evidence, and there was sufficient to support the finding, which is conclusive.

[10,11] 6. That "Plaintiff's Exhibit No. 7, being financial statement of witness Goetsch, was improperly admitted in evidence, because the books of the Orange County Supply Company, on which it was based, were not offered nor introduced in evidence." The business was carried on under the name of the Orange County Supply Company, the books of which were in the possession of the appellant, and in court counsel for the appellant twice said he would offer them in evidence, but the formal offer was not made. The witness testified he had made the statement from the books. The ledger being shown him, he was asked if that was the book from which he got the data. He replied:

"I couldn't say. *The only way I could tell is by comparing the figures of the statement I made with the ledger.* I don't now recall whether this is the book or not."

He was not asked, nor afforded the opportunity, to make the comparison. The specific objection to the statement was that the witness, who was simply an auditor, not the accountant, of the defendant's business, had not shown that the records on which the data was based were correct. There is no contention that the statement was not correct as a summary of what the books showed, nor that they were not correct. The appellant had it in its power to show any error in either in the trial court. The case was one permitting the use of just such a summary as was introduced. Code Civ. Proc. § 1855, subd. 5.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

44 Cal. App. 516

GOODRICH v. TURNEY. (Civ. 2030.)

(District Court of Appeal, Third District, California. Dec. 1, 1919. Hearing Denied by Supreme Court Jan. 29, 1920.)

1. BROKERS ⟸63(1) — COMMISSION EARNED WHERE EXCHANGE FAILS BECAUSE OF PRINCIPAL'S REFUSAL TO COMPLETE BARGAIN.

Plaintiff realty broker, having secured acceptance of defendant's offer to exchange his property for that of others, earned his agreed commission and is entitled to same on defendant's refusal to consummate the exchange.

2. HUSBAND AND WIFE ⟸267(7)—HUSBAND'S OFFER TO EXCHANGE COMMUNITY REALTY VOIDABLE ONLY AT INSTANCE OF WIFE.

If the instrument whereby defendant through plaintiff broker offered to exchange the property of himself and wife came within the language or purview of Civ. Code, § 172a, as added by St. 1917, p. 829, requiring the wife to join with the husband in executing any instrument by which community realty is leased, sold, conveyed, or incumbered, the writing, in which the wife did not join, was not absolutely void, but voidable only at her instance.

3. BROKERS ⟸58—RIGHT TO COMMISSION ON EXCHANGE OF COMMUNITY LANDS NOT DEPENDENT ON WHETHER WIFE SIGNED OFFER.

It was wholly immaterial to the right to commissions of plaintiff broker authorized to exchange defendant's land, the community property of defendant and his wife, whether the property was or was not community, or, if community, whether defendant's wife signed the written offer to exchange with the party procured by plaintiff broker, to render it effectual under Civ. Code, § 172a, as added by St. 1917, p. 829; there being no agreement between plaintiff broker and defendant that right to commission should depend on whether the exchange was consummated.

4. BROKERS ⟸63(1)—ENTITLED TO COMPENSATION FOR PROCURING AGREEMENT FOR EXCHANGE OF LANDS.

Where a landowner agreed with a broker to pay a stipulated compensation for securing an agreement for the exchange of lands, when the broker secured from another an agreement to make an exchange his contract was performed, and he was entitled to commission, having earned it by his service, as he in effect had procured a person ready, willing, and able to make the exchange on terms submitted, though there was a later unjustified refusal on the part of the principal to go on with the trade.

5. BROKERS ⟸58—RIGHT TO COMMISSION DESPITE INSUFFICIENT DESCRIPTION OF PROPERTY TO BE EXCHANGED FOR PROPERTY INSPECTED BY PARTY.

Where defendant and his wife visited and viewed land before the owner accepted an offer to exchange and learned and knew generally of what the property consisted and where it was situated, defendant was not prejudiced by any erroneous description in the written acceptance of his offer, and cannot claim, when sued for commissions by the broker who brought the parties together, that there was no effectual contract of exchange for such reason.

6. EVIDENCE ⟸433(6)—PAROL EVIDENCE ADMISSIBLE TO CORRECT MISDESCRIPTION OF LAND IN SUIT FOR COMMISSION.

In suit by a broker for commissions earned under contract to effect a sale or exchange of realty, it is proper to correct by parol evidence any misdescription in the employment contract of the land he was authorized to sell or exchange.

7. FRAUDS, STATUTE OF ⟸128 — AGREEMENT TO PAY COMMISSION ON EXCHANGE NEED NOT BE SIGNED BY BROKER AS WELL AS EMPLOYER.

Written offer to exchange lands, containing also the offerer's agreement to pay a broker for his services in negotiating the exchange, signed by the offerer or party to be charged, fully satisfied the statute of frauds (Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6), though not signed by the broker as well.

Appeal from Superior Court, Madera County; W. M. Conley, Judge.

Action by V. D. Goodrich, doing business under the name and style of the San Joaquin Valley Land Company, against M. Turney. From judgment for plaintiff, defendant appeals. Affirmed.

W. H. Larew, of Madera, for appellant.

Fry & Jenkins, of San Jose, for respondent.

HART, J. The action was brought to recover a broker's commission of $500 for the exchange of real properties. From a judgment in favor of plaintiff for that amount, defendant appeals.

Defendant and his wife were the owners, as tenants in common, of two lots, consisting of 40 acres, in Fairmead Colony No. 3, in the county of Madera. About one year before the contract in suit was executed, defendant signed a "listing card," in which he authorized plaintiff to sell or trade his real and personal property (describing it) for the sum of $10,000, stating that he would trade for "small orchard about 10 a. about same price, or small acg. in town of San Jose." Some months later, one R. T. Padget listed with plaintiff for sale or trade certain property in the city of San Jose and six acres of country property, "for the sum of $15,000.00 or any other price that I may agree upon," and stating that he wanted a "valley ranch." On the real property of defendant there was a mortgage of $3,000, while on Padget's property there was a mortgage of $4,250. Plaintiff called to defendant's attention the Padget property and drove him and his wife to San Jose to look at it. Defendant said he would trade if $1,250 of the Padget mortgage were paid, to make the equities, in

his opinion, of equal value. Plaintiff thereupon filled in a blank form of contract, read it to defendant and his wife, and defendant signed it. Said contract read, in part, as follows:

"This agreement entered into this 4th day of Jan. 1918, witnesseth, that the undersigned, the owner of the first piece of property, situate, lying and being near Fairmead (describing the property as 'Lots No. 423 and 424 of the Fairmead Colony tract'), now belonging to M. Turney, which the undersigned agree to exchange for the second piece of property (describing Padget's property), together with $1,250.00 cash or bank mtg. on 1st described property. The terms of such exchange are to be as follows: * * * The undersigned will execute and deliver a good and sufficient conveyance to the first described piece of property by grant, bargain and sale deed or contract to owner of second piece of property, subject to an incumbrance in the amount of $3,000.00," and also subject to certain road reservations, "for a like conveyance of the second piece of property by the owner thereof, subject to an incumbrance in the amount of $3,000.00."

Taxes on each piece of property were to be paid by the present owner and an abstract or certificate of title to be furnished by Turney. The San Joaquin Valley Land Company was authorized to act as Turney's agent, and in case it secured an acceptance of the exchange agreement within 20 days Turney agreed to pay 5 per cent. commission on the listed price of $10,000.

About one week after the execution of said agreement, Padget went to Madera and examined the Turney properties and thereafter executed to plaintiff an instrument, by the terms of which he accepted said agreement of exchange and agreed to furnish a deed or contract conveying title to his property to Turney. Both instruments contained a clause agreeing that plaintiff might act as agent for each of the parties.

Defendant furnished to plaintiff a certificate of title covering the former's property. Arrangements were made to have Turney execute a deed, and the abstracts and deeds of Padget were left with W. H. Larew, defendant's attorney. On January 25, 1918, Mr. Larew wrote to plaintiff, making certain suggestions about the Padget abstracts of title, and stating that he could not examine them and give a written opinion as to title in less than 10 days. On January 30, 1918, Mr. Larew wrote to plaintiff:

"Mr. M. Turney of Fairmead requests me to write and say that he has decided to go no further with the proposed land trade."

Defendant, in his answer, alleged that he was a married man; that he was the owner of an undivided one-half interest "in lots 423 and 424 of Fairmead Colony tract No. 3, in Madera county, as a tenant in common with" his wife, Lydia A. Turney; "that the property described is community property; that it stood of record in the names of the defendant and L. A. Turney, his wife, at the time the defendant signed; that there are eight Fairmead Colony tracts in Madera county, numbered from No. 1 to No. 8, inclusive; * * * that no sufficient description of any property is contained in the paper signed by defendant and alleged by the plaintiff to be an offer to R. T. Padget; and that the terms of the alleged offer are unintelligible."

As a second defense, defendant alleged that he was induced to sign said contract through fraud and misrepresentation and that plaintiff plied him with liquor at the time he signed so that he was incompetent to transact business. Among the misrepresentations set forth were that plaintiff said that the Padget property was worth $11,000, when in fact it was worth but $7,000, and was in the hands of another broker for sale for the last-named sum, and that the Padget land was subject to flood and overflow.

The court, upon sufficient evidence, found that the above affirmative allegations of the answer were untrue.

[1] Nothing could be clearer than that the plaintiff, having secured an acceptance of the offer of the defendant to make an exchange of his property for that of the Padgets, earned the commission which the defendant agreed to pay it for that service, and that it is entitled to be paid the same. But the defendant contends that the written offer is void under section 172a of the Civil Code, as added by St. 1917, p. 829, because, the property which the defendant agreed to exchange for that of the Padgets being community property, it was necessary, to make the agreement valid, that the defendant's wife should also have signed said written offer. Said section provides, among other things, that—

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered. * * *"

[2, 3] It is doubtful whether the instrument by and in which the defendant offered to exchange his property comes within the language or purview of said section, since it does not involve a lease or a sale of the real property, but only an offer to exchange such property for other property; but, assuming that it does, that does not make the writing absolutely void, but voidable only at the instance of the wife. But, as far as is concerned the right of the plaintiff to the stipulated compensation for securing an acceptance of the offer, it is wholly immaterial whether the property was or was not community, or, if community, whether the

defendant's wife signed the written offer. Indeed, the defendant's title to the property might be so defective that he could not have given a clear title thereto if the exchange had been consummated, and still the plaintiff would be entitled to the commission agreed upon. There was no agreement between the plaintiff and the defendant that the plaintiff's right to the commissions was to depend upon whether the defendant could make a legal conveyance of his property to the Padgets or whether the title was good or defective, or whether the exchange was actually consummated. See, in support of the foregoing views, Martin v. Ede, 103 Cal. 157, 160, 37 Pac. 199; Justy v. Erro, 16 Cal. App. 519, 522, 117 Pac. 575; Jennings v. Jordan, 31 Cal. App. 335, 337, 160 Pac. 576.

[4] The further contention is made that, before a broker agreeing to secure for another an acceptance of an offer to exchange real estate is entitled to be paid for his services for effecting the exchange, he must procure in the acceptor a person ready, willing, and able to make the exchange. That is, of course, the general rule as to contracts with brokers when employed to sell real property for another; but in this case the agreement with the broker was that he would be paid the stipulated compensation for his services in securing a particular agreement—that is, an agreement from the Padgets that they would exchange particular property of theirs for that of the defendant. When, therefore, the plaintiff secured from the Padgets the agreement to make the exchange, its contract was fulfilled, and it then had earned the commission which the defendant agreed to pay for it for such service. Jauman v. McCusick, 166 Cal. 517, 521, 522, 137 Pac. 254. Indeed, this in fact amounted to the procuring of a person ready, willing, and able to make the exchange upon the terms submitted by the defendant; he being perfectly willing at the time the agreement was secured to make the exchange. It is true that subsequently he informed plaintiff that he would not go any further with the negotiations, but he gave no reason for repudiating the agreement of acceptance by the Padgets —that is, he did not state that the agreement was unsatisfactory for any reason or object to the title to Padget's property—and, of course, his mere refusal to go on with the trade, unaccompanied by objections which would justify him in such refusal, could not have the effect of relieving him of his obligation to pay the plaintiff for the services it had performed under its agreement with him.

[5, 6] The further objection is made that the description in the written acceptance by the Padgets of defendant's offer is too indefinite and uncertain to indicate the particular property therein referred to. The point is without merit. The defendant and his wife visited and viewed the Padget properties before the latter accepted his offer to exchange, learned and knew generally of what the properties consisted and where they were situated. Moreover, the Padgets, upon accepting defendant's offer to exchange, tendered the latter their deeds to their properties, in which the same were fully described. It is obvious from all these facts that the defendant could not have been prejudiced by an erroneous description of the Padget properties in the written acceptance of his offer. In a case of this character, where a broker is suing for his commissions on a contract of employment to effect a sale or exchange of real property, it would be proper, as was done here, to correct a misdescription in such contract of the land which he is authorized to sell or exchange by parol evidence. As is said in MacKnight, Adm'r, etc., v. Davitt, 174 Pac. 77:

"Much greater liberality is allowed in construing and curing defective descriptions in brokers' contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances."

See Maze v. Gordon, 96 Cal. 61, 30 Pac. 962; Proulx v. Sac. Val., etc., Co., 19 Cal. App. 529, 534, 126 Pac. 509.

The description objected to here is as follows: "6 A. Cor. 24th St. and Story rd. House and lot 173 Empire St. Lots 69x137½ ft. on 4th just off Empire." Immediately preceding this description in the written acceptance by the Padgets it is stated that the properties so described are situated "near and in San Jose, county of Santa Clara, Cal." It was not objected at the trial in the court below that there was a misdescription of the properties, nor was there any claim made by the defendant at the trial that he did not know what properties were meant or referred to by said description. Indeed, the point as to the description of the Padget properties is made for the first time on this appeal.

[7] The defendant further claims that, to satisfy the statute of frauds, it was necessary that plaintiff should have signed defendant's written offer of exchange with Padget, inasmuch as said instrument contained also the agreement to pay the plaintiff for its services in negotiating the exchange. There is no force to this point. The essential object of the instrument, in so far as it gave plaintiff the right to negotiate an exchange of defendant's property for the Padget's properties, was to evidence, as the statute requires, the authority of plaintiff to act in the premises, and to bind the defend-

ant to the extent only that the defendant desired and intended to be bound by the plaintiff in the transaction, and to prevent the exercise of any power which would result in a fraud upon him. It is therefore only necessary when giving another the authority to sell or exchange real estate that the writing vesting such authority should be signed or subscribed by the party by whom such authority is given. He is the source from which such authority is derived, and the subscription of his name to the writing giving it is all that is or should be required, and our statute of frauds so declares. Civ. Code, § 1624, subd. 6; Code Civ. Proc. § 1973, subd. 6. It provides that "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" is invalid, "unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent." The writing involved here is subscribed by "the party to be charged," and therefore fully satisfies the statute. Cavanaugh v. Casselman, 88 Cal. 543, 548, 549, 26 Pac. 515; Vassault v. Edwards, 43 Cal. 458; Worrall v. Munn, 5 N. Y. 246, 55 Am. Dec. 330; Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576. In Toomy v. Dunphy, 86 Cal. 639, 25 Pac. 130, the following writing, signed by the defendant, was held sufficient to meet the requirement of the statute: "Henry Toomy can arrange for the sale of my ranch in Nevada, as per written memorandum."

There are some other points of minor importance advanced by the appellant, but they are so wanting in merit that it is not deemed necessary to notice them herein.

The appeal is wholly without a meritorious foundation for its support.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 597

ACTON ROCK CO. v. LONE PINE UTILITIES CO. (Civ. 3021.)

(District Court of Appeal, Second District, Division 2, California. Dec. 4, 1919.)

1. FRAUDS, STATUTE OF ⊂=104—SUBSEQUENT WRITING VALIDATES PREVIOUS ORAL AGREEMENT.

Though an oral lease of a machine, with option to purchase, was not enforceable under the statute of frauds (Civ. Code, § 1624, subd. 4), the subsequent reduction to writing of the agreement made the lease enforceable from the date of the oral agreement.

2. BAILMENT ⊂=30—VARIANCE AS TO DATE OF CONTRACT IMMATERIAL.

Variance between allegations that a contract for the lease of an electric shovel was made on a certain date, and proof that an oral agreement was made at an earlier time, which was reduced to writing on the date mentioned in the complaint, *held* an immaterial variance not affecting defendant's substantial rights.

3. LANDLORD AND TENANT ⊂=71—LEASE MAY OPERATE RETROSPECTIVELY.

A lease may operate retrospectively from the date of its execution.

4. BAILMENT ⊂=5—ELECTRIC SHOVEL SUFFICIENTLY DELIVERED UNDER "F. O. B." AGREEMENT.

Under a lease requiring an electric shovel to be delivered by the lessor "f. o. b. cars" at a named point, the term "f. o. b." means free on board, and was sufficiently complied with where the shovel stood on its own wheels or trucks on a railroad siding at the named point ready to be hauled as part of a train, and it was unnecessary to give any special notice of delivery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by the Acton Rock Company against the Lone Pine Utilities Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John O. Bender, of Los Angeles, for appellant.

Gurney E. Newlin, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action for rent on the lease of an electric shovel, and likewise to recover for failure to redeliver the shovel in good condition after termination of the lease. Defendant appeals from a judgment in plaintiff's favor.

On November 1, 1913, plaintiff was the owner of a model 50 Marion electric shovel, then standing upon its own trucks on a siding of the Southern Pacific Company at that company's station in Tejunga, in Los Angeles county. It had been brought from Marion, Ohio, on its own wheels, attached to a train of cars. On November 1, 1913, plaintiff and defendant, through the president of the former and the vice president and manager of the latter, orally agreed upon a lease of the shovel to defendant for one year, commencing November 1, 1913, for the sum of $3,650, being at the rate of $10 per day. On the same day a written instrument, embodying the terms of the oral lease, as well as an option giving defendant the optional right to purchase the shovel, was executed by plaintiff, and thereupon given to defendant for execution by it. Later it was executed by defendant and returned to plaintiff. As the written instrument bears date January 17, 1914, it may be presumed that that was the date of its execution by defendant.

The writing, so far as material to the questions presented on this appeal, is as follows:

"This agreement, made and entered into this 17th day of January, 1914, by and between Acton Rock Company, a corporation, hereinafter termed the 'lessor,' as party of the first part, and Lone Pine Utilities Company, a corporation, hereinafter termed the 'lessee,' as party of the second part, witnesseth: That for and in consideration of the rental hereinafter specified, and of the conditions and covenants hereinafter set forth on the part of the lessee to be performed, the lessor does by these presents lease and demise unto the said lessee that certain model 50 Marion electric shovel, owned by said lessor and now located at Tejunga, in the county of Los Angeles, state of California, for the period of one (1) year, commencing on the first day of November, 1913, and ending on the thirty-first day of October, 1914; said electric shovel to be delivered by the lessor to the lessee at the commencement of said term f. o. b. cars at Tejunga, California. * * * And in consideration of the premises the said lessee does hereby hire from the lessor said electric shovel for said period of one year, and does covenant and agree that it will pay rental for said electric shovel at the rate of ten dollars per day, including Sundays, said rental to be payable * * * in the sum of thirty-six hundred and fifty and no/100 dollars ($3,650.00). * * * The said lessee does further agree that * * * it will return said leased property to the lessor in good order and condition (reasonable wear and tear thereof excepted) by delivering said electric shovel f. o. b. cars at any shipping point in Southern California designated by the lessor."

Until some time in February or March, 1914, when it was washed off the tracks of the Southern Pacific Company and thrown upon its side by freshets due to a heavy flood, the shovel remained at the railroad company's siding at Tejunga, resting on its own trucks. After it was washed off the railroad tracks in February or March of 1914, it remained on its side until replaced by plaintiff. This was after the expiration of the term of the lease. At the time when the oral lease was made by plaintiff and defendant, which was also the day when plaintiff executed the written instrument, November 1, 1913, defendant expected to use the shovel in Cajon Pass, San Bernardino county, and to pay the freight for hauling the shovel from Tejunga to Cajon Pass and back again at the expiration of the lease, unless, in the meantime, it elected to exercise its optional right to purchase the shovel. At all times after the execution of the written lease by plaintiff on November 1, 1913, until washed off the tracks by the flood of the following spring, the shovel, upon its own wheels on the siding at Tejunga, and without any cost to defendant other than the payment of the freight from Tejunga to Cajon Pass, or other destination, was in a condition to be moved to Cajon Pass, or elsewhere, by defendant, or by the railroad as defendant's agent.

In pleading its cause of action, plaintiff, in its complaint, alleges:

"That on or about the 17th day of January, 1914, said plaintiff entered into a certain agreement in writing with said defendant wherein and whereby said plaintiff leased and demised unto said defendant, and said defendant hired from said plaintiff, one model 50 Marion electric shovel for the period of one (1) year, commencing on the first day of November, 1913, and ending on the 31st day of October, 1914, for the rental of ten ($10.00) dollars per day, including Sundays, which said rental, to wit, the sum of three thousand six hundred fifty ($3,650.00) dollars, said defendant agreed to pay on or before the 31st day of October, 1914."

This allegation, though not stating all the facts, conforms to the facts so far as it goes. There was an oral lease on November 1, 1913, and on that date there likewise was a written lease, embodying the terms of the oral lease, but executed by plaintiff only. It was not until January 17, 1914, that defendant obligated itself in writing, though it had orally leased the shovel on the first day of the preceding November.

[1, 2] Appellant claims that because the complaint alleges, and the court finds, that the written contract was entered into on January 17, 1914, to take effect as a lease from November 1, 1913, it is impossible as a contract of lease, that it was impossible of performance, and that, therefore, no cause of action is alleged in the complaint or found by the court. There is no merit in this contention. Assuming, for the purpose of the decision, that, because the contract gives defendant the optional right to purchase, the contract is within subdivision 4 of our statute of frauds (Civ. Code, § 1624), and, assuming, further, that the contract is indivisible, and that no part of it became binding on defendant until signed by it, nevertheless the oral agreement was not absolutely void or invalid; it merely lacked the necessary evidence of its existence—evidence which later was supplied when defendant signed the written contract and returned it to plaintiff. In re Balfour, 14 Cal. App. 261, 111 Pac. 615. Or if, until the writing was signed by defendant, the contract should be deemed to be invalid, in so far as the creation of any obligation by defendant is concerned, nevertheless, the execution of the instrument by defendant, on January 17, 1914, not only supplied the necessary legal evidence, but confirmed the oral lease that had been made on the 1st day of November next preceding, and which was evidenced by the writing that day signed by plaintiff. And from the date of the execution of the instrument by defendant, the previously made lease, now evidenced by a writing signed by defendant, but which it had consented to on November 1, 1913, was valid and enforceable as a lease made on November 1, 1913—as much so as if the writing had been signed

on that date by defendant as well as plaintiff. In re Balfour, supra. The mistake in the complaint as to the date when plaintiff and defendant entered into the contract gave rise to an immaterial variance, and no substantial right of defendant was affected thereby.

[3] Not only did the writing, when signed by defendant on January 17, 1914, confirm the previously made oral lease, but it is, moreover, the established rule that a lease, as to its commencement, may operate retrospectively from the date of its execution as well as prospectively. 24 Cyc. 960; Johnson v. Stagg, 2 Johns. (N. Y.) 510. Assuming that, where a lease commences retrospectively, the tenant is not liable for the breach of a covenant occurring after the commencement of the term, but before the execution of the lease, still in the instant case the defendant is liable for the sum agreed upon as the total rental for the use of the shovel, for it agreed, in writing, to pay a fixed and certain total amount, namely, $3,650.

[4] The lease provides that "said electric shovel shall be delivered by the lessor to the lessee at the commencement of said term, f. o. b. cars at Tejunga, California." It is claimed that plaintiff never delivered the shovel to defendant as agreed. This is an untenable claim. The initials f. o. b., standing for the expression "free on board," used frequently in mercantile contracts, imply that the lessor or vendor, as the case may be, will save the lessee or vendee from any expense attending the bringing of the article leased or sold to the point named, whether it be the initial point of transportation, as in the instant case, or the final destination of the consignment, as is frequently the case. In the instant case, not only was the initial point of transportation—Tejunga, Los Angeles county—the place designated as the point where plaintiff was to deliver the shovel f. o. b. the cars, but, as testified to by defendant's vice president, it was understood that defendant itself should pay the freight from Tejunga to Cajon Pass, the point of final destination. Under this state of facts, plaintiff did everything requisite to a delivery as agreed. The shovel was at Tejunga; it stood on its own wheels or trucks on the railroad tracks at the siding at Tejunga. It is obvious, therefore, that, without any further act on plaintiff's part, it could be coupled to a train of cars and hauled as a part of the train from Tejunga to Cajon, just as it had been hauled to this state from Marion, Ohio. Plaintiff exercised no control over it after the completion of the oral contract of November 1, 1913. Defendant knew all the circumstances. Upon paying the freight, as it was understood it should, defendant was free to take actual manual possession at any time after it entered into the oral lease on November 1, 1913, and cause the shovel to be moved by the railroad company to any place where it might wish to use it. In fact, the evidence shows that defendant considered the shovel under its control for use by it during the term of the lease. On March 25, 1914, after the shovel had been turned on its side by the flood heretofore referred to, defendant's vice president and manager wrote a letter to the Southern Pacific Company, requesting that company to have a wrecking crew raise the shovel and "place it on the tracks * * * and send us the bill." Since defendant at all times knew that the shovel was at the point designated, resting on trucks, in a condition to be hauled by the railroad to any point of destination that it might desire, and without any expense whatever to defendant other than the freight from Tejunga to the point of destination, it was not necessary for plaintiff to give defendant any special notice of delivery. At all times after plaintiff signed the written lease on November 1, 1913, defendant had the right to take possession and assume control of the shovel, without any act on plaintiff's part whatsoever.

There are no other points that merit notice. Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

44 Cal. App. 466

In re BUNDY'S ESTATE. (Civ. 2060.)

(District Court of Appeal, Third District, California. Nov. 28, 1919. Hearing Denied by Supreme Court Jan. 26, 1920.)

1. INSANE PERSONS ⟸27—CONCLUSION OF TRIAL COURT UPON CONFLICTING EVIDENCE CONCLUSIVE.

In a proceeding for adjudication of incompetency and appointment of a guardian, where evidence as to the incompetent ward's residence was sharply conflicting, the appellate court is bound by the trial court's conclusion.

2. INSANE PERSONS ⟸28—PROPER TO ALLOW PETITIONER FOR GUARDIANSHIP ATTORNEY'S FEE.

An applicant for adjudication of incompetency and for letters of guardianship acts for and on behalf of one who cannot act for himself, and the filing of petition and hearing thereon are indispensable steps for preserving the trust fund of the incompetent; and, in view of Code Civ. Proc. § 1720, authorizing costs "as justice may require," the petitioner for guardianship may be allowed an attorney's fee.

3. JURY ⟸19(8)—INCOMPETENT HAS NO RIGHT TO TRIAL BY JURY IN PROCEEDINGS FOR ADJUDICATION OF INCOMPETENCY AND APPOINTMENT OF GUARDIAN.

In view of Code Civ. Proc. §§ 1716, 1717, 1808, guardianship proceedings are probate proceedings of purely statutory origin, and are governed by the provisions of the probate law,

and no constitutional right to jury trial exists, since such right is confined to those cases only which were recognized at common law, and neither such sections nor sections 1312, 1330, 1763, 1764, or 1766 confer any right to jury trial in proceedings under section 1763, notwithstanding such right exists on the question of restoration to competency.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition of Edna Miller to have W. L. Bundy adjudged incompetent and a guardian appointed for his person and estate, and from an adjudication against said Bundy he appeals. Affirmed.

Call & Call and Edward F. Wehrle, all of Los Angeles, for appellant.

Thomas B. Leeper and O. G. Hopkins, both of Sacramento, for respondent.

PREWETT, Judge pro tem. On petition of one Edna Miller, a niece, the above-named appellant was adjudged incompetent by the superior court of the county of Sacramento and a guardian appointed for his person and estate.

The appellant, Bundy, in his answer alleged that he was a resident of the county of Los Angeles, and denied the jurisdiction of the court. In addition to this he denied the allegations as to his incompetency, and demanded, in writing, that the issues be tried before a jury. A jury was accordingly impaneled and a trial was had. The jury disagreed, and the court thereupon announced that it regarded the verdict of a jury as advisory only, and proceeded to determine the issues adversely to the appellant. Findings and judgment were filed in due course. The appellant appealed therefrom to the Supreme Court, and that tribunal transferred the matter to this court for determination.

[1] 1. The claim of the appellant that he was a resident of the county of Los Angeles need be no further noticed than to say that the evidence bearing thereon is sharply conflicting, and, under well-established principles, this court is bound by the conclusions of the trial court.

[2] 2. The trial court allowed to the contestant a fee for the attorneys employed by her to present the petition, and the point is urged that this allowance is in contravention of a line of decisions in this state touching the question. It is quite true that such fees are not allowed in ordinary probate proceedings when they are incurred for the benefit of the person employing the attorney.

"Moreover, in such a contest, the public administrator was not acting as a trustee of the estate of the deceased, but acting solely in and for his own interest. * * * Hence the services so rendered constituted no basis for the allowance of statutory fees." Estate of Murphy, 171 Cal. 699, 154 Pac. 839; Estate of Byrne, 122 Cal. 261, 54 Pac. 957, 1015.

But in a guardianship application the interests to be considered by the court and the principles to be applied are quite unlike those in an ordinary administration. In the case of the death of a person some one succeeds to the estate, and presumably will look after his own interests. An applicant for letters of administration acts in his own interest, but in the case of an application for letters of guardianship the applicant acts for and on behalf of one who cannot act for himself. An incompetent person is helpless and the law must think and act for him. The filing of the petition and the hearing thereon are indispensable steps in the preservation of the trust fund. The court, as general conservator of the rights of incompetents and other helpless persons, is solicitous that an application be filed to the end that it may assume control of his estate and preserve it for the owner.

Even in the case of an ordinary administration, it has been held that the court may, in the exercise of its discretion, allow attorney's fees in the case of a bona fide contest. Estate of Simmons, 43 Cal. 543. And section 1720, Code of Civil Procedure, clearly authorizes the court in its discretion to order costs paid to any party "as justice may require." Estate of Berthol, 163 Cal. 345, 125 Pac. 750. In the case in hand, the chief matter before the court was the alleged incompetency of the appellant, and this issue was determined against him. The allowance of the attorney's fee to the petitioner was proper.

[3] 3. It is insisted that the court erred in taking the matter away from the jury and itself deciding the issue. This constitutes the chief and only really important question in the case.

It is clearly seen from an examination of the authorities in this state that, in probate and guardianship proceedings, the right to move for a new trial, the right to demand a trial by jury, and the duty of the court to file written findings, in cases in which no jury is demanded, are each and all coexistent in a given case, and each depends upon the further point as to whether or not the Code expressly authorizes written issues or objections. Authorities upon any one of these four points are decisive of the law as to all of them.

It is settled law in this state that probate proceedings are special in their nature and purely statutory in their origin. Smith v. Westerfield, 88 Cal. 379, 26 Pac. 206; Estate of Strong, 119 Cal. 667;[1] Reither v. Murdock, 135 Cal. 201, 67 Pac. 784; Estate of Dolbeer, 153 Cal. 657, 96 Pac. 266, 15 Ann. Cas. 207; Curtis v. Schell, 129 Cal. 220, 61 Pac. 951, 79 Am. St. Rep. 107; Clark v. Superior Court, 20 Cal. App. 309, 128 Pac. 1018; Matter of O'Connor, 29 Cal. App. 233, 155 Pac. 115.

[1] 51 Pac. 1078.

Proceedings in guardianship are "probate proceedings," and are governed by the provisions of the general probate law.

"It is long established by a uniform and unbroken line of authorities in this state that appeals in probate proceedings, which, of course, include proceedings in guardianship, are governed exclusively by these sections of the Code." Estate of Dunphy, 158 Cal. 3, 109 Pac. 628.

Section 1808, Code of Civil Procedure, expressly provides that the provisions of the probate act relative to the estates of deceased persons, so far as they relate to the practice in the superior courts, shall apply to guardianship proceedings. The following sections of the Code of Civil Procedure are pertinent to the inquiry as to the right of a party to a jury trial in guardianship proceedings:

"Sec. 1716. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article two, chapter two of this title," etc.

"Sec. 1717. If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in sections six hundred and thirty-two and six hundred and thirty-three. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either party may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this Code for civil actions."

The section just quoted provides for three distinct proceedings, to wit: (a) The filing of written findings in court cases; (b) trial by jury; and (c) a motion for a new trial; and it implies a fourth, (d) the necessity for written issues in the cases to which it relates. There are three general classes of probate proceedings in this state with reference to the right of trial by jury. In the first class are those in which express provision is made for jury trials, such as the contest of a will before probate, the contest of a will after probate, and proceedings under section 1766, Code of Civil Procedure, for the restoration to competency of a person theretofore adjudged to be incompetent. See sections 1312, 1330, and 1766, Code Civ. Proc. In the second class are all those cases wherein a jury may be demanded under sections 1716 and 1717, above quoted. These are the cases in which written issues must be framed and in which a party can move for a new trial, and in which, if tried before the court, written findings of fact must be filed. An example of this class is the case of a petition for partial distribution. Estate of Baird, 173 Cal. 622, 160 Pac. 1078. In the third and largest class are embraced all those matters in the trial of which a party has not the right to demand a jury, such as settlement of accounts, family allowances and exemptions, admeasurement of homesteads, etc.

The court is relieved, at the outset, from any concern as to a possible invasion of the constitutional right of the appellant to a trial by jury, since it is well established that this right extends to those cases only in which a right of trial by jury was recognized at common law.

"The right to demand a trial by jury in probate proceedings was not given by the common law. It exists in this state only where it is given by some statute." Estate of Baird, supra.

"It has been held that the right of trial by jury is secured by the Constitution only in cases in which it had previously existed, in the administration of justice, according to the course of the common law. Probate matters belonged to the ecclesiastical jurisdiction, where a jury was not a right." Estate of Moore, 72 Cal. 335, 13 Pac. 880.

"It follows then, in the absence of a statute providing for trial by jury, probate proceedings have always been heard by the court without the intervention of a jury. Only in those probate proceedings where the statute expressly confers the right to a trial by jury does the right exist." Estate of Dolbeer, 153 Cal. 657, 96 Pac. 266, 15 Ann. Cas. 207; Matter of O'Connor, supra.

In a clear and extended exposition of this question Mr. Justice Hart, speaking for this court in the last-mentioned case, shows that the right to a trial by jury in a case analogous to this did not exist at common law. The following extract therefrom is illuminative of the question:

"The theory upon which such inquisitions were conducted in a summary manner without the aid of a jury was doubtless that the proceeding does not involve an inquiry as to whether a crime had been committed, nor was the commitment of the patient intended as a punishment, but that its purpose was for the sole benefit of the patient, by facilitating the proper treatment for his disease and at the same time protecting his estate from being lost or destroyed by that improvidence which necessarily accompanies a defect of will or understanding or by impositions practiced upon the incompetent," etc.

And further:

"The proceeding does not involve a trial, but, in analogy to the common-law proceeding in insanity cases, is a mere inquisition, by way of a special proceeding, the determination of which should be left, as the law intends, largely to persons possessing the learning of experts, and not to laymen, of whom juries are ordinarily composed, and who do not, nor are expected to, possess the training and learning essential to a just and intelligent solution of a scientific question such as is necessarily involved in a proceeding whose purpose is to ascertain and determine whether a person, from whatsoever cause, is suffering from some serious mental infirmity."

In Ex parte Ah Peen, 51 Cal. 280, the Supreme Court held that a proceeding for the

commitment of a person to a state reform school is not one in which a right of trial by jury exists.

4. It remains, then, to inquire whether the appellant is entitled to a trial by jury under any provision of the statute. There are no probate provisions which relate to a general right of trial by jury, other than those herein quoted; hence, if appellant has the right at all, it is by virtue of the provisions of sections 1716 and 1717. We think it clear that these sections do not provide for a jury trial in incompetency proceedings. Sections 1763 and 1764, Code of Civil Procedure, under which the proceeding was instituted, make no provision for objections or answer of any kind, whether written or oral, nor do they provide for the filing of findings by the court. On the contrary they clearly imply that the court must proceed to determine the truth of the allegations of the petition, even though no objections be filed by any one. In other words, they make no provision for the making up of issues of fact, and, since the court must determine the truth of the allegations of the petition in any event there remains no office for issues to perform, even if they were authorized. If the Code does not expressly provide for issues of fact, the right to a jury trial does not exist.

"We think it must be taken as established by the decisions that, in any probate proceedings in which the statute authorizes the formation of issues of fact, either party is, under sections 1716 and 1312, entitled to a jury trial at his option." Estate of Baird, 173 Cal. 622, 160 Pac. 1078.

"We are satisfied that it must be taken as established in this state that, under our law as it now exists, a motion for a new trial of any issue of fact actually made and determined in any proceeding in probate will lie when the law expressly authorizes issues of fact to be framed in such proceeding." Carter v. Waste, 159 Cal. 23, 112 Pac. 727.

In the Estate of Franklin, 133 Cal. 585, 65 Pac. 1081, it is distinctly held that the reasoning as to the right of trial by jury clearly includes a motion for a new trial. In the Estate of Land, 166 Cal. 538, 137 Pac. 246, the court held that a contestant of a will was not entitled to submit to the jury the question as to the fact of his interest in the estate.

"The provisions relating to the right to move for a new trial and those upon the right to a trial by jury * * * are similar; the two propositions are cognate, and are governed by the same * * * principles." (Estate of Baird, supra.)

Further along in the same opinion the court says:

"We think it must be taken as established by the decisions that, in any probate proceeding in which the statute authorizes the formation of issues of fact, either party is, under sections 1716 and 1312, entitled to a jury trial at his option."

In the case before the court, written objections were filed by the appellant, but the court, in Leach v. Pierce, 93 Cal. 618, 29 Pac. 235, held that unauthorized objections do not raise issues within the meaning of the Code. In re Moore, 72 Cal. 340, 13 Pac. 880, lays down a similar rule. The Estate of Dolbeer, 153 Cal. 657, 96 Pac. 266, 15 Ann. Cas. 207, contains a valuable review of the legislation leading up to the present enactments.

The statutes furnish a number of instances in the case of special proceedings, wherein a party may call a jury subsequently to the original adjudication. For instance, in proceedings for the commitment of a person to a state hospital for the insane, no provision is made for a trial by jury, but, if committed, he may immediately call for a re-examination of the question before a jury. So, also, in a contest of a will filed after the will has been admitted to probate, the contestant may call a jury, if no jury was called to try the original issue.

Lastly, although no provision is made in section 1763 for trial by jury, a person declared under that section to be incompetent may have the question as to his restoration to competency tried before a jury, as provided in section 1766. The fact that the Legislature has seen fit to provide, ex industria, for a jury trial in restoration proceedings raises a strong implication that it deliberately intended to deny a jury trial in the original inquiry.

The conclusion of the court is that proceedings under section 1763 are controlled by the general provisions of the probate law; that no authority exists for the filing or joinder of issues of fact therein, and hence that in such proceeding the right of trial by jury does not exist. The trial court committed no error in trying the issues tendered by the petition without the aid of a jury.

The order appealed from is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 511

FIRTH v. SOUTHERN PAC. CO.

(Civ. 2028.)

(District Court of Appeal, Third District, California. Dec. 1, 1919. Hearing Denied by Supreme Court Jan. 29, 1920.)

1. RAILROADS ⟸348(2) — EVIDENCE SUFFICIENT TO SHOW NEGLIGENCE AT CROSSING DAMAGING AUTOMOBILE.

Evidence *held* to support a finding that defendant railroad was guilty of negligence proximately causing the damages to plaintiff's automobile in a collision.

2. APPEAL AND ERROR ⟸994(3)—CREDIBILITY OF WITNESS CONTRADICTING HIMSELF FOR TRIAL COURT.

Where witness' story, on which finding was based, was not of such character as to be rejected as unworthy of belief, though contradictory, finding will not be disturbed.

3. NEGLIGENCE ⟸136(9)—EVIDENCE MAKING CASE FOR JURY.

If the evidence in an action for negligence is such that different conclusions on the matter can rationally be drawn therefrom, the case is one for the jury, or for the court, if questions of fact be submitted to its arbitrament.

Appeal from Superior Court, Shasta County; J. E. Barber, Judge.

Action by Mark Firth against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Freeman, of Willow, for appellant.

Jesse W. Carter, of Redding, for respondent.

HART, J. Plaintiff sued for $1,200 damages received by his automobile in a collision with one of defendant's cars. The case was tried before the court sitting without a jury, findings and judgment were in favor of plaintiff for $600, and the appeal is by defendant from said judgment.

The accident occurred at a street crossing in the city of Redding, where four railroad tracks are maintained by defendant. From east to west the tracks are: The main line, the passing or switch track, the house track, and a spur track. Plaintiff, who was at the time of the accident 55 or 56 years of age, resided on the west side of the tracks; his place of business being east thereof. A short time before 8 o'clock in the evening of October 18, 1917, he started in an automobile from his home to his store, traveling on Shasta street. He testified:

"Before I left home I heard a train bell ringing, which we generally do; it was switching; and I came to the track, within 40 or 50 feet, and I looked up the track, and the engine was standing on the house track, near the bridge. I could see a trainman with a light. He was turning the switch for the engine to go north, as I thought."

There were three box cars on the passing track north of Shasta street, one of them projecting slightly into the street. On the switch track there was a car projecting nearly half way into the street from the south. The engine was about a block north of Shasta street, on the house track, and its bell was ringing. The witness said it was twilight; that the lights on his automobile were lit, and there was a street light on the west side of the track; that he approached the track at a rate of between 10 and 15 miles an hour; that when he got to a point 40 or 50 feet west of the main line track he stopped "dead still." He then started up, and was crossing the tracks at a rate of about 5 miles an hour. When he reached the passing track, he saw two or three cars standing north of Shasta street; he also saw the car standing on the spur track, and had to go a little to the north to get through. When he reached the house track, there was a freight car coming from the north, with no light and no person on it that he could see. The car struck his automobile, badly damaging it.

The deposition of W. I. Snook was read. He was night watchman for the Chico Construction Company and witnessed the accident. He corroborated the testimony of the plaintiff as to the fact that he stopped before reaching the tracks, and said that he was traveling across the tracks at about 6 miles an hour. An automobile expert was called as a witness, and fixed the damage to plaintiff's car at about $600, and plaintiff rested his case.

Thereupon defendant moved for a nonsuit, on the ground "that the accident occurred solely and absolutely by reason of plaintiff's own negligence and carelessness." The motion was denied. The division engineer of the Shasta division of the defendant company was called as a witness for defendant, and explained a map, which was introduced in evidence, showing the conditions at the scene of the accident. A witness also gave testimony for the defendant to the effect that the damage to plaintiff's car amounted approximately to $500, and thereupon defendant rested its case.

[1] The only point made here is that the evidence does not support the finding that the defendant was guilty of the negligence proximately causing the damage complained of; it being the contention that the plaintiff was himself guilty of contributory negligence without which the accident could not and would not have occurred. We cannot say, as a matter of law, that the evidence does not support the findings.

It was shown that the plaintiff approached the railroad tracks at a reasonable rate of speed, and that, before attempting to make the crossing, he stopped, looked, and listened;

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that he heard a locomotive bell ringing, and that he thereupon "looked up" the track and saw the engine, which was then about a block north of the street (Shasta) on which he was traveling, and a switchman with a light engaged in turning a switch. It was twilight, the lights on his automobile were lit, and there was a street light on the west side of the street. Under all these circumstances, he conceived it to be safe to make the crossing and started to do so, but had not proceeded far before he saw a freight car, with no lights and no one that he could see on it, moving toward where he was on the track, and approximately 6 feet from him. He was driving across the tracks at a very low rate of speed, and cautiously, so as to avoid a mishap; but the freight car came along so suddenly and unexpectedly that he had no time to get out of its way. No warning signal of the approach of the car was heard by the plaintiff. His view of the tracks to the north was more or less obstructed by box cars standing on the different tracks. He testified that when he was in the act of crossing the tracks he looked ahead, and also to the north and the south, and saw no car or engine moving, except the car with which his automobile collided. He further stated that, when using his eyeglasses, which he then had on, he could see a considerable distance up and down the track.

It is true that, on cross-examination, when asked if he did not keep his eyes ahead of him all the time he was in the act of crossing the tracks, and if he did not then fail to look to the north or the south, his answers do not appear to involve a clear and unequivocal statement that he looked both to the north and to the south; but he did say that he looked ahead and "on all sides," from which it was proper to infer that he looked to the north and to the south. At any rate, as shown above, he did testify on direct that he looked to the north and to the south as he was crossing the tracks, and if his testimony on cross-examination was made to appear not as strong or definite or clear as to that matter as did his testimony in chief, it was for the court to consider and determine how far, if at all, such cross-examination tended to weaken his direct testimony.

[2] The presumption on appeal is that, where a witness' testimony at the trial is itself contradictory and inconsistent, and the verdict or a vital finding is in accord with facts testified to by him, and his is the only testimony from which facts supporting such verdict or finding are derived, the trier of the facts has found some reasonable or legal excuse for the inconsistency, and has justification for concluding that, upon the whole, such witness has told the truth about the matter; and where in such a case the story of the witness, viewed as a whole, is not of a character to justify a reviewing court in declaring that it should have been rejected in its entirety, because it was unworthy of being believed, the conclusion of the trial court or jury as to its probative value is conclusive.

[3] On the whole testimony of the plaintiff and that of the deponent, Snooks, corroborating it in all important or vital particulars, the trial court could well have found, as it did find, that it was the negligence of the defendant that was the sole and direct cause of the collision and the damage following therefrom. The rule in such cases as this is that where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn therefrom—then the case presented is one for the jury, or the court, if the questions of fact be submitted to its arbitrament. The case here, we are persuaded to believe, after a careful examination of the evidence, comes within that rule.

Appellant cites as supporting its position a number of cases among which are the following: Murray v. S. P. Co., 177 Cal. 1, 169 Pac. 675; Blackburn v. S. P. Co., 34 Or. 215, 55 Pac. 225; Thompson v. S. P. Co., 31 Cal. App. 567, 161 Pac. 21; Griffin v. San Pedro R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842; Herbert v. S. P. Co., 121 Cal. 227, 53 Pac. 651. We will not make the attempt, nor is it necessary to do so, to review herein those cases or the other cases cited by appellant. It is sufficient to say that an examination of them will show, as thus we have been convinced, that the evidence in those cases brought to light a very much different state of facts from that with which the record herein confronts us. In those cases, or most of them, the evidence was not such as to afford grounds for an honest difference of opinion between intelligent men as to its effect, and thus whether the ultimate fact in dispute was sufficiently supported by the evidence became a question of law for the court, and not one of fact for the jury, to decide.

We perceive from the record before us no just reason for holding that the decision herein of the court below is not sufficiently buttressed by the proofs, and the judgment is accordingly affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 528

ROGER v. STRUVEN. (Civ. 2927.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1919. Hearing Denied by Supreme Court Jan. 29, 1920.)

1. ESTOPPEL ⟸83(4)—GRANTOR'S REPRESENTATIONS THAT STRIP OF LAND WAS A PUBLIC WAY CREATES AN EQUITABLE ESTOPPEL.

Vendor's representations that a strip of land was a public way and a deed, naming the strip in describing the land conveyed, *held* to constitute an estoppel in pais, precluding the vendor from contending the strip of land was not a public way or street.

2. EASEMENTS ⟸61(9)—EVIDENCE SUSTAINING FINDING OF COMMENCEMENT OF ACTION FOR EASEMENT WITHIN STATUTORY PERIOD.

In action to quiet title to a right of way, conflicting evidence *held* to sustain a finding that defendant's fences had not cut off plaintiff's use of the easement for the five-year period within which actions to recover interest in real property are required to be brought by Code Civ. Proc. §§ 318, 319.

3. JUDGMENT ⟸256(2) — FINDINGS SUPPORT JUDGMENT ENJOINING INTERFERENCE WITH FREE USE OF RIGHT OF WAY.

Finding that plaintiff was an owner of a right of way supports a judgment restraining defendant from erecting obstructions on the strip of land involved, or in any way interfering with plaintiff's free use thereof, since the judgment, properly construed, only restrains defendant from interfering with plaintiff's right of way easement over the strip.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Joseph Roger against Berthold Struven. Judgment for plaintiff, and defendant appeals. Affirmed.

F. D. Brown, Elmer E. Robinson, M. M. Getz, and Robinson & Brown, all of San Francisco, for appellant.

A. P. Dessouslavy and P. A. Bergerot, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal by defendant from a judgment quieting plaintiff's title to a special easement of right of way over and upon certain land described in the complaint, declaring certain fences erected thereon by the defendant to be nuisances which the plaintiff is entitled to abate, and forever enjoining the defendant from maintaining or erecting any fences thereon or in any way interfering with the plaintiff's free use thereof.

The complaint alleged that the plaintiff, ever since the 7th day of December, 1906, had been the owner of a parcel of land situated in the city and county of San Francisco, conveyed to him by the defendant, and described as follows:

"Commencing at the point formed by the intersection of the westerly line of Shotwell street with the southerly line of 26th street, running thence southerly along the westerly line of Shotwell street 97 feet to its intersection with the northerly line of Serpentine avenue; thence along the northerly line of said Serpentine avenue north 69¾° west 32 feet more or less to a point; thence northerly," etc.

—under which description the said lot of land had been conveyed to him by the defendant and his wife. Then followed an allegation that on said 7th day of December, 1906, and for many years prior thereto, said Serpentine avenue was a "traveled way or street," and that the plaintiff was and had been ever since said date the owner in fee of a special easement of right of way or passage over and upon said Serpentine avenue as the same extends through the block of land of which his said lot forms a part; that prior to the purchase by plaintiff of said lot from the defendant and his wife the defendant stated and represented to him that said portion of Serpentine avenue was a public street of the city and county of San Francisco, and said purchase was made by him in reliance upon said representation, and that the building then existing upon said lot extended to the southerly line thereof, and that a door and window of said building opened upon said Serpentine avenue. The complaint then proceeds to allege that within five years before the commencement of the action the defendant erected a substantial and permanent fence directly across the portion of said Serpentine avenue extending through the said block immediately adjacent to the southerly line of the plaintiff's lot, the effect of which was to prevent access to said avenue from the plaintiff's said lot, and, finally, that the defendant claims that the plaintiff has no easement whatsoever in or over any portion of said Serpentine avenue.

The answer of the defendant denied that Serpentine avenue was a traveled way or street, or that the plaintiff was the owner of any easement of right of way or passage thereover; and also denied the making of the representations charged, or that the plaintiff purchased the said lot in reliance thereupon. He alleged that the said land described as Serpentine avenue was his privately owned property, and that it had never been a way or street, and that neither plaintiff nor any one else had ever acquired or become entitled to an easement or any other right therein, either by grant, prescription, usage, or any other means. He further alleged that for a greater period than five years next immediately preceding the commencement of the action he had maintained substantial fences, cutting off all access over or upon said Serpentine avenue; that the same was inacces-

sible as a passage, and that travel could not be had thereover, either by persons on foot or by vehicle. As a further and separate defense the defendant alleged that the plaintiff's cause of action was barred by the provisions of sections 318 and 319 of the Code of Civil Procedure. As a third defense he pleaded title to said tract of land constituting Serpentine avenue by adverse possession and payment of taxes thereon.

The court found in favor of the plaintiff upon the questions as to Serpentine avenue as described in the complaint being a traveled way or street until February 1, 1916, a short time before the commencement of the action, when the defendant obstructed the same; as to the plaintiff being the owner of a special easement and right of way in and over said avenue as described; and as to the representations of the defendant by which the plaintiff was induced to purchase his said lot of land. It also found that the obstruction by defendant of said avenue by a substantial fence took place about two months only before the commencement of the action; that the land constituting said Serpentine avenue as described in the complaint was not the private property of the defendant, and that the defendant had not for a greater period than five years immediately preceding the commencement of the action maintained substantial or permanent fences, cutting off access to or over said Serpentine avenue; that it was not true that said avenue was inaccessible, as alleged, and could not be traveled either on foot or by vehicle; that the plaintiff's cause of action was not barred by the provisions of either section 318 or section 319 of the Code of Civil Procedure; and that the defendant had not acquired any title to said portion of Serpentine avenue by adverse possession and payment of taxes.

[1] In support of the appeal it is contended that the evidence is insufficient to sustain the findings and judgment. Under this head the appellant first argues that the only basis of the respondent's right as shown by the evidence is an estoppel arising from the fact that the appellant's deed to the respondent described the lot conveyed as being bounded on one of its sides by Serpentine avenue. The appellant refers to this as an estoppel by deed, and proceeds to point out that the authorities cited by the respondent have no application to the present case, as they consist in the main of cases in which the grantor describing the property conveyed as being bounded by a given street or way was the owner or had a property interest in the land over which said street or way passed, without which the mere reference in the description to a street or way as one of the boundaries of the property conveyed is not sufficient to create an estoppel. The distinction suggested by the appellant seems to be well founded in the authorities, but the estoppel in the case at bar, as we understand the facts found by the court, is not based upon the mere inclusion of the so-called Serpentine avenue in the description of plaintiff's lot as conveyed to him by the defendant, but upon the further facts that the defendant before and at the time of the sale of said lot to the plaintiff expressly represented to him that Serpentine avenue was a public way, and that the plaintiff purchased said lot in reliance upon said representation. These facts constitute an estoppel in pais, by which the defendant cannot now be heard to say that Serpentine avenue is not a public way or street. 16 Cyc. 680; Id. 722; Pom. Eq. Jur. § 804.

[2] It is next argued by the appellant that the evidence is insufficient to support the findings and judgment, for the reason that the evidence shows that the plaintiff's cause of action was barred by the provisions of sections 318 and 319 of the Code of Civil Procedure, requiring it to appear, in an action arising out of title to real property, that the person prosecuting the action, or his ancestor, predecessor or grantor, was seized or possessed of the premises in question within five years before the commencement of the action. Under this head the appellant insists that the evidence shows that he inclosed Serpentine avenue with a fence which he maintained for more than five years preceding the commencement of the action. On this point it appears from the evidence that the defendant shortly before the commencement of the action did erect a substantial fence cutting off access to that part of Serpentine avenue concerned in this action, and that he had prior to that time placed an obstruction upon said avenue, but not of a character and not maintained with sufficient continuity as to constitute an unequivocal denial of the plaintiff's right of passage. Part of this obstruction was a movable bar, which was frequently removed by persons passing ever the so-called avenue, and remained out of place for long periods of time, and passage was freely had by such of the public as desired to travel over the locus in question; nor, according to the plaintiff's testimony, was his access ever interfered with until the construction of the substantial fence a short time before the institution of the action, as found by the court. While there was testimony contradictory of this state of facts, the trial court arrived at its conclusion that the plaintiff was in the enjoyment of his easement within the period prescribed for the commencement of his action after considering the evidence pro and con, and such determination will not be interfered with by this court.

[3] The final contention of the appellant is that the findings do not support the judgment. The court found that the respondent

is the "owner in fee of a special easement of right of way or passage over and upon said Serpentine avenue." By the judgment the appellant is restrained from maintaining any structures or obstructions over said avenue, or "in any way interfering with plaintiff's free use thereof." The appellant argues that under this part of the judgment the respondent could use said avenue in ways other than for passage thereover, and that the appellant, irrespective of what property interest he might have in the land over which said avenue passes, is restrained from interfering with the respondent's "free use thereof." But the judgment must be construed in relation to the issues before the court; and, when so construed, we think no question can arise as to the fact that the appellant is only restrained from interfering with the respondent in his enjoyment of the special easement of right of way over the so-called avenue, of which the trial court decreed him to be the owner.

For the reasons given the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 533

REED v. HOLLISTER. (Civ. 3014.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1919. Rehearing Denied Dec. 30, 1919.)

1. APPEARANCE ⟸19(4) — OBJECTION AS TO JURISDICTION OF PERSON, FIRST RAISED AFTER JUDGMENT, NOT CONSIDERED.

Where a defendant voluntarily submitted to jurisdiction and answered to the merits, and without objection went to trial, he may not, after an adverse judgment, complain that he was a resident of another state and that the state court did not have jurisdiction of his person.

2. APPEAL AND ERROR ⟸674 — THAT SUBJECT-MATTER OF ACCOUNTING WAS OUT OF STATE CANNOT BE CONSIDERED, WHERE RECORD DOES NOT SHOW SUCH FACT.

It cannot be claimed on appeal that moneys or credits for which accounting was sought were located out of the state, thus depriving court of jurisdiction, where the record does not show where the moneys or credits were located.

3. EXECUTORS AND ADMINISTRATORS ⟸519(1) —ASSETS BEYOND TERRITORIAL JURISDICTION SUBJECT TO ADMINISTRATOR'S SUIT FOR ACCOUNTING.

Where ancillary letters of administration have not been issued in other states, the California courts may take jurisdiction of a proceeding seeking an accounting as to moneys and credits located outside the state.

4. WILLS ⟸589—EXECUTION OF POWER OF APPOINTMENT SUFFICIENT.

Where a power of appointment was conferred on the beneficiary in a testamentary trust having no estate except $1,600, the accumulated interest on the trust fund, which amounted to $40.000, her will giving $32,000 to a daughter, and $6,000 to other legatees, and the residue to a son, was an execution of the power.

5. TRUSTS ⟸95 — CLAUSE OF WILL UNDERSTOOD AS EXECUTION OF POWER OF APPOINTMENT RAISED IMPLIED OR CONSTRUCTIVE TRUST.

Where testator and residuary legatee, who prepared will, understood that a clause in the will was an execution of a power of appointment as to $32,000, testator's estate being only $3,000, such understanding was sufficient of itself to raise an implied or constructive trust against the residuary legatee; such clause of the will being held not a valid execution of the power of appointment.

6. WILLS ⟸153—DRAWER OF WILL CANNOT GAIN BY OWN WRONG.

If the residuary legatee, who prepared a will for a person having an estate of only $3,000 and power of appointment as to $40,000, intentionally so drew up a clause as an execution of the power of appointment that it would not be valid, equity will not permit him, as residuary legatee, to appropriate the estate intended by the testator to be bequeathed by the defective clause to another person.

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by Edwin Reed, administrator of the estate of Frances S. Furry, deceased, against Frederick Hollister. Judgment for plaintiff, and defendant appeals. Affirmed.

Fred Hollister, of North Bend, Or., Jos. S. Campbell, of San Diego, and A. S. Hammond, of Marshfield, for appellant.

Henning & McGee, of San Diego, for respondent.

BARDIN, Judge pro. tem. This is an action by the plaintiff, as administrator of the estate of Frances S. Furry, deceased, to require the defendant to account for certain moneys alleged to constitute a part of the assets of the estate of said deceased. The plaintiff obtained judgment as prayed for, and the defendant has appealed from the judgment. A statement, somewhat in detail, is necessary to a consideration of the points presented for review.

William H. Hollister, who was a resident of the state of New York, died in that state and his last will and testament was admitted to probate in that state on February 1, 1912. By the terms of this will the sum of $30,000 was bequeathed to George Stanton Hollister, a nephew of the testator, and a like amount to Frederick Hollister, also a nephew

of the testator, and the defendant in this case. Philoclea A. Hollister was the widow of George Stanton Hollister, a deceased brother of the testator, and the will above referred to contains the following provision:

"Fourth. I hereby give and bequeath in case Philoclea A. Hollister, widow of my deceased brother, George S. Hollister should survive me, the sum of forty thousand ($40,000) dollars to the Central Trust Company of New York, to have and to hold the same, in trust, to invest and reinvest the same as it may think best, in the exercise of its judgment and discretion, to collect and receive the income thereof during the life of the said Philoclea A. Hollister and to pay over the net income to her so long as she shall live and upon her death to pay the principal of said fund to such person or persons as she may direct by her last will and testament, duly executed in accordance with law, and should she leave no last will and testament then to pay over the principal of said fund to her then surviving children, in equal parts."

Philoclea A. Hollister survived the testator, William H. Hollister, and in due time said sum of $40,000 was paid to the Central Trust Company. On October 7, 1912, Philoclea A. Hollister died, and her last will and testament, which was duly probated in the state of Oregon, contains the following provisions:

"Thirdly—I give and bequeath to my beloved daughter, Frances S. Furry, the sum of thirty-two thousand dollars; to my beloved son George Stanton Hollister—the sum of two thousand dollars, to my beloved grandson Frederick Bergman Hollister, the sum of one thousand dollars—to my beloved daughters-in-law Mary Hollister—and Carrol M. Hollister—the sum of one thousand dollars apiece, to my beloved son-in-law, Dave L. Furry—the sum of one thousand dollars.

"Fourthly—I give and devise and bequeath all the rest residue and remainder of my estate of every name and nature whatsoever owned by me at the time of my death to my beloved son—Frederick Hollister."

By the terms of this will, the defendant, Frederick Hollister, and George Stanton Hollister were nominated as executors, and they thereafter duly qualified as such. At the time of the death of Philoclea A. Hollister, she had no estate of any kind except the sum of $1,673, the accumulated interest on the trust fund above referred to, and she possessed no power of appointment over any other than said trust fund.

The defendant, Frederick Hollister, is a practicing attorney at law, and was the professional adviser of his mother, Philoclea A. Hollister, and her will was prepared by him and, as he testifies, the third provision of her will was intended to operate as an execution of the power of appointment created by the will of William H. Hollister, in favor of Frances S. Furry, to the extent of $32,000. There was no other fund or estate belonging to Mrs. Hollister at the time she made her will from which such fund, or any part thereof, was available.

The petition for the probate of the will of Philoclea A. Hollister, which is verified by the defendant, Frederick Hollister, sets forth that the probable value and character of the property of her estate consists of personal property in New York state, amounting to about $50,000, evidently referring to the trust fund, and other personal property in Oregon, amounting to about $1,000.

In due time these executors, as such, received from the Central Trust Company the sum of $1,673, the interest which had accumulated upon said trust fund at the time of the death of Philoclea A. Hollister, and on June 23, 1913, the defendant, Frederick Hollister, as an individual, received from, and receipted to said Central Trust Company, for the sum of $39,014.57, which constituted the corpus of said trust fund, less legal charges of the trustee.

It appears that this last amount was received by the defendant from the trust company upon the theory that while the testatrix, Philoclea A. Hollister, intended by the third clause of her will to bequeath $32,000 of the trust fund to her daughter, Frances S. Furry, nevertheless said clause was ineffective for the purpose, and the defendant was entitled to receive the same as residuary legatee under the fourth clause of her will.

It should here be stated that the defendant, shortly after receiving the corpus of the trust fund, paid to Frances S. Furry $7,000 from it, taking at the time a receipt for the full amount of $32,000, and thereafter regularly paid to her, interest at the rate of 8 per cent. per annum, upon the principal sum of $25,000, until the time of her death.

[1] In the brief of appellant it is claimed that as the defendant was a resident of Oregon, the superior court of San Diego county was without jurisdiction of his person, and was therefore unauthorized to entertain this proceeding; but it is a sufficient answer to this contention, waiving other considerations, that so far as the record in this case is concerned it appears that the defendant voluntarily submitted to the jurisdiction and answered to the merits, and without objection went to trial, and under such circumstances it may not now be urged that, having voluntarily assented to the trial upon the merits, he may now complain of an adverse judgment.

[2, 3] It is also argued in appellant's brief that the court was without jurisdiction of the subject-matter, because, as is claimed, the moneys or credits for which an accounting is sought were located in the state of Oregon. But the record does not show where these moneys or credits are located; and,

even if such funds or credits were beyond the territorial jurisdiction of the California courts, the jurisdiction would not necessarily thereby be affected. 1 C. J. 627. Of course, if ancillary letters of administration upon the estate of Frances S. Furry had been issued in Oregon, the California courts would decline to take jurisdiction over funds properly payable to such foreign administrator. But that condition is not shown by the record to exist.

[4-6] In our opinion the third clause of the will of Philoclea A. Hollister was an execution of the power of appointment provided for in the fourth clause of the will of William H. Hollister; but, in any event, the circumstances attending the execution of her will, and the fact that both she and the defendant, who prepared the will, understood that the third clause was an execution of the power of appointment, would be sufficient of itself to raise an implied or constructive trust against the defendant. Whether the defendant, as legal adviser of his mother, was mistaken in his understanding as to whether said third clause was an exercise of the power of appointment, is unimportant, for it would be in the highest degree inequitable, and not to be countenanced by a court of equity, to permit an attorney at law, under whose direction and suggestion a will has been prepared, to himself seize and appropriate a part of the estate, which the testator intended, and which the attorney himself intended at the time the will was drawn, to go to another legatee or devisee. It seems that under such circumstances the attorney might well be held to be estopped to claim such bequest.

As has been pointed out, Philoclea A. Hollister died leaving no estate whatever, except the interest which had accumulated upon this trust fund, amounting to $1,673, and, unless the third provision of her will shall be held to be an exercise of the power of appointment, there is nothing whatever upon which it could operate, so that it is clear from the terms of the will itself, taken in connection with known facts as to the extent of her estate, that she intended to exercise this power, to the extent of apportioning $38,000, by the third paragraph of her will.

The trust fund was, of course, a part of the estate of William H. Hollister, and not a part of the estate of Philoclea A. Hollister, and it does not appear from the record here that there was any judicial action in the courts of New York directing or authorizing the payment of this fund by the Central Trust Company; but it does appear that the defendant received and has retained a large part of this trust fund to which he has no right whatever, and which clearly now constitutes a part of the property of the estate of Frances S. Furry, deceased.

It may be that a considerable part of the above discussion is unnecessary to the decision of this case, in view of the fact that no attack whatever is made upon the findings, and from these it appears that the plaintiff was entitled to the relief prayed for.

In addition to the final judgment, the learned trial court, nine days before judgment was rendered, made its order directing the defendant not to leave the county of San Diego, or the jurisdiction of the court, before making payment to plaintiff of the sum of $25,000, with interest thereon at the rate of 8 per cent. from March 25th, 1914, or the giving of security therefor; and said order directed the payment of said sum within the period of 10 days from the service thereof. The notice of appeal includes this order, but in view of the fact that it is conceded in the briefs that the defendant left the state without complying with this order, it is unnecessary to further notice it, other than to say that it seems to have been improvidently made, and may be deemed vacated.

The judgment is affirmed; the plaintiff to have his costs on appeal.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 645

OWENS et ux. v. W. J. BURT MOTOR CAR CO. (Civ. 3119.)

(District Court of Appeal, First District, Division 1, California. Dec. 6, 1919.)

1. MUNICIPAL CORPORATIONS ⊂=706(5)—EVIDENCE SUSTAINED VERDICT FOR PEDESTRIAN, INJURED BY AUTOMOBILE WHILE CROSSING STREET.

In an action for injuries to woman by defendant's automobile as she was crossing a street, evidence as to defendant's negligence and plaintiff's due care *held* sufficient to sustain verdict for her.

2. MUNICIPAL CORPORATIONS ⊂=705(10)—PEDESTRIAN CROSSING A STREET MAY ASSUME THAT AUTOMOBILES WILL BE CAREFULLY OPERATED.

A pedestrian crossing a street has a right to assume until the contrary reasonably appears that automobile drivers will keep a reasonable lookout ahead and exercise ordinary care to avoid injury to him, and is bound generally to look after his own safety and to use care and caution to see that he is not in danger from vehicles.

3. JURY ⊂=131(10)—COLLECTIVE EXAMINATION BY COURT AS TO QUALIFICATIONS NOT ERRONEOUS.

In an action for injuries when struck by an automobile in crossing a street, where, after

statement of the case, the trial court proceeded to examine the jurors collectively as to their qualifications, whether they knew anything about the accident, had read or heard of it, or knew of any reason why they could not sit as jurors, in view of liberality subsequently permitted counsel in inquiring into the qualifications of the several jurors, court's mode of examination, adopted to expedite trial, *held* not erroneous.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John Owens and wife against the W. J. Burt Motor Car Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Jas. W. Bell, L. W. Roth, Noel C. Edwards, Griffith Jones, and Warren L. Williams, all of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondents.

KERRIGAN, J. This is an action for damages for personal injuries suffered by plaintiff Sarah J. Owens, and for damages for the loss of her services by the plaintiff John Owens, her husband, as the result of the former being struck by an automobile driven by an employé of the defendant. In the opinion we shall refer to Sarah J. Owens as the plaintiff.

[1, 2] The collision occurred on the evening of December 12, 1916, at about 6 o'clock, when plaintiff was crossing Slauson avenue at a point a little east of Central avenue, within the incorporated limits of the city of Los Angeles. She had proceeded to within a few feet of the southerly side of Slauson avenue when the defendant's car struck her, causing the injuries complained of. According to the evidence introduced by plaintiff, it was dark at the time of the accident, the lights on defendant's car were very dim, no warning signal of any kind was given by its driver, and the car was being operated, as variously estimated by the witnesses, at 15, 25, or 30 miles an hour, and there was considerable traffic at the point where the collision occurred. The plaintiff herself testified —being in this respect corroborated by other witnesses—that she was looking both ways as she crossed the avenue, and these witnesses testified that they did not see the automobile until just as it struck the plaintiff. We think the evidence ample to sustain the verdict of the jury. "The law is well settled that a pedestrian crossing a street has a right to assume, until the contrary reasonably appears, that drivers of automobiles will keep a reasonable lookout ahead and exercise ordinary care to avoid causing him injury. The pedestrian, likewise, is bound generally to look after his own safety, and in that behalf a duty is imposed upon him, when crossing a highway where vehicles are to be looked for, to use due care and caution to see that he is not in danger. * * *" Wiezorek v. Ferris, 176 Cal. 353, 167 Pac. 234.

[3] After a statement of the case had been made, the court proceeded to examine the jurors collectively respecting their qualifications, whether or not they knew anything about the accident, whether or not they had read or heard of it in any way, whether or not they knew any of the parties to the action or their attorneys; whether or not any member of the jury, or any member of his family, had ever been injured by a moving automobile; whether or not any of them knew of any reason why he could not sit as a juror in the trial of the case free from bias or prejudice and do absolute justice between the parties. This method of examining the jurors was adopted to expedite the trial; and, while obviously it was the intention of the court that neither counsel should re-examine the jurors concerning matters touching their qualifications already covered by the questions of the court, much liberality was permitted, both as to those and all other matters bearing on the qualifications of the several jurors; and it is not contended by the appellant that such examination was unduly restricted. Under these circumstances it cannot be seriously urged that, by the adoption of this method of examination, the court committed error.

There is no merit in the two points made by the defendant as to the rulings of the court on the admission of evidence, nor in the claim that the court was guilty of misconduct in its brief comment denying defendant's motion for nonsuit.

We have examined the alleged errors in the giving and refusing of instructions to the jury, and find no occasion for discussing them separately. The instructions as a whole gave to the jury a full and fair statement of the law pertaining to each and every phase of the case.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

44 Cal. App. 657

BLAKE & BILGER CO. v. CHAPPELL et al.

(Civ. 2052.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1919. Hearing Denied by Supreme Court Feb. 5, 1920.)

1. MUNICIPAL CORPORATIONS ⟸339(4)—SEVERAL STREETS MAY BE IMPROVED UNDER ONE CONTRACT.

A municipality may improve several streets under a single contract.

2. APPEAL AND ERROR ⟸348(1)—NOTICE OF APPEAL WITHIN SUFFICIENT TIME, THOUGH NOTICE OF ENTRY OF JUDGMENT HAD NOT BEEN GIVEN.

A notice of appeal taken June 4, 1912, within six months after entry of judgment and without notice of the entry being given, was taken within the time prescribed by Code Civ. Proc. § 941b, as it then read.

3. APPEAL AND ERROR ⟸396—NOTICE OF APPEAL NEED NOT BE SERVED.

Under Code Civ. Proc. § 941b, as it read in June, 1912, it was unnecessary to serve a notice of appeal upon the opposing parties, especially parties who had not been served and had never appeared in the action.

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by the Blake & Bilger Company against C. W. Chappell and others. From a judgment for defendants Chappell, plaintiff appeals. Reversed.

Johnson & Shaw, of Oakland, for appellant.

R. M. F. Soto, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action brought by the plaintiff to foreclose a lien claimed to have arisen under a certain street assessment made by the superintendent of streets of the town of Emeryville, in the county of Alameda, to cover the costs and expenses of certain street work upon certain streets in said town under the provisions of the Vrooman Act (St. 1885, p. 147).

The trial court sustained a demurrer of the defendants C. W. Chappell and Clara J. Chappell, the owners of the land sought to be impressed with said lien, basing its decision upon the ground that the board of trustees of said town did not have power to order the street work, which formed the basis of the lien in question, to be done under a single contract, inasmuch as the said work involved the construction of several distinct streets, and hence, according to the view of the court, should have been performed under several contracts. The plaintiff did not amend its complaint, and judgment was accordingly rendered against it, and in favor of said demurring defendants; and it is from that judgment that this appeal has been taken.

[1-3] The appellant contends that the sole question presented upon this appeal, being that urged upon the demurrer of said defendants, has been decided contrary to the views of the trial court, and, in full support of the appellant's contention herein, in the case of Remillard v. Blake & Bilger Co., 169 Cal. 277, 146 Pac. 634, Ann. Cas. 1916D, 451. An examination of that case discloses that it arose out of the same assessment as that which gave rise to the plaintiff's claim of lien herein, and that the same question which is presented to the court upon this appeal was presented to the Supreme Court upon the appeal in that case, and was therein determined adversely to the contention of the respondent herein and to the views of the trial court sustaining said contention. It follows that upon the authority of that case the judgment in the instant case must be reversed, unless the further contention of the respondent herein that this appeal should be dismissed as having been improperly taken shall be found to have merit. Our examination of the record herein, however, convinces us that the respondents' said contention is without merit. The appeal herein was taken on June 4, 1912, and within six months after the date of the entry of judgment. The record fails to show that any notice of the entry of judgment was ever given, and hence that the notice of appeal was within the time prescribed by section 941b of the Code of Civil Procedure as it read at the time of taking said appeal. The notice of appeal was in the form prescribed by the terms of said section as it then read, and under said section such notice was not required to be served upon any of the parties to the action or proceeding or their attorneys; and the filing of said notice with the clerk of the court operated to perfect the appeal and transfer the cause to the higher court for determination. Southern Pacific Co. v. Sup. Ct., 167 Cal. 250, 139 Pac. 69; Title Ins. & Trust Co. v. Cal. Development Co., 171 Cal. 173, 152 Pac. 542.

It further appears from the record herein that Donovan, Murphy, and Delucia, to whom said notice of appeal was not addressed, and who were not served therewith, had never been served with summons in the action and had never appeared therein. They were not, therefore, necessary parties to be served with a notice of appeal in this action, even if such service was requisite upon any of the defendants. There are numerous authorities sustaining this view, but the case of Clarke v. Mohr, 125 Cal. 540, 58 Pac. 176, presents a state of the record almost identical with that of the case at bar; and in that case the Supreme Court decided that defendants who were not served with the summons in the ac-

tion and who had not appeared therein were not parties affected by the judgment, and hence that service of a notice of appeal upon such parties was not required. It follows that the respondents' contention as to the dismissal of this appeal is without merit.

The judgment is reversed.

We concur: BEASLY, Presiding Judge pro tem.; KERRIGAN, J.

44 Cal. App. 571

CRONENWETT et al. v. IOWA UNDERWRITERS OF DUBUQUE FIRE & MARINE INS. CO. et al. (Civ. 3144.)

(District Court of Appeal, First District, Division 2. California. Dec. 3, 1919. Hearing Denied by Supreme Court Jan. 29, 1920.)

1. APPEAL AND ERROR ⊂=1011(1)—FINDINGS OF FACT CONCLUSIVE.

Findings of fact below based on evidence from which opposite conclusions may logically be deduced will not be disturbed on appeal.

2. INSURANCE ⊂=322—CHANGE OF NAME NOT VIOLATION OF CHANGE OF OCCUPANCY CLAUSE.

A rider to a fire policy, stating that the building insured was occupied as a clubhouse "by Automobile Country Club," was not intended to guard against a mere change in the name and management of the country club, so that there was no violation of the change of occupancy clause, where the name was later changed to "Monrovia Country Club" and new manager placed in charge; the membership remaining practically unchanged, and the purposes of the two organizations being identical.

3. INSURANCE ⊂=328(2)—LEASE NOT "CHANGE IN TITLE" OR INTEREST OF PROPERTY.

A lease is not a change in the title or interest of the property within the meaning of a fire insurance policy, providing that the company "shall not be liable while the interest in, title to, or possession of, the subject of insurance is changed."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Change.]

4. INSURANCE ⊂=328(2)—NEW LEASE TO SAME LESSEE UNDER ANOTHER NAME NOT CHANGE IN TITLE OR INTEREST OF PROPERTY.

Assuming that a lease is a change in the title or interest of real property, within the meaning of a fire policy providing that the insurer shall not be liable "while the interest in, title to, or possession of, the subject of insurance is changed, excepting a change of occupancy of the building without material increase of the hazard," there was no change in the title or possession, where at the time policy was issued a country club was in possession thereof under a lease given to the manager of the club, and thereafter the name of the club was changed, a new manager appointed, and a new lease executed, the membership of the second club being practically the same as the first; the second club being merely a continuation of the first.

5. INSURANCE ⊂=146(3)—PROVISIONS IN FIRE POLICY CONSTRUED TO PREVENT FORFEITURE.

Provisions in a fire insurance policy are always construed so as to prevent a forfeiture, if the provisions will reasonably admit of such a construction.

6. INSURANCE ⊂=229(3)—AGENT EMPLOYED TO PLACE INSURANCE NOT AGENT TO CANCEL POLICY.

The fact that an agent is employed to place insurance does not make him an agent to cancel the policy on behalf of the owner of the property, and hence where the owner of property accepted policies taken out by the order of a mortgagee through an agent authorized by such mortgagee to cancel and replace the insurance at will, without knowledge that the agent had authority to cancel insurance, he was not bound by a notice of cancellation received by such agent.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by A. E. Cronenwett and another against the Iowa Underwriters of the Dubuque Fire & Marine Insurance Company and another. From an adverse judgment, defendants appeal. Affirmed.

W. W. Hindman, of Santa Monica, for appellants.

Charles Coan and Harold C. Morton, both of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal from a judgment for the plaintiff, A. E. Cronenwett, in an action upon two fire insurance policies issued by the appellants. Cronenwett was the owner of the real property covered by said policies, and Louise Guenther, the other party plaintiff, was the owner of the mortgage upon said property. It was stipulated by the parties in open court that the said mortgagee had duly received notice of cancellation of said insurance policies, and judgment was entered against said mortgagee accordingly. We consider the case, therefore, merely with reference to the rights of the plaintiff Cronenwett. The fire occurred in May, 1916. The answers of the defendants set up as a separate defense that during the year 1915 the defendants gave written notices to Cronenwett that said policies would be canceled within five days from the respective dates of the notices, and that said notices were duly received by the plaintiff. As a second defense the defendants allege that by the terms and conditions of the policies sued upon it is provided, among other things, that:

"Unless otherwise provided by agreement, indorsed hereon or added hereto, this company shall not be liable for loss or damages occurring * * * while the interest in, title to, or pos-

session of, the subject of insurance is changed, excepting * * * a change of occupancy of building without material increase of hazard. * * *"

It is then alleged that after said policies had been issued, the property covered by them was leased to one Daniel W. Markin for a term of three years, and that Markin was let into possession under said lease, and that no written permission for such action was indorsed upon the policy. It is also alleged that the hazard of the defendants was materially increased without their consent by reason of the fact that the lessee of the property kept upon the premises 400 gallons of distillate, a highly inflammable liquid. This last defense was not relied upon at the trial, and is not urged upon appeal.

[1] The first contention of appellants may be briefly disposed of. It is that the proof shows that the policies in question were canceled by written notices sent to the assured or to his agent. In support of this position, appellants urge upon our attention certain testimony in the record sustaining this view. However, the record contains testimony from which opposite conclusions may logically be deduced. Findings were waived by the parties hereto, and it was agreed that the court should submit to the jury certain questions of fact. These questions related to the cancellation of the policies, the receipt by plaintiff of the notices of cancellation alleged to have been sent, and the agency of one Kiminsky to represent Cronenwett for the purpose of receiving said notices of cancellation. The jury answered all of these questions in the negative—and against the contentions of the defendants. Such matters are therefore not open for review here, and we start from these findings of the jury as from established facts.

[2] Another objection of the appellants is that certain conditions of the policies were broken because of the fact that there was a change in the occupancy of the building after the policy was issued. With regard to this contention we shall state the facts in support of the judgment which fairly appear from the evidence. At the time the insurance was taken out upon the property it was occupied by a corporation known as the Automobile Country Club, and was under lease to the manager of that club, Rowl King. Later, the name of the club was changed to Monrovia Country Club. The membership in the new organization remained practically the same as in the old; the purposes of the two organizations were identical. A new manager was placed in charge of the new club and the lease was executed to him by the owner and the former lease canceled. The transaction was, in effect, nothing more than a change of name and the substitution of a new manager. A change of managers might have occurred with or without a change of name, and certainly it will not be contended that the club could not change managers without avoiding the insurance policies upon the premises occupied by it. Also, even though the name had not been changed, the directors and other officers of the club were subject to change without in any way changing the real occupancy of the premises. There is no evidence that this change in name and management in any way increased the hazard of the defendants. The language of the policies upon this point is that the company "shall not be liable while the interest in, title to, or possession of, the subject of insurance is changed, excepting * * * a change of occupancy of the building without material increase of hazard." Under these circumstances, we think the plaintiff was not guilty of a violation of the policy with regard to the occupancy of the premises. The appellants argue that the above condition, with regard to increase of hazard, is modified by riders attached to the policies, stating that the building is insured while occupied as a clubhouse, but with the words "By Automobile Country Club" in parenthesis following such general statement. It is contended that because of the parenthetical insertion in this rider of the name of a particular club that the occupancy of that particular country club was necessary to keep the policy in force. It may be conceded that in so far as the language of the rider is inconsistent with the suspension clause of the policy, the former will prevail (O'Neill v. Caledonian Ins. Co., 166 Cal. 313, 135 Pac. 1121) but we are not inclined to hold that this provision in the rider was intended to guard against a mere change in nomenclature and management of the country club; and, as stated before, it appears from the evidence, and the trial court has impliedly found, that, in substance, the change amounted merely to a change of name and of the manager.

[3-5] Appellants next argue that in the provision above quoted possession and occupancy are treated separately, and the conditions with relation to each are distinct; that the use of the term "occupancy" was intended to cover temporary use of the building, and that the use of the word "possession" was intended to designate the possessory right. It it contended that whether or not there was a change of occupancy as hereinbefore discussed, nevertheless, the lease given to the manager of the Monrovia Country Club was the granting of such an interest in the property to the lessee as to make him the virtual owner of the property for the period of the lease, and to change the title, interest, and legal possession of the property. While it would seem to us that a lease is not a change in the title or interest of the property within the meaning of the policies (Smith v. Phœnix Ins. Co., 91 Cal. 323, 328, 329, 27 Pac.

738, 13 L. R. A. 475, 25 Am. St. Rep. 191; Rumsey v. Phœnix Ins. Co. [C. C.] 1 Fed. 396; Ins. Co. v. Helfenstein, 40 Pa. 289, 80 Am. Dec. 573; Planters' Ins. Co. v. Rowland, 66 Md. 236, 243, 7 Atl. 257), yet it becomes unnecessary for a determination of this case that we should rest it upon this proposition. For it appears that the property was under lease to the manager of the Automobile Country Club and occupied by said club as a clubhouse when the policies were issued; and the tenancy of this country club was known to the defendants and acquiesced in by them. Whatever title and interest and possessory right attached to a lessee attached to said manager of said club at the time the contract of insurance was entered into. And if the two clubs are so substantially one and the same that the occupancy of the premises was not changed within the meaning of the policies, then, assuredly, the two clubs, represented by their respective managers, were so substantially one that the making of the lease to the manager of the second club, instead of to the manager of the first club, was not a change in the possession, title, and interest within the meaning of the policy. If the second club was merely a continuation of the first club, then the right, title, and interest of the second club in the premises was merely a continuation of the right, title, and interest of the first club in the property, and that existed at the time the insurance was issued on the building. We consider it proper to regard the substance and not the form of the transaction in question here in view of the well-recognized rule that provisions in an insurance policy are always construed so as to prevent a forfeiture, if the provisions will reasonably admit of such a construction. O'Neill v. Caledonian Ins. Co., 166 Cal. 315, 135 Pac. 1121; Arnold v. American Ins. Co., 148 Cal. 666, 84 Pac. 182, 25 L. R. A. (N. S.) 6.

[6] It is further urged that, because there is some testimony in the record to the effect that Kaminsky was the agent of the mortgagee, Louise Guenther, and was authorized by her to cancel and replace insurance at will, this plaintiff is bound by the scope of the agency between Mrs. Guenther and Kaminsky. This is predicated upon the fact that plaintiff has brought suit upon the policies so taken out by order of Mrs. Guenther through her agent, Kaminsky. But the plaintiff has testified that he did not know of this arrangement between Mrs. Guenther and Kaminsky. The fact that an agent is employed to place insurance does not make him an agent to cancel the policy on behalf of the owner of the property. Quong Tue Sing v. Anglo-Nevada Assurance Corporation, 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144. The mere fact, then, that the plaintiff accepted the policies of insurance secured by Kaminsky and sued upon them does not bind him by notice of cancellation received by Kaminsky. It cannot be argued that he accepted, with respect to himself, the full scope of the agency asserted by appellant to have existed between Mrs. Guenther and Kaminsky, because the plaintiff has stated that he knew nothing about the scope of such agency. As we have heretofore stated, this question of agency was an issuable fact between the parties, and the jury has found for the plaintiff upon substantial evidence.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

44 Cal. App. 568

CRONENWETT et al. v. DUBUQUE FIRE & MARINE INS. CO. et al. (Civ. 3150.)

(District Court of Appeal, First District, Division 2, California. Dec. 3, 1919. Hearing Denied by Supreme Court Jan. 29, 1920.)

1. INSURANCE ⟸328(2)—LEASE NOT "CHANGE IN TITLE" OF PROPERTY WITHIN MEANING OF FIRE POLICY.

A lease is not a change in the title of the property within the meaning of a fire policy, providing that the company shall not be liable "while the interest in, title to, or possession of, the subject of insurance is changed, except a change of occupancy of the building without material increase of hazard"; a lease being but a chattel interest, and the possessory right of the lessee being in support of the seisin of his landlord in whom the title to the property is vested.

[Ed. Note.—For other definitions, see Words, and Phrases, First and Second Series, Change.]

2. INSURANCE ⟸606(2)—INSURER NOT ENTITLED TO BE SUBROGATED TO INTEREST OF MORTGAGEE ALTHOUGH CLAIMING NO LIABILITY TO MORTGAGOR.

The clause in standard fire policies, to the effect that when insurer shall pay to the mortgagee any sum under policy and shall claim as to the owner that no liability therefor existed, the company shall be subrogated to the rights of the mortgagee under all securities held as collateral to the mortgage debt, and shall receive full assignment and transfer of the mortgage, etc., only applies to a claim by the insurer of no liability to the mortgagor, supported by legal right; the right to subrogation falling with the claim.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by A. E. Cronenwett and another against the Dubuque Fire & Marine Insurance Company and another. From an adverse judgment, defendants appeal. Affirmed.

W. W. Hindman, of Los Angeles, for appellants.

Charles Coan and Harold C. Morton, both of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action upon two policies of insurance against fire issued by the defendant companies to plaintiffs. The plaintiff A. E. Cronenwett was the owner of the real property covered by said policies, and Louise Guenther, the other party plaintiff, was the owner of the mortgage upon said property.

[1] The first objection of the appellants is that the trial court erred in holding that the policies of insurance were not invalidated by a change of possession of the insured property after the issuance of the policies. The facts relating to this objection, as found by the court, are: During the year 1914, the plaintiff A. E. Cronenwett leased the insured building to Messrs. Warren and Nelson, who organized a country club known as the Automobile Country Club, which occupied the insured building, Warren and Nelson being its managers. Thereafter, in 1915, one King succeeded Warren and Nelson as manager of the club and a lease of the building was executed to him. Thereafter, the insurance policies were issued by the defendants. In the early part of 1916 one D. W. Markin succeeded King as manager of the club, and the lease to King was canceled and a lease to the building executed to Markin, whereby the building was leased to Markin, and Markin was in possession of the building under said lease until the time of the fire the lease being in full force and effect at that time. The insurance policies contain the following clause:

"Unless otherwise provided by agreement indorsed hereon or added hereto, this company shall not be liable for loss or damage occurring * * * while the interest in, title to, or possession of, the subject of insurance is changed, except * * * a change of occupancy of the building without material increase of hazard."

It is argued that by said clause the change of title is made separate and distinct from a change of occupancy; that the possession referred to in said quoted clause applies to the possessory rights and not to occupancy. It is argued that the owner of the building is in legal possession of the building, although the building may be occupied by some one else—and that the granting of a lease to Markin was the granting of such an interest and title in the property as to transfer the possessory right from the owner to the lessee, in violation of the conditions of the policies sued upon here. This precise point has been discussed by this court in a case this day decided which involves rights growing out of the destruction of this same building, under other policies of fire insurance. Cronenwett v. Iowa Underwriters of the Dubuque Fire & Marine Ins. Co. et al. (No. 3144) 186 Pac. 824. We are of the opinion that a lease is not a change in the title of the property within the meaning of the policies. Smith v. Phœnix Ins. Co., 91 Cal. 323, 328, 329, 27 Pac. 738, 13 L. R. A. 475, 25 Am. St. Rep. 191; Rumsey v. Phœnix Ins. Co. (C. C.) 1 Fed. 396; Ins. Co. v. Helfenstein, 40 Pa. 289, 80 Am. Dec. 573; Planters' Ins. Co. v. Rowland, 66 Md. 236, 243, 7 Atl. 257. The owner of the fee held the seisin to the property and the lease was but a chattel interest. The possessory right of the lessee was in support of the seisin of his landlord, in whom the title to the property was vested. Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 352, 45 Pac. 680.

[2] The second objection of the appellants is that the trial court erred in refusing to subrogate the defendants to the interest of the mortgagee, Mrs. Louise Guenther. The claim to subrogation is based upon the standard mortgage clause in the policies to the effect that when the insurance company shall pay to the mortgagee any sum under the policy and shall claim, as to the owner, that no liability therefor existed, the company shall be subrogated to the rights of the mortgagee under all securities held as collateral to the mortgage debt and shall receive full assignment and transfer of the mortgage, etc. The appellants state that they have at all times claimed, and now claim, that there was no liability to the mortgagor, and therefore should be subrogated to the interest of the mortgagee. We think the clause above quoted only applies to a claim supported by legal right. It is quite immaterial what the company may claim so long as it be decided by the court that such claim is not founded upon legal rights. The decision of the first point made by the appellants completely disposes of their claim that there is no liability upon their part as to the owner of the premises. That being true the appellants' right of subrogation falls with their claim.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

44 Cal. App. 583

EXCHANGE SECURITIES CO. v. ROSSINI et al. (Civ. 2902.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1919.)

1. LANDLORD AND TENANT ⊂=103(1) — NO RIGHT OF RE-ENTRY UPON BREACH OF INDEPENDENT COVENANT IN ABSENCE OF STATUTE OR STIPULATION.

Generally, in the absence of statutory provision, the breach of an independent covenant by the tenants will not justify the eviction of tenants, unless the lease contains a stipulation to that effect; the landlord's only remedy being an action for breach of covenant.

2. LANDLORD AND TENANT ⊂=103(3)—TENANT NOT ENTITLED TO TERMINATE LEASE UPON LANDLORD'S BREACH OF INDEPENDENT COVENANT IN ABSENCE OF STIPULATION OF LEASE OR STATUTORY PROVISION.

In absence of statute or stipulation in lease so providing, the breach of an independent covenant on the part of the landlord will not warrant the tenant in terminating the lease and refusing to pay the rent; tenant's only remedy being an action for breach of covenant.

3. LANDLORD AND TENANT ⊂=44(1)—STIPULATION AS TO FORFEITURE OR TERMINATION OF LEASE WILL BE STRICTLY CONSTRUED.

Stipulations in lease as to rights of landlord to re-enter, and as to rights of tenant to terminate lease, will be strictly construed against the party for whose benefit they are created, under Civ. Code, § 1442.

4. LANDLORD AND TENANT ⊂=103(3)—LESSEE NOT ENTITLED TO TERMINATE LEASE UPON BREACH OF COVENANT AS TO SALE BY LESSOR.

Lessor's sale of premises without first giving lessee an option to purchase in violation of provision of lease did not entitle lessee to terminate lease and refuse to pay rent thereunder, where lease did not provide for right of lessee to terminate lease upon lessor's breach of covenant.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Exchange Securities Company against John Rossini and Henry Monighetti, copartners doing business under the firm name and style of Rossini & Monighetti, and others. Judgment for defendants, and plaintiff appeals. Reversed, with instructions.

Shreve & Shreve and J. T. Reed, all of San Diego, for appellant.

Adam Thompson, of San Diego, for respondents.

SHAW, J. The material facts upon which the trial court rendered judgment for defendants, and from which plaintiff appeals, asserting that it is entitled to judgment upon the findings, are as follows: On the 9th day of May, 1913, Rosie J. Poggi made a written lease of certain real estate to defendants John Rossini and Henry Monighetti. The term of the lease was for a period of five years, and the rental reserved therein was $12,500, payable in equal semiannual installments in advance. The lessees at the time caused a bond for the faithful performance of their covenants contained in the lease to be executed to the lessor by Joe Guidotti and Pietro Guidotti, who are joined with them as defendants herein. Among other covenants contained in the lease was one whereby the lessor agreed that if during the term of the lease she should receive a bona fide offer for the purchase of the property and desire to accept such offer and sell the property, such facts should be communicated to the lessees, who were, for a period of ten days from the service of such notice, given an option to purchase the leased property at the price and upon the terms contained in the offer so received by the lessor, which option to purchase by defendants, unless exercised within the time so specified, should terminate. The lease also contained provisions under which the purchaser, if other than the lessees, might terminate the lease upon notice as therein provided. On March 20, 1915, the lessor, without any notice to the lessees of her intention so to do and in violation of the covenant to give the lessees an opportunity to exercise their option to purchase the property, sold and conveyed the same to the Diamante Gardini Company, to which she assigned and transferred the lease, together with the bond given her for the faithful performance of the terms thereof; and on October 29, 1915, the Diamante Gardini Company conveyed the property to plaintiff herein, to which it likewise assigned the lease and bond aforesaid. On November 8, 1915, the lessees, having paid all rent due to said date, abandoned the leased premises without plaintiff's consent, and thereafter refused to pay any rent for the balance of the term, which expired on May 8, 1918. Thereafter plaintiff notified the lessees to resume possession of said premises, and that, in case of their failure so to do within ten days, plaintiff would rent the property to other tenants upon the best terms obtainable for and on account of said lessees and look to them for the payment of the difference between the amount called for by the lease and that which they might be able to obtain from the new tenant, to which the lessees, through their attorney, answered, saying that their abandonment of the leased property was due to the violation of the lessor's covenant contained in the lease by failing to give them an opportunity to exercise the option for the purchase of the property, and that plaintiff was at liberty to take such steps in the premises

with reference to letting the property to another tenant as it might be advised. Thereupon, on December 1, 1915, plaintiff leased the property for the balance of the term at $1,000 per year, which, though less than that reserved in the lease, was at the time a fair and full rental for the property.

Upon these facts being made to appear, in an action to recover the amount called for by the lease, with interest on the installments of rent as they became due, less the sum of $1,000 per year, for which the premises were re-rented, the court, as a conclusion of law, found that plaintiff was entitled to take nothing, and that defendants were entitled to their costs.

[1] Whether or not the covenant in question so made by the lessor warranted the lessees in terminating the lease and refusing to pay the rent is the sole point in controversy between the parties. As to the landlord, the general rule is that, in the absence of statutory provision, the breach of an independent covenant made by the tenant will not justify the eviction of the latter unless the lease contains a stipulation to that effect.

"The mere breach of a covenant by the tenant can give the landlord no right of re-entry unless there be a stipulation in the lease that such breach of covenant shall work a forfeiture or determination of the tenant's interest. No ejectment can be maintained by the landlord for mere breach of covenant not coupled with a proviso that the term shall end. His only remedy would be an action for breach of covenant." Section 487, Jones on Landlord and Tenant.

[2] In support of this proposition, the author cites a number of cases. And where there is no statutory regulation of the subject, it is equally true, upon like principle, that in the absence of stipulation to such effect, the breach of a like covenant on the part of the landlord will not warrant the tenant in terminating the lease and refusing to pay the rent called for thereby. Thus it has been held that, in the absence of such stipulation giving the tenant the right to terminate the lease, the failure of the landlord to comply with his covenant to make improvements upon the demised premises will not justify the tenant in abandoning the premises and refusing to pay the rent. Partridge v. Dykins, 28 Okl. 54, 113 Pac. 928, 34 L. R. A. (N. S.) 984; Huber v. Ryan, 26 Misc. Rep. 428, 56 N. Y. Supp. 135; 18 Am. & Eng. Ency. of Law, p. 230.

[3] In the absence of a stipulation therefor, which must be construed strictly against the party for whose benefit it is created (Civ. Code, § 1442; Randol v. Scott, 110 Cal. 590, 42 Pac. 976), neither party can claim forfeiture. As to the landlord, the covenant must be coupled with a proviso that the breach thereof shall entitle him to a re-entry of the premises, and shall, as to the tenant, to entitle him at his option to terminate the lease, be coupled with a like proviso. Otherwise, and in the absence of such stipulation, the remedy in either case is an action for breach of the covenant. Conditions arising upon a breach of covenant are the subject of contract, and, if desired, the party interested should insist upon their insertion in the lease. In the instant case the lease expressly provides that upon breach of any of the covenants therein contained on the part of the lessees the lessor shall, at his option, re-enter upon the demised premises and terminate the lease. No such provision, however, is contained in the lease giving the tenants a like right. Hence, in the absence thereof, the lessees' remedy for breach of the covenant in question is an action thereon.

[4] Our conclusion is that the covenant in question on the part of the lessor was in its nature independent, and not a condition precedent to the payment of the rent by the lessees; and, since the lease contains no stipulation that upon a breach thereof the tenants may at their option abandon the premises and terminate the lease, they are not absolved from the obligation to pay the rent reserved therein.

The judgment is reversed, and the lower court instructed to render judgment on the findings for plaintiff for the rent reserved in and payable under the terms of the lease, together with interest upon each installment thereof from the time when it became due and payable, less the amount of $1,000 per year and interest thereon from the time when under the terms of the contract of re-rental the same became due and payable. Such judgment, however, as to defendants Joe Guidotti and Pietro Guidotti, to be limited to the penal sum specified in their bond for the faithful performance by the lessees of the covenants contained in the lease.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 661

WALLACE v. FRESNO CANAL & LAND CORPORATION. (Civ. 2976.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1919.)

APPEAL AND ERROR ⊂⊃1011(1)—FINDINGS ON CONFLICTING EVIDENCE THAT DEFENDANT IRRIGATION COMPANY'S NEGLIGENCE CAUSED FLOODING OF PLAINTIFF'S LANDS WILL NOT BE DISTURBED.

In an action against an irrigation company for negligent flooding of plaintiff's land and that of plaintiff's assignor, evidence being conflicting as to whether the damage resulted from defendant's negligent failure to properly control the waters, which overflowed the ditches, or from some stranger's meddling with the headgates, the findings will not be disturbed.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by C. B. Wallace against the Fresno Canal & Land Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

G. Levin Aynesworth, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff and against the defendant for damages alleged to have been sustained by the plaintiff, and also by one T. Hampoyan, his assignor, through the alleged negligence of the defendant.

The complaint alleged that the defendant was a corporation engaged in the business of distributing water for irrigating purposes in the county of Fresno, wherein, for several years, it maintained and controlled a system of ditches and canals, among which was a large ditch or canal commonly known as Dry creek, which ran to and by the southeast corner of the lands leased by the plaintiff and by plaintiff's assignor, from which point a small lateral ditch had been constructed along the south line of said plaintiff and of his assignor and of a number of other landowners, from which smaller ditch their lands were supplied with water. The complaint further alleged that the defendant, through its servants, agents, and employés, so negligently and carelessly handled, managed, and controlled the water flowing in said Dry creek and the headgates therein, and particularly the headgate which turns the water into said smaller lateral ditch, that an amount of water far in excess of the capacity of said lateral ditch was turned into it, and, having broken over and overflowed its banks, flowed onto and upon the lands of plaintiff and his assignor, causing the damage complained of. The defendant, while admitting the ownership of the irrigation system and of the ditches and headgates above referred to, denied any negligence in the conduct and management thereof from which the plaintiff and his assignor suffered the damages of which the former complains.

Upon the trial of the cause before the court, the defendant admitted that, if the injuries complained of were caused by its negligence, the amount of damages sought to be recovered was reasonable. The only question, therefore, before the trial court, was as to whether the plaintiff's damages were the result of the defendant's negligence.

The trial court upon this issue found in favor of the plaintiff, and from the judgment thereupon entered for the amount of damages claimed by him this appeal has been taken.

The only question presented by the appellant upon this appeal is as to whether there is sufficient evidence to sustain the finding of the court with respect to the defendant's negligence, the sole contention of the appellant being that there is an entire absence of sufficient evidence to sustain such finding. The argument of the appellant in that regard is based upon the testimony of one of its own employés, whose name was R. N. Clift, and who was the ditch tender of the defendant, having charge of that portion of its irrigation system which embraces Dry creek and its smaller lateral canal and the headgates which control the amount of water flowing and to flow in each of these. It is the appellant's contention that the testimony of its said witness in respect to the amount of water flowing in these two ditches, and in respect to the condition of the headgates controlling such flow, is uncontradicted, and, if taken to be true, shows that the defendant exercised all due care in the premises, and that whatever overflow of waters occurred must have been caused by the tampering with the headgates of the defendant by some person or persons unknown, and for whose acts in that regard it cannot be held responsible.

After a somewhat careful examination of the record, we are unable to adopt the appellant's contention in this regard, since we find that the testimony of said witness for the defendant was, in fact, contradicted by the testimony of several witnesses for the plaintiff with respect to the condition of said ditches and of the headgates therein, and also with respect to the time and amount of water flowing in said ditches a short time prior to the overflow of said water from the lateral ditch and onto the plaintiff's land. These contradictions, in our opinion, create a substantial conflict in the evidence sufficient to justify the trial court in disregarding a large portion of the evidence of defendant's said witness, and in finding that the overflow in question occurred through the failure of the defendant's said ditch tender to properly con-

trol the waters flowing in said ditches, and to so properly adjust the headgates therein as to prevent an overplus of water from entering the said lateral ditch and pouring over its banks onto the plaintiff's land. This being the state of the record, this court will not interfere with the findings and conclusions of the trial court.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 149

ATKINSON v. FOOTE et al. (Civ. 2023.)

(District Court of Appeal, Third District, California. Nov. 5, 1919.)

1. MORTGAGES ⟹376—MORTGAGEE PURCHASER AT FORECLOSURE NOT LIABLE FOR SURPLUS NOT REMAINING IN HIS HANDS.

Mortgagee who has purchased the mortgaged property under the decree of foreclosure is not liable for the surplus unless such surplus remained in his hands or possession.

2. MORTGAGES ⟹376—TRUSTEE REQUIRED TO TURN SURPLUS ON FORECLOSURE OVER TO TRUSTOR.

Even though a trust deed does not expressly impose upon trustees the duty of obtaining and turning over to the trustor any surplus remaining after payment of the debt, and the costs and expenses of sale have been satisfied, it would nevertheless be their duty to do so; the trustee being trustee for trustor as well as for lender of money.

3. MORTGAGES ⟹376—TRUSTEES BEING SUED FOR EXCESS HAVE BURDEN OF PROVING RECEIPT OF NO ACTUAL CASH.

In action by owner of the equity against trustees who sold property under deed of trust for an amount in excess of the debt to recover excess, trustees, defending on ground that they had received no actual cash, have burden of proving such fact.

4. EVIDENCE ⟹383(7)—RECITAL IN TRUSTEES DEED CONCLUSIVE AS TO AMOUNT RECEIVED AT SALE.

Statement in trustees deed as to consideration received for land sold under deed of trust is conclusive as to amount received, in action against trustees to recover surplus in excess of amount necessary to satisfy debt.

5. MORTGAGES ⟹151(1)—RULE AS TO FUTURE ADVANCES APPLICABLE TO TRUST DEEDS.

The rule with reference to future advances applicable to mortgages is applicable to trust deeds given entirely for the purpose of securing the payment of a debt or for the performance of any other act capable of being so secured.

6. COURTS ⟹91(1) — COURT OF APPEALS BOUND BY RULE LAID DOWN BY SUPREME COURT.

Court of Appeals is bound by rule of law as declared and applied by the Supreme Court.

7. MORTGAGES ⟹151(1)—RULE AS TO FUTURE ADVANCES STATED.

The mortgage lien of a superior or prior mortgage will not operate to secure optional advances made under such mortgage after such mortgagee has acquired actual notice of an incumbrance subsequent in point of time to his mortgage so as to defeat or impair the rights of the second incumbrancer, but rule is otherwise where the provision as to advances is mandatory so as to make it obligatory upon mortgagee to make advances.

8. MORTGAGES ⟹116 — MORTGAGE CONSTITUTES NEW LIEN AS TO ADVANCES.

Where advances are made by senior mortgagee under provision providing for optional advances with no actual notice of a second mortgagee, the advances extend the scope of the lien; the mortgage as to such advances constituting a new lien or incumbrance.

9. MORTGAGES ⟹151(1) — ADVANCES AFTER RECORDATION OF TRUSTEE'S DEED ON FORECLOSURE MADE WITH CONSTRUCTIVE NOTICE OF SUCH DEED.

One who made advances under a deed of trust after recordation of trustee's deed on foreclosure under second deed of trust was charged with constructive notice of such deed under Civ. Code, § 1213, and was bound and concluded by such notice; the senior deed of trust constituting as to such advances a new incumbrance.

10. ATTORNEY AND CLIENT ⟹104—NOTICE OF TRUSTEES' SALE BY ATTORNEY OF PURCHASER IMPUTABLE TO CLIENT.

Actual knowledge by attorney for purchaser of deed of trust of the fact that the property had been sold under a second deed of trust was imputable to purchaser and charged her with notice thereof in making future advances.

11. ATTORNEY AND CLIENT ⟹104—NOTICE TO ATTORNEY IS NOTICE TO CLIENT.

An attorney at law, when acting as such for his client, is an agent, and the rule that notice to an agent is constructive notice to the principal is applicable to an attorney or counsel when acting for another in a particular matter or generally in the affairs of the latter.

12. MORTGAGES ⟹376—FACTS SUFFICIENT TO SHOW NOTICE OF SALE UNDER JUNIOR DEED OF TRUST BY ATTORNEY FOR PURCHASER OF SENIOR DEED OF TRUST.

In action by purchaser under a junior deed of trust to recover surplus upon sale under senior deed of trust, involving issue of whether purchaser of latter deed had notice of sale under junior deed at time of making advances, facts *held* to show that attorney for purchaser of senior deed of trust had notice that property had been sold under the junior deed.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by A. B. Atkinson against George E. Foote and another. Judgment for plaintiff, and defendants appeal. Affirmed.

H. W. Zagoren, of Sacramento, for appellants.

White, Miller, Needham & Harber, of Sacramento, for respondent.

HART, J. From a judgment in favor of plaintiff for the sum of $572 and costs, defendants prosecute this appeal.

On December 10, 1914, Alfred H. Borchard and Mabel Borchard executed two deeds of trust, conveying to trustees the same real property in the city of Sacramento, owned by them, the first deed of trust securing a promissory note for $2,000 payable to Mary Phleger, and the second securing a promissory note for $1,000 payable to the plaintiff. On February 5, 1917, no payments of principal or interest having been paid, plaintiff caused his trustees to sell the property, he becoming the purchaser thereof, and a deed to him from the trustees was recorded February 8, 1917.

On June 13, 1917, Luise Borchard, mother of Alfred H. Borchard, took an assignment to her from Mrs. Phleger of said first deed of trust, and recorded said assignment on June 15, 1917. The property was sold under said first deed of trust on July 7, 1917, Mrs. Luise Borchard becoming the purchaser, and she received a deed from the trustees reciting that they had received for the property the sum of $2,720 in gold coin. Before any bids were received, the persons present, including the defendants, were informed that plaintiff was the owner of the property and claimed all the surplus over and above the amount due the holder of the first deed of trust. As soon as the final bid was accepted, demand was made upon the trustees for the surplus. The trustees on July 16, 1917, served on plaintiff's attorneys a written notice setting forth that Luise Borchard, subsequent to the time of taking the assignment of said deed of trust and prior to the sale, had made certain advances to Mabel and Alfred H. Borchard, amounting to $589.78, claimed all of said advances to have been secured by the deed of trust, and which, together with the amount due her for principal and interest and costs of sale, more than made up her bid of $2,720 for the property. The deed of trust provided for future optional advances.

It was stipulated at the trial by and between the attorneys for the respective parties, and agreed that said stipulation should be considered as evidence of the facts so stipulated, that on the 3d day of May, 1917, an action was commenced in the superior court in which the plaintiff here was plaintiff, and Alfred H. Borchard and Mabel Borchard, his wife, were defendants, for the purpose of recovering from defendants in said action possession of the property herein involved; that in the complaint filed in said action the plaintiff therein (plaintiff herein) alleged ownership in himself of said real property, and further alleged his right to the possession thereof, and that the defendants named in said complaint were unlawfully depriving him of the possession of said property; that the prayer of the complaint filed in said action asked for restitution of the possession of the said premises to the plaintiff therein (also plaintiff herein); that H. W. Zagoren, attorney for the defendants herein, and George E. Foote, one of the defendants herein, were attorneys for the defendants in said action brought by the plaintiff herein for the restitution of possession of said premises: and that as such attorneys for the defendants therein they "appeared in open court on behalf of said defendants and filed pleadings therein." It was further stipulated that, if sworn as a witness in this case, Clyde H. Brand, an attorney at law of the city of Sacramento, and who was the attorney for Mrs. Phleger in the transaction resulting in the assignment by her of the trust deed and promissory note executed by Alfred H. and Mabel Borchard to trustees of said Mrs. Phleger to Luise Borchard, would have testified to the following facts, and that his said testimony, if given, should constitute a part of the evidence in this case: That prior to the assignment just mentioned H. W. Zagoren, attorney for the defendants in this case, discussed with said Brand the matter of a proposed assignment to Luise Borchard of the said deed of trust then held by Mrs. Phleger; that said Zagoren at that time stated to said Brand that he (said Zagoren) was acting as attorney for Mrs. Luise Borchard and that she was then contemplating the purchase of said deed of trust from Mrs. Phleger, for whom at that time the said witness Brand was acting as attorney; that at the time of said discussion between said Zagoren and Brand it was stated to Zagoren that the real property described in said deed of trust had been sold under a deed of trust of subsequent date to the Phleger deed of trust, executed to trustees of plaintiff, Atkinson, and that record title to said premises at the time of said discussion, which was prior to the assignment of the Phleger deed of trust to Mrs. Luise Borchard, stood in the name of said Atkinson; that at the same time, and prior to the said assignment to the said Mrs. Borchard, witness Brand stated to the said Zagoren that he had been endeavoring to secure from A. B. Atkinson, the plaintiff herein, the payment of certain assessments that had become a lien on the real property involved in this action, viz. lot 89, Yoerk court, in the city of Sacramento; that at the time of said conference between said witness Brand and said Zagoren, and prior to the assignment of said deed of trust by Mrs. Phleger to said Luise Borchard, the witness Brand showed to said Zagoren and

delivered to him a certificate of title prepared, according to the witness' best recollection, by the Sacramento Abstract & Title Company, which said certificate certified that on its date, which was a few days prior to the said conference between the witness Brand and said Zagoren, title to said property was vested in said A. B. Atkinson.

The situation as developed by the evidence may thus be summarized: The plaintiff, the owner of the junior trust deed, upon default by the trustors or owners of the property conveyed to the trustees to pay the indebtedness secured by said deed, caused after due proceedings, the real property to be sold in the manner prescribed by law in such cases, and became the purchaser of the property at said sale. He received the trustees' deed thereto, and thereupon the legal title and the right to the possession of the property immediately vested in him. This deed to him was duly recorded. The trustors under the deed of trust, the younger Borchards, refused to deliver to him possession of the property, and he brought an action in ejectment to recover possession. Attorneys Zagoren and Foote, the former the attorney in this action for the defendants, and the latter one of the defendants here, were, and still are (the ejectment action is still pending and undisposed of), the attorneys for defendants in said ejectment action. After Atkinson became the record owner of said property, Mrs. Luise Borchard, mother of one of the original owners of the property, the trustors in the prior deeds of trust, bought and had assigned to her the said senior trust deed given by the younger Borchards to secure to Mrs. Mary Phleger the sum of $2,000 loaned by her to the said younger Borchards. In this transaction the said attorney Zagoren acted as the attorney for Mrs. Luise Borchard. After Atkinson had acquired the title to the property in the manner above indicated, and subsequent to the time that she took over the Phleger trust deed, Mrs. Luise Borchard made further advances on the security of said deed to her son and daughter-in-law, the younger Borchards, original trustors in both deeds of trust. While all these transactions were being negotiated and consummated—that is, all transactions with reference to the property and the trust deed of Mrs. Phleger—Mr. Zagoren, the attorney for these defendants and also the attorney for Mrs. Luise Borchard, was in possession of actual knowledge of the fact that the record title to the property involved was in the plaintiff here. Moreover, we may assume, since he, too, was an attorney for the defendants, the younger Borchards, in the ejectment action, and appeared and filed pleadings in said action on behalf of their clients, that defendant Foote was in possession of actual knowledge of the fact that, prior to the assignment of the Phleger trust deed to Mrs. Luise Borchard, the record title of the property was in the plaintiff herein.

Believing on the facts so summarized, that he was entitled to the surplus of the amount for which the property sold over and above the amount due on the Phleger note and costs and expenses, exclusive of the advances made by Luise Borchard, the plaintiff brought this action to recover such surplus, which, it is alleged, amounts to $589.78, with interest from July 7, 1917.

The point first made by the appellants is that they are not liable for a surplus which they have never received; the fact being, as they contend, that at the time of the sale of the property by them to Luise Borchard under the Phleger deed of trust they received from her the promissory note for $2,000 executed to Mary Phleger, and received Luise Borchard's receipt for $197.30 as interest and costs of conducting the sale, and for $589.78 further advances, and that they did not receive any cash gold coin. They further contend that, if there exists in favor of the plaintiff any action at all for the alleged surplus, it is against the purchaser at the sale. The case of Russell v. Duflon, 4 Lans. (N. Y.) 399, is cited as supporting the above-stated proposition. That case lays down these doctrines:

"A mortgagee who, upon foreclosure of his mortgage by advertisement and sale under the statute, receives only the amount due and expenses from the purchaser of the mortgaged premises, is not liable as trustee to lienors subsequent to his mortgage for the surplus. The ordinary agreement or condition assumed by a mortgagee to pay the surplus to the mortgagor is not extended to subsequent incumbrancers of the mortgaged property."

That case refers to Bevier v. Schoonmaker, 29 How. Prac. (N. Y.) 411, which sustained an action by the owner of an equity of redemption under a sheriff's sale, who was also the holder of the lien on the mortgaged premises, next in order to the mortgagee, who was himself the purchaser under a statute of foreclosure, to recover the surplus money in the sheriff's hands after the sale, and of that case it was said:

"But there the plaintiff stood in the shoes of the mortgagor, and was the eldest judgment creditor, and the defendant had the surplus moneys in his hands. The case of Matthews v. Duryee, 45 Barb. (N. Y.) 69, recognizes the liability of the party holding the surplus to an action by the party entitled to it (in that case the widow of the mortgagor) to recover it."

[1, 2] Upon principle, it would seem to be unquestionably true that the mortgagee, who has purchased the mortgaged property under the decree of foreclosure, would not be liable for the surplus unless such surplus remained in his hands or possession. There is no agree-

ment on a mortgagee's part which binds him to pay over the surplus to the mortgagor. Indeed, he is not interested in what disposition is made of the surplus from a sale under a decree foreclosing a mortgage conducted by an officer of the court making the decree and authorizing the sale. When he receives satisfaction of the mortgage debt and interest, and the costs and expenses are paid, his interest in the transaction thereupon ceases, and, as above stated, unless he himself retains the surplus, he is not liable to an action for the surplus by the mortgagor or a creditor of the mortgagor. In this case, however, a different situation is presented. In the first place, while it is true that a trust deed, like a mortgage, is given to secure a debt or the performance of some act capable of being so secured, and that its primary purpose is to secure the debt or the performance of such act, its legal characteristics are different from those of a mortgage. By it trustees, duly nominated and appointed by the lender of the money, are authorized to sell the property affected by the conveyance upon default in the payment of the debt or the performance of the act it was given to secure. We apprehend that it will not be questioned that, even though a trust deed may contain no provision expressly imposing upon the trustees the duty of obtaining and turning over to the trustor any surplus remaining after payment of the debt to secure which the deed was given, and the costs and expenses of sale have been satisfied, it would nevertheless be their duty to do so. Indeed, it cannot be doubted, from the nature of a trust deed given to secure a debt, that the trustees in such a case are as well trustees for the trustor as for the beneficiary of the trust, or, perhaps it would be more accurate to say, the lender of the money, since both the latter and the owner of the property affected or covered by a trust deed are equally beneficiaries of the trust to the extent of their respective interests; and therefore it must be, in the very nature of the situation, the duty of the trustees, upon a sale of the trust property to satisfy the indebtedness it was given to secure, to see that they get possession of the excess, if any there be, over and above the sum necessary to satisfy the debt, etc., and to see that to the possession of the trustor such excess be delivered. Suppose it be true that trustees under a deed of trust have paid to the lender of the money more than was his due, even under an honest misapprehension of the amount actually and justly due the lender and secured by the deed; would it be contended that they would not be liable to an action by the trustor to recover the sum paid in excess of what was justly due the lender? Have trustees under such a trust no legal liability thrust upon them but merely to see that the lender of the money is paid his debt? In the sale of the property and the payment of the debt do not the trustees act for the trustor as well as for the lender of the money? And is it not then, their imperative duty to see that any excess of the sum for which the property was sold over and above that necessary to pay the debt, etc., comes into their hands as the trustees for the owner of the property and the same accounted for by them to the owner? No reasonable ground for returning negative answers to these questions can be suggested or conceived. They unquestionably, as above declared, become trustees of the trustor in the strictest sense when there is a surplus in their hands upon the sale after they have satisfied in full the obligation to secure which the trust deed was given.

[3, 4] Aside from the mere recital in the deed of the trustees to Mrs. Luise Borchard that she made additional advances to the younger Borchards after she (Mrs. Luise) became owner of the Phleger trust deed, there is absolutely no evidence in this record showing that Mrs. Luise Borchard ever made the advances referred to. The trustees (assuming that they received no actual cash or coin for the sale of the property, as they now claim is the fact), so far as we are advised by this record, acted upon the mere extrajudicial or unverified representation of the said Mrs. Borchard that, after she had acquired ownership of the Phleger deed of trust, she advanced to her son and daughter-in-law additional sums on the faith or security of said trust deed. If it is important in the decision of this case to know whether the trustees did or did not actually receive cash, then we remark that the burden was upon them to show that, as a matter of fact, they received no actual cash into their hands. The fact is undisputed that the property sold for an amount in excess of that which was necessary to satisfy in full the obligation due Mrs. Borchard on the Phleger obligation as it came into her hands. There is no presumption that one party is indebted to another, and if such a presumption were applicable in any circumstances at all, it would be less so as to a contract like the one here, which makes it optional with the proposed lender whether he will lend the money, or make advances to the borrower in addition to any money already loaned. But, as stated, there is no such a presumption of law in any case, and if one claims that he has loaned money to another, he must prove his claim or demand in an action to recover the money. But, however this may be, we hold that, if we concede that an action involving a case of this character will not lie against the trustees if they are not in actual possession of any surplus remaining after the sale of the property and the payment of the debt secured by the deed of trust under which

they are acting or have acted as trustees, a reply to their claim that they received no cash or actual money from the sale of the property lies in the proposition that such claim is in that particular inconsistent with and contradictory to the recitals of their deed to their vendee, and we think that upon the question whether they did receive cash or gold coin they are concluded by the statement in that respect contained in their deed. Said deed, as we have shown, recited that the trustees received in gold coin the sum for which the property sold, viz. $2,720. The plaintiff had and has the right to rely upon the statement so made in the said deed as to the consideration therefor and the nature of such consideration, and to hold the trustees down to their declaration contained in the deed that they received from the sale of the property gold coin. In Harvey v. Foster, 64 Cal. 296, at page 298, 30 Pac. at page 849, in which it appears that the mortgagee, at the mortgage sale conducted by the sheriff, bid in the property at a sum far in excess of the mortgage debt for the purpose of covering also an unsecured debt due the mortgagee from the mortgagor, and in which it further appears that the sheriff executed his deed to the mortgagee for the full amount of the indebtedness, both that secured and that unsecured, and that the sheriff set up that fact as a defense in an action against him by an attaching creditor of the mortgagor to establish the validity of his attachment lien as against such excess, the court said:

"The sheriff's return to the order of sale shows that he received at the mortgage sale the sum of $15,753 cash. He cannot make any defense inconsistent with his return. Freeman on Executions, 450; Ferguson v. Tutt, 8 Kan. 370. A sheriff is concluded by his return when it is set up by any party who may claim something under it. Crocker on Sheriffs, 46."

We think, as above suggested, that the principle thus declared applies with equal pertinency and force to the case here. The trustees cannot declare in their deed that they have received, as a consideration for the conveyance, a certain sum in cash or gold coin, and then be permitted thereafter, in an action by the owner to recover the surplus remaining after the debt to secure which the deed of trust was given has been paid, to say or set up the defense that they received no cash or money. Indeed, as we have shown, if there is or ought to be an excess in their hands after the debt is satisfied, such a defense would be no defense at all, and, as is further said in the case from the opinion in which we have just made an excerpt, so it is in principle equally true in a case of this character:

"Where at a judicial sale property brings more than the amount of the execution, if the officer fails to pay the excess, or see to it that it is paid to the defendant, he and his sureties on his official bond are liable in an action * * * at the suit of the defendant for the excess. State v. Noel, 5 Ired. [27 N. C.] 357."

But there is still another phase of the case to which consideration is to be given and which involves questions to which the arguments in the briefs are principally addressed, viz. whether, upon the assumption that Mrs. Luise Borchard made the additional advances claimed by the trustees, she made such advances with or without that notice of the subsisting rights of the plaintiff which determines her right to do so.

[5] The rule with reference to future advances applicable to mortgages is, of course, applicable to trust deeds given entirely for the purpose of securing the payment of a debt or for the performance of any other act capable of being so secured. Savings & Loan Soc. v. Burnett, 106 Cal. 514, 533, 39 Pac. 922.

In Tapia v. Demartini, 77 Cal. 383, 19 Pac. 641, 11 Am. St. Rep. 288, the rule is stated as follows:

"The lien of the mortgage cannot be enforced as against subsequent incumbrances, of which the mortgagee has actual notice, for advancements or indorsements made or given after such notice. The notice must be actual. Constructive notice, by the recording of subsequent incumbrances, is not enough. Ackerman v. Hunsicker, 85 N. Y. 52, 39 Am. Rep. 621; Ward v. Cook, 17 N. J. Eq. 93, 99; Shirras v. Caig, 7 Cranch, 34 [3 L. Ed. 260]; 1 Jones on Mortgages, § 372; 3 Pomeroy's Eq. Jur. § 1199."

In Savings & L. Soc. v. Burnett, 106 Cal. 514, 533, 39 Pac. 922, 926, supra, our Supreme Court expressly approves the statement of the rule as made in Tapia v. Demartini, declaring that "the rule * * * as to optional advances made by a prior mortgagee, though opposed elsewhere by authority of respectability (1 Jones on Mortgages [5th Ed.] § 373), may be taken as declared in Tapia v. Demartini, 77 Cal. 387 [19 Pac. 641] 11 Am. St. Rep. 288," following which is the statement of the rule above quoted herein from the Tapia Case.

But in section 373 of 1 Jones on Mortgages (6th Ed.) the rule is broadly stated in the text as follows:

That "the rule that a recorded mortgage expressed to cover future advances has priority in all cases over subsequent conveyances and incumbrances has full support in recent discussions, and must now be regarded as a settled rule of law. Notwithstanding all the distinctions and refinements which have been introduced into the law on this subject by the many conflicting adjudications upon it, there is strong reason and authority for the rule that a mortgage to secure future advances, which on its face gives information enough as to the extent and purpose of the contract, so that any one interested may by ordinary diligence ascertain

the extent of the incumbrance, whether the extent of the contemplated advances be limited or not, and whether the mortgagee be bound to make the advances or not, will prevail over the supervening claims of purchasers or creditors, as to all advances made within the terms of such mortgage, whether made before or after the claims of such purchasers or creditors arose, or before or after the mortgagee had notice of them. If the mortgage contains enough to show a contract between the parties, that it is to stand as a security to the mortgagee for such indebtedness as may arise from the future dealings between the parties, it is sufficient to put a purchaser or incumbrancer on inquiry, and if he fails to make it he is not entitled to protection as a bona fide purchaser."

[6, 7] The rule as thus stated is deduced from a number of decisions from as many different jurisdictions, and it only goes to show that there is a decided contrariety of judicial views upon the subject, and, while it is to be readily conceded, as the learned author declares, that the rule as he states it is supported "by strong reason and authority," it must at the same time likewise be conceded that the rule as declared in the California cases above named is also sustained by strong reason and eminent authority. Indeed, the learned author himself so stated the rule in the earlier edition of his admirable work on mortgages. The California rule, as we may with propriety denominate it, would stand as ample protection to the senior mortgagee whose mortgage provided for optional future advances; for, having actual notice of the junior incumbrance, he would, if a prudent business man and the property was insufficient security to indemnify both mortgagees and additional advances by him, refuse to make the additional advances. On the other hand, it might happen that, although the property hypothecated might be amply sufficient to secure all the moneys loaned and such additional advances up to the limit specified in the mortgage as the mortgagee in his discretion might make, the mortgagee would, in the exercise of his optional right, refuse to make further advances. Let it then be supposed that the mortgagor, being in need of more money than he had in the first instance received from the mortgagee, secured a loan from a third party, giving to the latter a second mortgage on the property as security for the loan, and further suppose that thereafter the senior mortgagee, with actual notice of the second incumbrance, should elect to make further advances under his mortgage, and that the mortgagor, although in doing so acted in bad faith with the second mortgagee, accepted such advances up to the limit fixed in the senior mortgage; can it not then readily be seen how the rights of the second mortgagee could be wholly destroyed if the rule, as stated by Mr. Jones, were applied to the transaction? We are not only bound by the rule as it is declared and applied by our own Supreme Court, but are fully persuaded that it rests upon equally as sound reason as the rule accepted by the learned author referred to, and that its application is no more likely to lead to injustice or inequitable results than the other rule. Of course, we may suggest, if the provision in the first or prior mortgage as to future advances is mandatory in its nature and it thus becomes obligatory upon the mortgagee to make such advances, then the rule is different, and should be; for it would be manifestly unsound to hold that actual notice or knowledge by the senior mortgagee of a subsequent incumbrance would have the effect of taking from him the security of his lien for advances he was compelled by his contract to make. Be that as it may, however, the rule in this state, repeating it, is that the mortgage lien of a superior or prior mortgagee will not operate to secure optional advances made under such mortgage after such mortgagee has acquired actual notice of an incumbrance subsequent in point of time to his mortgage so as to defeat or impair the rights of the second incumbrancer.

Counsel for the appellants contend that, when Mrs. Luise Borchard made the advances referred to, she was without actual notice of the rights of Atkinson growing out of his mortgage, and that therefore her right to make advances at the time she claims that she did was not affected or foreclosed by the fact of the existence then of the said second mortgage.

In regard to this question of notice we conceive it to be proper first to consider what effect the recordation of the trustees' deed conveying the property to plaintiff had upon the rights of the parties. And in limine we remark that it is clear, from the undisputed evidence, that, as a matter of fact, as well as of law, Luise Borchard made no additional advances, notwithstanding it may be true that she paid for the younger Borchards an obligation existing against them, but which was not secured by the Phleger deed of trust prior to the acquisition of said deed by Luise Borchard. As seen, the evidence conclusively shows that at the time she (Luise) assumed and satisfied the said obligation the younger Borchards had been, by virtue of the sale and transfer of the property to the plaintiff, divested of any and all legal and equitable interest in the property. They were then no longer owners of the property, and therefore had lost their status as trustors under the Phleger deed; the plaintiff having been, in relation to said deed, transferred to their shoes and subrogated to all rights which they at any time had in the property. The plaintiff, in other words, upon acquiring the title of the younger Borchards to the property, became, in legal ef-

fect, the trustor under the Phleger deed of trust.

That at the time of making the alleged advances Luise Borchard had the notice prescribed by law of the deed conveying the property to Atkinson is quite obvious, as we shall now proceed to show.

Section 1213 of the Civil Code declares, inter alia:

"Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees."

This rule is, of course, applicable as well to trust deeds given to secure a debt. Savings & L. Soc. v. Burnett, 106 Cal. 514, 533, 39 Pac. 922, supra.

[8] The California rule, as we have shown, is that, when a second incumbrance is put upon property already hypothecated by mortgage to secure a debt, the senior mortgagee, under a clause in his mortgage providing for optional advances, may make such advances on the security of his mortgage if he has no actual notice of the second incumbrance. When additional advances are so made, they extend the scope of the lien, and in doing so the mortgage as to such advances constitutes a new lien or incumbrance.

[9, 10] It follows that Mrs. Luise Borchard, having made the alleged advances after the due recordation of the deed to Atkinson, is to be classed among the persons who, by virtue of the provisions of section 1213 of the Civil Code, are as subsequent mortgagees charged with constructive notice of the contents of the deed conveying the property to Atkinson, and she was bound and concluded by such notice. To be more explicit and stating the proposition concretely, the situation is this: That so long as the second trust deed existed as a lien upon the property, and before the sale of the property thereunder, actual notice of said lien by Mrs. Luise Borchard was necessary to cut off the lien of her deed as security for additional advances, but, when the transfer of the property to the plaintiff through the sale under the second deed of trust occurred, the said deed ceased to exist, and there was then no incumbrance on the property by virtue of the Atkinson trust deed, and upon the due recordation of the deed from the Atkinson trustees to Atkinson Luise Borchard was then, as a subsequent incumbrancer so far as were concerned any additional advances she might have made under her deed of trust, charged with constructive notice of the conveyance to the plaintiff, and this notice, under section 1213 of the Civil Code, was all that was required to vitiate the effect of the lien of her deed so far as were concerned any additional advances so made. This proposition obviously does not conflict with the rule as to the necessity of actual notice to the senior mortgagee of the subsequent incumbrance before the mortgage can become abortive as a lien to secure advances made after the second incumbrance has come into existence. We are firmly persuaded that this proposition is logical and sound; but, if we were compelled to yield our ground as to that position, we think that the plaintiff should prevail upon the proposition that Mrs. Luise Borchard, as a matter of law, had more than the constructive notice of the Atkinson deed of trust and of the conveyance of the property to Atkinson than is established by a mere recordation of a deed of conveyance.

It is not disputed that the attorney who acted for Mrs. Luise Borchard in the transaction culminating in the purchase by and transfer to said Mrs. Borchard of the Phleger deed of trust as well as one of the trustees under said trust had actual knowledge, prior to and at the time of said transaction, not only of the Atkinson deed of trust, but also of the sale and conveyance of said property to Atkinson under his deed of trust. They not only had such knowledge of these facts prior to and at the time Mrs. Luise Borchard took over the Phleger deed, but at the time had actual knowledge of the recordation in the office of the county recorder of the conveyance of the property to Atkinson.

The cases, in declaring that in such a case as this the lien of the senior mortgage will not operate to secure advances made after there has been a subsequent mortgage given against the property where such advances have been made by the senior mortgagee with actual notice at the time of the making of such advances of the existence of the subsequent incumbrance, say, as illustrative of the kind of notice which is not sufficient to charge the senior mortgagee with such notice in such case, that "constructive notice by the recording of subsequent incumbrances is not enough." In the present case, as we have shown, the attorney for Mrs. Luise Borchard at and before the time the alleged advances were made had actual knowledge of the fact of the existence of the second trust deed. This knowledge he acquired while he was acting as attorney for Luise Borchard in the transaction whereby she became the owner of the Phleger deed, and before she made the alleged additional advances. While this, as to Luise Borchard, was constructive notice only, yet it amounted to more than that mere constructive notice, which is, by virtue of the statute, imparted to subsequent purchasers and mortgagees. It is actual knowledge acquired by an agent of a matter vital to a pending transaction the execution or consummation of which is within the scope of the agent's powers as such agent.

[11] An attorney at law, when acting as such for his client, is an agent, and the rule that notice to an agent is constructive notice to the principal is applicable to an attorney or counsel when acting for another in a particular matter or generally in the affairs of the latter. Watson v. Sutro, 86 Cal. 500, 517, 24 Pac. 172, 25 Pac. 64. An agent acts in the place and stead of the principal in the matter committed to the former by the latter. His (the agent's) acts, within the scope of his agency, are those of the principal, and his knowledge of facts relating to any transaction within the limits of his authority as such agent is his principal's knowledge. In short, the agent, when negotiating a transaction for his principal, is engaged in performing acts which he has been authorized by his principal to perform, and he is when so acting in contemplation of law himself the principal. Watson v. Sutro, 86 Cal. 500, 517, 24 Pac. 172, 25 Pac. 64; Christie v. Sherwood, 113 Cal. 526, 45 Pac. 820. In the first mentioned of these cases the court, at page 517 of 86 Cal., at page 177 of 24 Pac., discussing this very question, expressly approves the following statement of the principle on which the above-stated rule rests in the case of The Distilled Spirits, 11 Wall. 367, 20 L. Ed. 167, Justice Bradley writing the opinion:

"'The general rule * * * that a principal is bound by the knowledge of his agent is based upon the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of the negotiation, and the presumption will be that he will perform that duty. It will be of no avail to the purchaser that the agent omitted to communicate what he ascertained to his principal. Williamson v. Brown, 15 N. Y. 359. In other words, one who acts through another will be presumed to know all that the agent learns during the transaction, whether it is actually communicated to him or not. There is no difference in this respect between actual and constructive notice; for, if there were, an agent would be employed whenever it was convenient to remain in ignorance.' Bank of United States v. Davis, 2 Hill [N. Y.] 451–461."

[12] It is true, of course, that, the purchase by Luise Borchard of the Phleger deed of trust having been consummated several months after her attorney in that transaction first acquired knowledge of the conveyance of the property to Atkinson upon the sale thereof under his deed of trust, the presumption that said attorney retained such knowledge, and had it present in his mind when the purchase by Luise Borchard was made, must depend upon the lapse of time and other circumstances. Distilled Spirits, 11 Wall. 366, 20 L. Ed. 167, supra; Yerger v. Barz, 56 Iowa, 77, 8 N. W. 769; Christie v. Sherwood, supra. The circumstances of the two transactions with both of which the attorney for Mrs. Luise Borchard was connected in his capacity as an attorney or counsel afford no other reasonable inference than that the circumstance of the sale and conveyance of the property on the sale thereof under the trust deed to Atkinson was present in his mind when the said Mrs. Borchard acquired ownership of the Phleger trust deed. The time intervening between the date of the acquisition by Atkinson of title to the property and that at which Mrs. Luise Borchard acquired title to the trust deed of Mrs. Phleger was only a few days over four months. Moreover, the said attorney of Luise Borchard appeared as one of the attorneys for the younger Borchards in the action in ejectment brought by Atkinson against the former to secure possession of the property after he (Atkinson) had become the owner thereof. Furthermore, just prior to the consummation of the negotiations resulting in the transfer of the Phleger deed to Luise Borchard, said attorney consulted and discussed with Mrs. Phleger's attorney the Atkinson trust deed and the sale thereunder. All these circumstances could not well have escaped the recollection of said attorney. Christie v. Sherwood, supra.

Thus we have given this appeal extended and painstaking consideration, and after such consideration we are thoroughly and firmly persuaded that from every point of view of which the case is susceptible no other just course is open to us but to affirm the judgment herein of the court below, and accordingly such is the order.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 477

PIONEER TRUCK CO. v. CLARK et al.

(Civ. 3003.)

(District Court of Appeal, Second District, Division 1, California. Nov. 28, 1919.)

1. JUSTICES OF THE PEACE ⟸44(9)—ACTION AGAINST ASSIGNOR OF SEVERAL CLAIMS NOT WITHIN JURISDICTION OF JUSTICE WHERE CAUSE OF ACTION IS SINGLE AND AGGREGATE OF CLAIMS BEYOND ITS JURISDICTION.

Assignee's cause of action against the assignor of claims against several hundred individuals, such claims ranging from 13 cents to $281 in amount, and aggregating over $9,000, was single and for the whole amount of the claims, so that jurisdiction was in the superior, and not in a justice, court; the cause of liability having grown out of the assignor's single contract.

2. JUDGMENT ⟸592—NO SPLITTING OF SINGLE DEMAND TO AVOID PLEA OF RES ADJUDICATA.

Plaintiff, having a demand which could and should have been presented in a single suit, could not so divide and split it up as to avoid the defense that the first action brought to judgment would debar him from any further prosecution of the claim.

3. JUDGMENT ⟸948(4)—PLEADING RES ADJUDICATA IN ABATEMENT UNTIL JUDGMENT BECOMES FINAL THEN PLEADING IN BAR.

Where successive suits were brought on items of a single cause of action, though plea in bar could not be interposed to the second and successive actions until the judgment in the first had become final, plea in abatement could be interposed in such second and subsequent actions until the first judgment had become final, and a plea in bar then made.

4. INJUNCTION ⟸32—NO RESTRAINT OF NUMEROUS SUITS ON SINGLE CAUSE OF ACTION.

Assignor of several hundred claims subjected to separate suits thereon in justice court by the assignee, though assignee's cause of action was single and within the jurisdiction of the superior court, *held* not entitled to injunction to stop proceedings in justice court, not being annoyed or put to unnecessary expense by being compelled to interpose plain legal defense available in justice court.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Pioneer Truck Company, a corporation, against Rex B. Clark and Solon Bryan, as Justice of the Peace of San Diego Township, San Diego County, State of California. From an order granting injunction, defendants appeal. Reversed.

Arthur L. Dorn, of San Diego, for appellants.

Warren E. Libby and Johnson & Ryan, all of San Diego, for respondent.

JAMES, J. This appeal is taken from an order granting an injunction, by which order the appellants were "enjoined and restrained from doing any act in the prosecution of or in any way prosecuting those certain actions, or any of them," at the time pending in the court of appellant Bryan, a justice of the peace. In form the injunction is of a permanent character, although when the stage of the proceedings at which it was made is observed it appears to be a temporary injunction merely, or one granted pending final determination of the issues joined in the complaint and answer. For all necessary purposes it may be considered as a temporary injunction only. Under this assumption all questions presented may be considered.

The facts, as shown by the allegations of the complaint, are that, various differences having existed between respondent and appellant Clark, a written agreement was entered into settling all disputed matters. One consideration, among many others which under the settlement contract moved to Clark from respondent, was the assignment of claims said to exist in favor of respondent against sundry individuals (several hundred in number), said claims ranging from 13 cents to $281 in amount. The aggregate of the claims exceeded $9,000. The term of the written contract under which this assignment was made provided in part as follows:

"The Pioneer Truck Company, a corporation, hereby assigns, transfers, and sets over unto Rex B. Clark each and every its accounts and claims against various persons, a full and complete list of which is marked Exhibit A, hereto attached and made a part hereof, and does hereby further agree with said Clark to deliver to him all data of every kind and character or nature in its possession relating thereto or necessary or expedient to enable the said Clark to establish the virtue of each and every said claim in the ordinary procedure in a court of justice."

After obtaining title to these claims Clark, as appears by his allegations in the justice court actions hereinafter referred to, failed to secure payment from the individual debtors. He claimed that some of the alleged claims were worthless and did not in fact exist at the time of the assignment by respondent, and that as to others the respondent had failed to furnish him with the necessary data by which the verity of the claims might be established. Thereupon he brought 18 suits in the justice's court against respondent for an aggregate amount of $4,785.23. In these different actions he chose sufficient of the alleged claims to make the amount sued for in each a sum within the jurisdiction of the justice's court. These actions were all filed on the same day; hence we assume that the liability of the respondent as to all of them, if any there was, had then accrued. The

first action filed was brought to trial, a trial was had, and the justice took the matter under advisement. Before decision was rendered respondent brought this action for an injunction, praying that the appellants be restrained from proceeding any further in any of the actions in the justice's court, and that Clark be permitted by cross-complaint to set up in the injunction suit any claim which he might have as embraced within the eighteen separate actions. A temporary restraining order was made, an order to show cause was issued, and hearing had thereon. At the conclusion of this hearing the court made the order which has been appealed from. Appellant's position may be summarized under two heads, namely: First, that the demands which he presented in the justice court actions were several, and that he had the legal right to sue separately as to each; second, that even though his demands were not several, equity would not restrain the prosecution of the suits for the reason that respondent herein was not restricted in its right to interpose any legal defense possessed by it in the justice's court. In addition to these contentions, appellant urges also that no facts were stated in the petition of the respondent from which it could be deduced that the prosecution of the several actions would be vexatious to respondent within the legal meaning of that term.

[1-4] Our preliminary conclusion is, and one about which we entertain no doubt at all, that Clark at the time he brought his justice court actions had but one right of action, and that right of action was for the whole amount of his claim. The jurisdiction because of this amount was in the superior court, and not in a justice's court. The cause of the liability sought to be fixed upon the respondent grew out of one contract. It matters not that, considering it to be true, as Clark alleged, some of the alleged claims never existed, and others were prevented from being collected by failure of respondent to furnish data. The whole amount sought to be collected having accrued under the same contract, all was collectible in one action, even though different counts might have been used. Bailey v. Sloan, 65 Cal. 387, 4 Pac. 349; Ventura County v. Clay, 114 Cal. 242, 46 Pac. 9. Having, then, a demand which could and should have been presented in a single suit, Clark could not have so divided and split up his demand as to avoid the defense that the first action brought to judgment would debar him from any further prosecution of the alleged claim. Herriter v. Porter, 23 Cal. 385; Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423. It might be suggested that a plea in bar could not be interposed to the second and successive actions until the judgment had become final. A plea in abatement could be interposed in such second and subsequent actions until the first judgment had become final, and a plea in bar then made. Brown v. Campbell, 110 Cal. 644, 43 Pac. 12. Clearing up the legal situation, then, as to Clark's rights, it appears that a plea in abatement and bar to all of the actions in the justice's court subsequent to the first one would be good, and that he would be debarred from any relief in the latter. We then have to consider whether, under these circumstances, the respondent here had the right to call into use the extraordinary remedy of an injunction to stop the proceedings in the justice's court. We do not think that it had such right; for we do not think that it is made to appear under the circumstances that respondent would be unnecessarily vexed and annoyed or put to unnecessary expense by reason of being compelled to interpose the plain legal defenses available to it in the justice's court. The remedy here sought exists without question in a proper case. Mr. Pomeroy, in his work on Equity Jurisprudence (4th Ed.) at paragraph 1371, says:

"There are, however, special circumstances in which a resort to the injunctive jurisdiction may still be necessary, in order to prevent a failure of justice. These cases may, I think, be reduced to a few general classes: (1) Where it is essential to promote the ends of justice that an entire controversy should be determined in one proceeding, so that the rights and duties of all parties interested may be finally settled, it may be necessary to restrain other suits, so as to prevent the pendency of two or more actions involving the same subject-matter, or to prevent a partial litigation of the controversy, or to prevent a multiplicity of suits depending upon the same facts or principles. In short, the jurisdiction must sometimes be exercised to prevent a multiplicity of actions, or partial investigations which would work injustice. * * *"

Section 254:

"* * * It must be admitted that this exercise of the equitable jurisdiction is somewhat extraordinary, since the rights and interests involved are wholly legal, and the substantial relief given by the court is also purely legal. It may be assumed, therefore, that a court of equity will not exercise jurisdiction on this particular ground, unless its interference is clearly necessary to promote the ends of justice, and to shield the plaintiff from a litigation which is evidently vexatious. It should be carefully observed that a court of equity does not interfere in this class of cases to restrain absolutely and completely any and all trial and decision of the questions presented by the pending actions at law; it only intervenes to prevent the repeated or numerous trials, and to bring the whole within the scope and effect of one judicial investigation and decision."

In practical effect appellant Clark, by bringing different actions on the same claim, upon securing a determination of the first action, waived or lost his right to pros-

ecute any of the others subsequently commenced; this condition, of course, assuming a proper plea properly interposed by his adversary. If he saw fit to do this and suffered loss in consequence, we do not think that a court of equity should deny him that privilege. The determination of the legal question of the bar would be settled without the presence of many witnesses and speedily settled. For these reasons, we do not think such a case is presented as authorized the court to make the injunction from which order this appeal is prosecuted.

The order appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 660

Ex parte BOOTH. (Cr. 882.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1919.)

CRIMINAL LAW ⇐979(2)—UNAUTHORIZED INDETERMINATE SENTENCE DID NOT AFFECT JURISDICTION OF COURT TO SUBSEQUENTLY RENDER CORRECT JUDGMENT.

A judgment imposing an indeterminate sentence in a case where the sentence was unauthorized was in legal effect no judgment at all, and the court did not thereby lose jurisdiction to pronounce a valid judgment after accused was committed and ordered returned to court for that purpose.

Application by Ernest G. Booth for a writ of habeas corpus to be directed to James A. Johnston, as Warden of San Quentin State Prison. Petition denied.

Ernest G. Booth, in pro. per.

PER CURIAM. This is an application for a writ of habeas corpus. The petitioner, who is confined in the California state prison at San Quentin, was sentenced by the superior court, in and for the county of Butte, on September 24, 1917, "for the indeterminate term of one to fourteen years," after having entered a plea of guilty to the crime of forgery, committed on the 18th day of June, 1917, before the indeterminate sentence law of this state went into effect. Thereafter, and pursuant to the personal request of the petitioner, the court made an order for his return into court, to the end that a legal judgment might be pronounced and entered in the case, following the procedure laid down in the Matter of the Application of Charles Lee for a Writ of Habeas Corpus, 177 Cal. 690, 171 Pac. 958. The defendant was, on the 22d day of March, sentenced to serve a term of five years in the state penitentiary at San Quentin. The defendant thereupon in open court gave notice of, and thereafter perfected, an appeal from the judgment. The precise questions, presented by this petition, were considered by the District Court of Appeal for the Third Appellate District and were decided adversely to the appellant. People v. Booth, 174 Pac. 685.

The petition for the issuance of a writ of habeas corpus is therefore denied.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

44 Cal. App. 685

LAWSON v. STEINBECK et al. (Civ. 3022.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1919. Hearing Denied by Supreme Court Feb. 5, 1920.)

1. PRINCIPAL AND AGENT ⊂=23(4) — FACTS SHOWING BUYING AGENCY.

Where an intermediary was authorized to draw upon defendant for the purchase price of live stock purchased by the intermediary and shipped to defendant, and defendant, after deducting freight, handling charges, his commission, and cost of live stock, would credit the balance to the intermediary, etc., the intermediary was defendant's agent.

2. APPEAL AND ERROR ⊂=761 — CONTENTION MERELY STATED WITHOUT AUTHORITY OR ARGUMENT NOT CONSIDERED.

Appellant's contention that certain findings were outside the issues, but not supported by authority or argument, will not be considered upon appeal.

3. TRIAL ⊂=396(1) — FINDINGS SUFFICIENT ALTHOUGH NOT CLOSELY FOLLOWING PLEADINGS.

Findings which are specific and definite as to the issuable facts are sufficient, although they do not closely follow the pleadings.

4. PRINCIPAL AND AGENT ⊂=190(2)—AGENT'S DECLARATIONS ADMISSIBLE IN ACTION AGAINST PRINCIPAL.

In action against a principal, the agent's declarations to plaintiff were admissible, where it appeared that an agency might exist and plaintiff desired to show he dealt with the agent as such, and not as a principal.

5 STIPULATIONS ⊂=18(6) — OBJECTIONS TO DEPOSITION GOVERNED BY STIPULATION INSTEAD OF STATUTE.

A deposition, taken under a stipulation that it might be used with the same effect as though legal notice had been given, is governed by the stipulation, and is not subject to the objections permitted by the Code of Civil Procedure.

6. WITNESSES ⊂=321 — SHOWING ANSWERS GIVEN BEFORE CORRECTING TESTIMONY NOT IMPEACHMENT OF DEPOSITION WITNESS.

Answers in a deposition as they read before the witness corrected his testimony are admissible when offered by the adverse party and do not constitute an attempt of the opposing party to discredit his own witness, in view of Code Civ. Proc. § 2055.

7. PRINCIPAL AND AGENT ⊂=20(2) — OTHER TRANSACTIONS INADMISSIBLE TO DISPROVE RELATIONSHIP.

In an action to hold defendant liable as principal for cattle purchases made by another, evidence regarding the course of dealing between defendant and his claimed agent on cattle shipments other than those involved is inadmissible to disprove the existence of the relationship.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by D. P. Lawson against H. C. W. Steinbeck and another. Judgment for plaintiff, and the named defendant appeals. Affirmed.

W. E. Rode, of Oakland, for appellant.

R. Clarence Ogden, of San Francisco, and W. D. L. Held, of Ukiah, for respondent.

WASTE, P. J. This action was brought by plaintiff to recover $800, for hogs alleged to have been sold by plaintiff in one lot, and $825 for cattle sold by him in another lot, to defendants, Steinbeck and Moore; it being particularly alleged that Moore was authorized by Steinbeck to act as Steinbeck's agent in making said purchases. Steinbeck answered, denying the purchase of the stock, and also denying that Moore was at any time his agent in the matter. No proceedings were taken in the trial against Moore, and plaintiff had judgment against Steinbeck, from which judgment this appeal is taken.

[1] The lower court found that, prior to any of the transactions had between plaintiff and Moore, Steinbeck and Moore had entered into an agreement, to the effect that Steinbeck would pay the owner for all live stock purchased by Moore and shipped to, and received by, Steinbeck, and that he (Steinbeck) would honor drafts drawn by Moore upon Steinbeck, in favor of the seller, in payment for the live stock so purchased and shipped to and received by him. The agreement also provided that Steinbeck would slaughter, or otherwise dispose of, the live stock, and, after deducting from the proceeds thereof the freight, handling charges, and commission for handling the same, together with the cost of such live stock, would credit the balance of the proceeds to Moore. This agreement, the court found, was in full force and effect during the negotiations between the plaintiff and Moore, and the live stock purchased by Moore from plaintiff and shipped to Steinbeck was received by the latter subject and pursuant to the terms and conditions thereof. Appellant attacks these findings as being without the issues, contending that by the allegations of the complaint and by the testimony plaintiff was seeking to hold defendant Steinbeck liable for obligations incurred through the agency of Moore, whereas the findings, he contends, "can be reasonably construed only as a finding that Moore purchased the live stock as principal." The evidence, as we construe it, supports, and fully warrants, the court's finding. It is therefore plain, so far as this phase of the case is concerned, that the plaintiff was entitled to judgment, for the circumstances of the case at bar are similar to those considered in Thomas v. Moody, 57 Cal. 215, which

facts the court held constituted an agency sufficient to charge the defendant.

[2] Appellant's contention that "findings I and III of a delivery (not a sale) of the live stock on certain unpleaded representations, were likewise outside of the issues," thus meagerly stated, without any citation of authority, or any argument, will not be considered by us. Dore v. Southern Pacific Co., 163 Cal. 182, 199, 124 Pac. 817; Duncan v. Ramish, 142 Cal. 686, 689, 76 Pac. 661.

[3] Appellant next contends that the court failed to find on the issues as to the alleged sale and delivery of the live stock and as to Moore's agency in the transaction. The findings on these issues are not that the allegations of the complaint are true, and do not in so many words find the allegations of the answer to be untrue. They are, however, specific and definite as to what the facts raised by each issue really were, as shown by the evidence. This is sufficient. It is not necessary that the facts found shall be in any particular form, or follow the pleadings. The law is complied with if the truth or falsity of each material allegation in issue can be demonstrated from the findings. Millard v. Supreme Council, 81 Cal. 340, 342, 22 Pac. 864. If the findings, taken together, are such that the court can say that the ultimate facts necessary result therefrom, they are sufficient. Mott v. Ewing, 90 Cal. 231, 235, 27 Pac. 194.

The appellant argues that several of the findings are not supported by the evidence. An examination of the record discloses that findings II and IV, to the effect that Steinbeck accepted the live stock purchases by Moore, is amply supported by testimony of Steinbeck himself and his manager, Lorey. Finding V, that Steinbeck received the entire proceeds from the sale and disposition of the live stock, and, after making the deductions provided for in his agreement with Moore, applied the balance thereof upon an indebtedness owing from Moore to Steinbeck, is fully supported by the word of Steinbeck himself, when he testified:

"I sold these hogs, and steers, and heifers, and applied the proceeds to Mr. Moore's account to offset his debt to me."

An apparent inconsistency in this finding, as to what constituted the balance of the proceeds applied to Moore's indebtedness, is immaterial and in no way affects the conclusion reached by the lower court. The phrase, "including the cost of such live stock," appears to have been inserted in the wrong place. Finding VI, as to the agreement made between Steinbeck and Moore, prior to the purchase of the cattle by the latter, is conclusively established by the testimony of Steinbeck and others.

Appellant's contention that the findings do not support the judgment is equally lacking in merit. Thomas v. Moody, supra.

[4] Appellant's claim that the court committed error in the admission of testimony rests upon his mistaken view as to the theory upon which the case was tried, and the effect to be given to the court's findings. The testimony of plaintiff Lawson, as to the conversation he had with Moore regarding the sale of the cattle, was not admitted until after the deposition of defendant Steinbeck had been read, from which the trial court held it appeared that an agency between Steinbeck and Moore might exist. Furthermore, the declarations of Moore at that time were admissible upon another theory. It was proper to show that plaintiff dealt with Moore as an assumed agent of Steinbeck, not for the purpose of proving Moore's agency or its extent, but to show that the plaintiff understood he was dealing with Moore as an agent and not as a principal. Swinnerton v. Argonaut Land, etc., Co., 112 Cal. 375, 379, 44 Pac. 719; Bergtholdt v. Porter Bros., 114 Cal. 681, 689, 46 Pac. 738.

[5-7] The deposition of Steinbeck, the admission of which appellant objected to, and which it moved to strike out, was taken and read at the trial by stipulation that same should be used "with like effect as though legal notice had been given." It was therefore not subject to objections permitted by the Code of Civil Procedure (People v. Grundell, 75 Cal. 301, 305, 17 Pac. 214), but is governed by the stipulation and not by the statutory provision (Robinson v. Placerville, etc., R. R. Co., 65 Cal. 263, 3 Pac. 878). The court did not commit error in permitting the plaintiff to put in evidence the answers made by defendant Steinbeck on the taking of his deposition prior to his having corrected the same. Such answers were the proper subject of cross-examination. The objection that the deposition was read in evidence by the plaintiff, and that, in seeking to show defendant's answers made before correcting the deposition, plaintiff was attempting to discredit his own witness, was of no force. Section 2055, Code Civ. Proc. The court correctly sustained the objection of plaintiff to the endeavor of defendant to prove the method of payment of drafts drawn by Moore for other cattle than the two lots concerned in the instant case. In order to disprove plaintiff's contention that Moore was Steinbeck's agent in dealing with plaintiff, defendant sought to go into the entire course of dealings between the two, which evidence the court rightly held to be immaterial.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

44 Cal. App. 576

GOODRICH v. MORTIMER. (Civ. 3118.)

(District Court of Appeal, First District, Division 1, California. Dec. 3, 1919. Hearing Denied by Supreme Court, Jan. 29, 1920.)

1. ADVERSE POSSESSION ⟸79(4) — INVALID TAX DEED SHOWS COLOR OF TITLE AND POSSESSION IN GOOD FAITH.

Deed from a tax collector supported by insufficient notice and affidavit was admissible in an action to quiet title to show color of title and possession in good faith by plaintiff's remote predecessor, the successor of the grantee.

2. ADVERSE POSSESSION ⟸46—ABANDONMENT OF INTENTION TO BUILD NOT A DESTRUCTION OF POSSESSION.

Where one claiming a lot under tax deed, based on insufficient notice and affidavit, on account of lack of means abandoned her intention to build on the lot, her adverse possession of and claim to the property were not destroyed.

3. ADVERSE POSSESSION ⟸100(1)—INCLOSURE NOT NECESSARY IN CASE OF ENTRY UNDER COLOR OF TITLE.

To constitute actual possession, inclosure of town lot by a fence or other structure was not necessary; the entry being under color of title supplied by a tax deed supported by insufficient notice and affidavit.

4. ADVERSE POSSESSION ⟸29—POSSESSION FOR REQUIRED PERIOD GIVES TITLE.

Where one claiming land under a tax deed supported by insufficient notice and affidavit so appropriated the land by piling building bricks on it and by clearing part of it as to convey to the community visible notice it was in the exclusive use and enjoyment of herself and husband, such adverse possession was sufficient to ripen into title in claimant and her successors, under Code Civ. Proc. § 322.

5. ADVERSE POSSESSION ⟸84—KNOWLEDGE OF DEFECT IN TITLE DOES NOT DESTROY ADVERSE CHARACTER OF POSSESSION OR RIGHTS.

Knowledge of a defect in title is not sufficient to destroy the adverse character of possession or rights acquired thereunder.

6. ADVERSE POSSESSION ⟸44—NO BREAK IN CONTINUITY BY COLORABLE CONVEYANCE OF RECORD TITLE IN TRUST.

Where an adverse holder of land under color of title afforded by a tax deed supported by insufficient notice and affidavit, to discourage a party who was presenting a claim against her, conveyed the lot and other property to her cousin, not parting with whatever title she acquired through the tax deed to her immediate predecessor and his deed to her, the cousin holding record title in trust for the adverse possessor, and later reconveying to her, there was no such break in the continuity of adverse possession as restored seisin to the owner prior to tax sale.

7. ADVERSE POSSESSION ⟸53—NO ABANDONMENT OF CLAIM TO LAND BY LEAVING TOWN TEMPORARILY.

Where an adverse possessor of land left the town, but with intention to return, she did not abandon her claim to the land; abandonment being a question of intention.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by O. F. Goodrich against C. White Mortimer, administrator, etc., substituted defendant. From judgment for plaintiff, defendant appeals. Affirmed.

H. A. Massey, Irl D. Brett, and Chas. S. Conner, all of Los Angeles, for appellant.

Geo. H. Moore, Wm. B. Ogden, and John F. Poole, all of Los Angeles, of respondent.

WASTE, P. J. Plaintiff brought this action against John Drew Gay and others to quiet title to a lot situate in the town of Lancaster, alleging himself and his predecessors to have been in the actual, exclusive, and adverse possession thereof, continuously for 20 years, claiming the same against the world, and having paid all taxes for the statutory time required to perfect adverse possession. After filing the complaint, appellant, C. White Mortimer, administrator of the estate of Gay, was substituted as defendant. The administrator filed a cross-complaint and brought into the action certain parties claiming as mortgagees and lienholders under, but not adverse to, plaintiff. Judgment was entered for the plaintiff against the defendant Mortimer, as administrator of Gay, and he alone appeals.

Gay acquired the legal title to the property during his lifetime from M. L. Wicks, by deed dated January 14, 1884. He failed to pay the state and county taxes levied thereon for the year 1890, and the property was sold by the tax collector of Los Angeles county to W. A. Dunn. He assigned the certificate thereof to Henry Hollamby, who in due time received the tax collector's deed. On August 11, 1892, Hollamby sold the lot to Mrs. Alice J. Rutledge, upon whose acts in the matter much depends in the determination of the question of adverse possession. Plaintiff acquired the lot from O. P. Adams by quitclaim deed dated December 27, 1909.

[1] At the trial the defendant objected to the admission in evidence of the deed from the tax collector to Hollamby on the ground that the notice and affidavit on which the deed was based were insufficient to support it. Plaintiff admitted the infirmity of the document, but relied upon it as and offered it for the purpose of showing color of title and possession in good faith, and the record indicates that it was admitted by the trial court upon that theory, which was correct.

Packard v. Moss, 68 Cal. 123, 127, 128, 8 Pac. 818; Kockemann v. Bickel, 92 Cal. 665–667, 28 Pac. 686; Simmons v. McCarthy, 128 Cal. 455, 458, 60 Pac. 1037.

The property was assessed in 1893, the next year after Mrs. Rutledge acquired it, in the name of her husband; for 1894–1896, inclusive, in the name of Ella G. Park; for 1897–1909, inclusive, in the name of Mrs. Rutledge; and for 1910–1916, inclusive, in the name of plaintiff. There were produced and received in evidence tax receipts showing the payment by plaintiff of all taxes levied and assessed on the lot for the years 1910 to 1915, both inclusive. The defendant administrator then admitted that all taxes which had been levied and assessed on the property subsequent to the 11th day of August, 1892, had been paid by plaintiff and his grantors.

The basis of plaintiff's title is the prior possession of himself and his grantors. Appellant contends that the acts of plaintiff and his grantors, relied upon by respondent, are not sufficient to establish and maintain a title by adverse possession. In 1892 Lancaster was a small, unincorporated village, covered with sagebrush where the lots had not been cleared off. When Mrs. Rutledge purchased the lot from Hollamby, she paid him the reasonable market value thereof, supposing, she testified, that she was getting a perfect legal title thereto. She intended to erect store buildings thereon, and in preparation for the work cleared the sagebrush from a portion of the lot and staked out the location of the first building. She bought some 50,000 bricks, which were hauled to the lot and dumped in piles three or four feet in height scattered in rows about the place. Finding that she did not have enough money with which to erect the store buildings as she had planned, some months later she removed about half the bricks to other property, where they were used for building purposes. The bricks remaining on the lot were sold from time to time, and the residents of the town carried away others. Mrs. Rutledge never inclosed the lot with a fence and never marked its exterior boundaries. There was testimony that for several years after the bricks were placed on the ground by Mrs. Rutledge the lot was used by the children of the town; these piles of bricks affording convenient "hiding places." Some of the children, now grown to maturity, and several other witnesses testified that the bricks were on the lot during that time and as late as 1900. Plaintiff testified that he bought from Mrs. Rutledge, and paid for, bricks taken from the lot as late as 1907.

There was further testimony that the witnesses "knew" Mrs. Rutledge was the owner of the lot; that they "understood" so; that that was the "general understanding" in the town of Lancaster; that "the general public understood" she owned it; that it was generally spoken of as "the Rutledge lot," and later as the "Goodrich lot." Some of the witnesses testified that it was "generally understood" that Mrs. Rutledge and plaintiff had a "tax title" to the lot.

Plaintiff leased the lot through Adams in 1908, and for a time used it as the site of a tent in which he maintained a bowling alley. Soon after he acquired the property in 1909 he cleared the lot, repaired the sidewalk, placed a barrier to ward off trespassers, and erected three buildings on the premises. At the time of the trial it was shown that Lancaster was still a small, unincorporated village of about 600 or 700 inhabitants. Judging from the entire record, it does not appear that there was much, if any, demand for real estate in the community from 1892, when Mrs. Rutledge entered into possession, until the advent of good roads and highways, about the time the present action was begun. The lot in question was covered with sand and sagebrush. The use the owner put it to during that time was about the only use it was adapted to in view of the needs of the community.

[2-4] Mrs. Rutledge always claimed to own as good title to the property as could be secured by a tax deed. It was purchased by her as a site for buildings to be erected thereon, which was undoubtedly the ordinary and eventual use to which the lot would be put. Her entry thereon was in good faith and for the purpose of carrying out her building plans. Her abandonment of her intention in that regard did not have the result of destroying her possession of and claim to the property, which was asserted in the manner before recited. Montgomery & Mullen Lumber Co. v. Quimby, 164 Cal. 250–253, 128 Pac. 402. To constitute actual possession, the inclosure of the lot by a fence or other structure was not necessary; the entry being under color of title. Hicks v. Coleman, 25 Cal. 122, 133, 85 Am. Dec. 103. In the instant case there was such an appropriation of the land by the claimants as to convey to the community where it was situated visible notice that it was in their exclusive use and enjoyment. Such possession was sufficient. Lofstadt v. Murasky, 152 Cal. 64, 68, 91 Pac. 1008. Plaintiff, by himself and his predecessors, paid all the taxes levied on the property for 26 years. This fact tended to show the nature and character of the claim under which plaintiff held and was further evidence that it had not been abandoned. Baum v. Reay, 96 Cal. 462, 466, 29 Pac. 117, 31 Pac. 561.

The lower court was correct in holding that the possession of the plaintiff and his grantors, as indicated by their foregoing assertion of control over the property, based as it was upon a claim of title, founded upon a written instrument, as being a conveyance

of the property in question, was sufficient to constitute adverse possession for the required statutory period. Section 322, Code Civ. Proc.; Cousino v. Western Shore Lumber Co. (Sup.) 175 Pac. 406; Kockemann v. Bickel, supra.

[5, 6] Appellant attempts to weaken respondent's position somewhat by calling attention to the fact that both he and Mrs. Rutledge had knowledge of the infirmity of Mrs. Rutledge's title before plaintiff acquired the property. There is no merit in the suggestion. The knowledge of a defect in title is not sufficient to destroy the adverse character of the possession or rights acquired thereunder. Montgomery & Mullen Lumber Co. v. Quimby, supra.

During 1893, in order "to discourage" a party who was pressing a claim against her, Mrs. Rutledge, by deed absolute on its face, duly recorded, conveyed the lot and other property to her cousin, Ella G. Park. Mrs. Park did not attempt to take possession of the property. She did not pay any of the taxes, made no claim of any actual interest therein, and on August 25, 1899, at the request of Mrs. Rutledge, reconveyed the lot to her. Basing his contention on these facts, appellant contends that when Mrs. Rutledge executed the deed to Mrs. Park she divested herself of her color of title, and as a result there was a break in the continuity of her adverse possession and a restoration of the seizin of Gay. The answer to this contention must rest in the fact that Mrs. Rutledge never parted with whatever right and title she acquired through the tax deed to Hollamby, her immediate predecessor, and his deed to her. While her record title passed to Mrs. Park, she never quit, but retained and at all times maintained her possession, and asserted her claim and color of title under the tax deed. She never parted with such ownership. Mrs. Park held the record title in trust for and subordination to the will and pleasure of Mrs. Rutledge. Defendant made no attempt to establish to the contrary. The facts at bar serve to distinguish the cases cited by appellant. In the instances therein considered, as we read them, there was an actual passing of all estate and interest of ownership, as well as of title, in some cases to the true owner, and in others to a stranger.

What we have said in relation to the deed to Mrs. Park would apply with equal force to the deed from Mrs. Rutledge to her son Adams, executed in 1905, and which appears to have been given for a similar purpose. Another element enters into the consideration of that transaction, however, for the claim of Mrs. Rutledge had long prior thereto ripened into a prescriptive title, through her entry in 1892, under color of right and her continued adverse possession and payment of taxes for nearly 13 years.

[7] The fact that Mrs. Rutledge did not live continuously in Lancaster during her alleged adverse possession, considered in the light of all the other features in the case, did not work an abandonment of her claim. If the person in possession of land leaves it with the intention of returning he does not abandon it. Abandonment is a question of intention. Moon v. Rollins, 36 Cal. 333, 338, 95 Am. Dec. 181; Wood v. Etiwanda Water Co., 147 Cal. 228, 234, 81 Pac. 512.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

182 Cal. 81

In re KELLEY'S ESTATE.

KELLEY et al. v. BEESON.

(L. A. 6132.)

(Supreme Court of California. Jan. 14, 1920.)

1. EXECUTORS AND ADMINISTRATORS ⟸15—EXECUTOR NAMED IN WILL MAY BE APPOINTED THOUGH HE IS A RESIDENT FOR SOLE PURPOSE OF ADMINISTRATION.

Under Code Civ. Proc. §§ 1349, 1350, the fact that the executor named in a will is not a permanent resident of the state, but in it only to administer on the estate, does not disqualify him from acting as executor, nor render him ineligible for appointment, and order appointing him on his application is authorized and required.

2. EXECUTORS AND ADMINISTRATORS ⟸15—EXECUTOR'S DISCOURTESY TO WIDOW AND DISREGARD OF HER WISHES NOT A WANT OF INTEGRITY.

Showing that the executor named in a will was not courteous to testator's widow and disregarded her requests or wishes concerning the selection of an attorney to advise him in administration is no support of the claim that he is incompetent to act as executor by reason of want of integrity.

3. COSTS ⟸260(4)—GROUNDLESS APPEAL DELAYING SETTLEMENT OF ESTATE CAUSE FOR ASSESSMENT OF PENALTY.

Where, on appeal from orders denying their application for letters of administration with the will annexed, and granting the application of another named as executor in the will for letters testamentary, appellants did not file closing brief within the time allowed, while the appeal, wholly without merit or support, has occasioned a delay of at least a year in settlement of the estate, and could not have been taken with any reasonable hope of success, appellants must pay a penalty of $100 to the executor.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Jasper Kelley, deceased, wherein Anne Kelley and R. L. Bocock applied for letters of administration with the will annexed to be issued to Bocock, and David Beeson, named as executor in decedent's will, applied for letters testamentary. From orders denying the application for letters of administration, and granting the application for letters testamentary, applicants Kelley and Bocock appeal. Orders affirmed, and penalty assessed.

E. B. Coil, of Los Angeles, for appellants.

Lucien Gray, of Los Angeles, for respondent.

SHAW, J. The appeal herein is taken from an order denying the application of the appellant Bocock for letters of administration with the will annexed, upon the estate of the decedent, and granting the application of David Beeson for letters testamentary thereon.

Jasper Kelley died, a resident of Los Angeles county, on August 29, 1918. He left a will wherein he named the respondent, David Beeson, as executor. At the time of the death of the decedent, Beeson was a resident of Illinois, but he has come to California and has appeared and submitted himself to the jurisdiction of the superior court for the purposes of administration of the estate and intends to remain here as long as may be necessary to complete the administration.

[1] The appellants opposed the appointment of Beeson as executor on the ground that he is a resident of Illinois, and that he is incompetent to perform the duties of the trust because of want of understanding and integrity. The fact that he is not a permanent resident of California, but is here only for the purpose of administering upon the estate of the decedent, does not disqualify him from acting as executor, nor render him ineligible for appointment as such, and the order of the court appointing him executor upon his application therefor was authorized and required by the Code (Code Civ. Proc. §§ 1349, 1350). These sections require the court to appoint the person named in the will as executor, provided he appears and submits himself to the jurisdiction of the court, regardless of the place of his residence. This question was before the court and was very fully considered and was so decided in Estate of Brown, 80 Cal. 381, 22 Pac. 233. The provisions of the Code are plain, and the decision is clear. Even if there was any doubt before that decision, it has been entirely removed thereby, and the decision has ever since been considered as settling the law of the state on the subject. Estate of Richardson, 120 Cal. 346, 52 Pac. 832; Estate of Brundage, 141 Cal. 540, 75 Pac. 175.

[2] The claim that Beeson is incompetent by reason of want of integrity and understanding is wholly without support in the evidence. It is not claimed that he is not fully competent so far as his understanding is concerned. The only impeachment of his integrity is based on the claim that he was not courteous to the widow and that he disregarded her requests or wishes concerning the selection of an attorney to advise him in the administration of the estate. There was nothing in his conduct which in any respect indicated a want of integrity.

[3] The appeal was presented to the court in October, 1919, and the appellants were then allowed 15 days thereafter within which to file a closing brief. The time elapsed and no brief was filed. The appeal is wholly without support or merit. It has occasioned a delay of at least a year in the set-

tlement of the estate. It could not have been taken with any reasonable hope of success. Under the circumstances, the appellant should pay a penalty to the respondent because of the appeal. We consider the sum of $100 a proper amount to be charged.

It is ordered that the orders appealed from be affirmed and that the respondent recover of appellants the sum of $100 as a penalty.

We concur: LAWLOR, J.; OLNEY, J.

182 Cal. 68

HINKEL v. CROWSON. (S. F. 9321.)

(Supreme Court of California. Jan. 9, 1920.)

APPEAL AND ERROR ⊂=465(2) — MANDAMUS ⊂=3(11)—SOLE REMEDY FOR STAY PENDING APPEAL FROM JUDGMENT FOR SALE OF LAND IS BY MANDAMUS TO JUDGE REFUSING TO FIX BOND AT AMOUNT CLAIMED.

Under Code Civ. Proc. § 945, providing that execution of a judgment for sale of real estate cannot be stayed pending appeal unless appellant execute a bond in an amount to be fixed by the judge of the trial court, he refusing to fix it in an amount claimed by appellant to be proper, the proper remedy is not by application to the appellate court for writ of supersedeas, it being without jurisdiction to fix the amount of the bond, without which there can be no supersedeas, but the sole remedy is by mandamus.

In Bank.

Action by John Hinkel against E. A. Crowson. Defendant, having appealed from judgment for plaintiff, applies to the Supreme Court for writ of supersedeas. Application denied.

James F. Sheehan, Chas. J. Heggerty, and Knight & Heggerty, all of San Francisco, for appellant.

Richard B. Bell, of Berkeley (R. M. F. Soto, of San Francisco, of counsel), for respondent.

PER CURIAM. This is an application for a writ of supersedeas pending appeal, in a case in which the judgment adjudged a vendor's lien, and directed a sale in satisfaction thereof. The case falls within the provisions of section 945, Code of Civil Procedure, the judgment directing the sale of real property. The property is in the possession of appellant. Section 945, Code of Civil Procedure, requires that the judge of the court rendering the judgment shall fix the amount of the bond. It is alleged that the judge refuses to fix the amount of a bond to indemnify against waste alone, but insists on including therewith an amount covering the value of the use and occupation of the premises. It is claimed that appellant is entitled to a stay upon a bond covering waste alone. See Englund v. Lewis et al., 25 Cal. 337, 354, which appears to have decided this very question upon a statute like section 945, Code of Civil Procedure.

However, we have no jurisdiction to fix the amount of the bond, and there can be no supersedeas in the absence of a bond the amount of which is fixed in the manner provided by the statute. Petitioner's sole remedy is a proceeding in mandamus. See Doudell v. Shoo, 158 Cal. 50, 109 Pac. 615.

The application is denied.

ANGELLOTTI, C. J., and OLNEY, WILBUR, SHAW, and LAWLOR, JJ., and KERRIGAN, Judge pro tem., concur.

44 Cal. App. 629

TRYON et al. v. CLINCH et al. (Civ. 2447.)

(District Court of Appeal, Second District, Division 1, California. Dec. 5, 1919. Hearing Denied by Supreme Court Feb. 2, 1920.)

1. PRINCIPAL AND AGENT ⊂=169(2)—RATIFICATION OF CONTRACT BY SUBSEQUENT SIGNATURE.

Where three owners of land determined it would be advisable to have a street constructed, and two of them made a contract for such construction, and subsequently the third owner, who had been absent during the work, signed his name on the written proposal for the work previously made by the others under their signatures after the word "Accepted" written by them, such action on his part constituted a sufficient ratification of the contract by him.

2. PRINCIPAL AND AGENT ⊂=163(2)—NO NEW CONSIDERATION TO SUPPORT RATIFICATION OF CONTRACT NECESSARY.

In case of ratification of a contract by a principal, there need be no new consideration particularly referable to the act of ratification.

3. PRINCIPAL AND AGENT ⊂=145(2)—PRINCIPAL KNOWN BUT NOT NAMED CANNOT BE HELD UNLESS HE RATIFIES.

Where a principal is known, but not named in the agreement, he cannot thereafter be held unless he ratifies the contract.

4. APPEAL AND ERROR ⊂=877(6)—FINDING OF LIABILITY TO OTHER DEFENDANTS NOT RESULTING IN ADJUDICATION CANNOT BE REVIEWED.

Where there could have been no judgment in favor of two defendants against a third, the court's determination or finding of liability existing on the part of such third defendant toward the other two was not an adjudication of the question, and therefore not a matter about which the third defendant can complain on appeal from judgment for plaintiffs.

5. INTEREST ⟸19(1)—NOT ALLOWED ON UNLIQUIDATED CLAIM OF CONTRACTORS PREVENTED FROM PERFORMING.

Where plaintiffs were prevented from fully completing their contemplated work for defendants in the manner agreed because of defendants' acts, their claim at the time was unliquidated, and not one falling within Civ. Code, § 3287, providing for an allowance of interest on unpaid claims.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by R. G. Tryon and W. C. Brain, copartners doing business under the fictitious firm name and style of Tryon & Brain, against C. N. Clinch, W. F. Markham, and others. From judgment for plaintiffs, the defendant Markham appeals. Judgment modified, and, as modified, affirmed.

Harlan G. Palmer and William J. Palmer, both of Los Angeles, for appellant.

Albert J. Sherer and Robert Young, both of Los Angeles, for respondents.

JAMES, J. This is an appeal taken by defendant Markham from a judgment entered in favor of the plaintiffs after second trial of the cause. The first judgment was brought here by appeal of the same defendant; the case being reported in 32 Cal. App. at page 150, 162 Pac. 162, under the same title.

The action was brought by the plaintiffs to recover for the value of work done and materials furnished in the laying out and improvement of a certain street or roadway. The facts are that appellant and his codefendants Clinch and See were severally the owners of certain portions of a tract of land; about two-thirds of it belonged to appellant, and the other defendants held an equitable title to the remainder. Under this condition of ownership appellant conferred with Clinch and See, and together they determined that it would be advisable to construct a street through the tract. Clinch or See agreed to look up a contractor, and did this. However, before any contract was made the appellant was called East. Before going he consulted further with Clinch and See and left the matter of arranging for the street improvement work with them. About this time, or shortly thereafter, the plaintiffs addressed a written proposal to Clinch and See in which terms were expressed for the doing of the work, and Clinch and See indorsed the same under the word "Accepted." We gather that they retained this letter in their possession, but gave notice to plaintiffs of their acceptance of the proposal and the plaintiffs proceeded to do the work agreed upon. A completed job, as the contract described the work, was not done for the reason that the plaintiffs were interrupted through the acts of the defendants. These acts culminated in the street being offered and received for dedication by the city of Los Angeles prior to the completion of the work. Under the city specifications the work, as contracted for, could not be completed in the manner specified by the parties in their agreement. Not being permitted by the city, because of the acts of the defendants, to proceed with the work, plaintiffs sought to recover the value of that already done and performed; hence this suit. All of the work for which compensation was claimed had been done and materials furnished prior to the time that appellant returned from his Eastern trip. Upon his return report was made to him by Clinch and See of the agreement entered into, and he, at their suggestion signed his name upon the written proposal theretofore made by plaintiffs and under the signatures of his codefendants after the word "Accepted." At the first trial the court entered judgment for the full amount against the three defendants. Upon the appeal this court determined that under the facts shown Clinch and See, assuming that they acted as agents of Markham, had only authority to bind him to such a proportion of the whole contract price as his proportion of the tract bore to the whole amount thereof. A reversal was accordingly ordered. Upon the second trial the court apportioned the recovery in accordance with the views expressed in the opinion in the former case. Appellant is once more here urging that the judgment be reversed.

[1, 2] Preliminarily it may be stated that there was ample evidence to support the conclusion that it was the intention of appellant, prior to his departure for the East, to authorize Clinch and See to act for him in the matter of contracting for the street work, although this fact is immaterial if it appear that appellant with full knowledge appended his signature to the letter of proposal after he returned from the East. This, of course, assuming that such act was sufficient to show ratification of the preceding acts of Clinch and See. That the approval of the proposal so expressed by Markham constituted a sufficient ratification of the contract we have no doubt. The doctrine of ratification is especially applicable to cases where the original act of the pretended agent was unauthorized. Mr. Mechem, in his work on Agency, vol. 1 (2d Ed.) par. 348, and in the paragraphs following, announces the general rule governing the application of the doctrine, which we need not here restate, for it is of an elementary kind. We may make the added remark, however, that in case of ratification of a contract by a principal there need be no new consideration particularly referable to the doing of the act of ratification.

[3] It appeared in evidence that at the time the written proposal was addressed to Clinch and See the plaintiffs had knowledge

of the interest of Markham in the tract of land, but not knowing his initials did not insert his name in the proposal. Taking this fact as a basis, appellant argues that there could then be no ratification because, where a contract is made omitting the name of a known principal, the latter cannot thereafter be held, citing Ferguson v. McBean, 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65. That case was not one involving ratification at all, and it is a better statement of the law to say that, where a principal is known but not named in an agreement, he cannot thereafter be held unless he ratifies the contract. The textbook on Agency to which we have referred, we think, sufficiently announces this rule, which is sustained by authorities therein cited.

[4, 5] In one of its findings the court used this language:

"But the said defendant Markham signed the said instrument as evidence of an agreement made between said defendant Markham and the said defendants Clinch and See, whereby the said defendant Markham agreed to pay the said defendants Clinch and See such proportion of the costs of improving Morning Gate court as the frontage owned by the defendant Markham upon said Morning Gate court would bear to the entire frontage thereupon; and the said defendant Markham also signed said instrument in ratification of and as evidence of a ratification of a contract entered into between the plaintiffs herein and the said defendants Clinch and See, by which the said defendant Markham was to pay the plaintiffs said proportion of the costs of said work."

Appellant complains that an inconsistent condition of fact is presented by the finding, in that it is found both that appellant agreed to pay Clinch and See and also agreed to pay the plaintiffs. We do not think that the finding as to a double liability vitiates the finding as to the liability to the plaintiffs separately considered. There was and could have been no judgment in this case in favor of Clinch and See against the appellant; hence the court's determination of any liability existing on the part of appellant toward Clinch and See would not be an adjudication of that question, and therefore a matter about which appellant cannot be here concerned. A similar observation might be made as to some other of the general findings made by the court. The general finding that the service, work, and labor were performed on account of defendants and were furnished to and for defendants was explained and modified in the subsequent findings, which showed the proportions of the liabilities assumed. Appellant did not deny that he had indorsed the proposal after the word "Accepted"; his whole contention apparently being that by so doing he became liable to Clinch and See and not to the plaintiffs, who were proposing to do the work. Under the pleadings and evidence shown in the record, we are satisfied that the main judgment, as made by the court, is fully supported, and that no errors have been pointed out sufficient to require a second reversal being ordered in the controversy. A modification, however, of the judgment is necessary. The court, in making up its judgment, included therein interest on the amount found to be due at legal rate from the date when the plaintiffs ceased in their performance of the work under their contract. We have before noted that they were prevented from fully completing the contemplated work in the manner agreed because of the act of defendants; hence their claim at that time was unliquidated, and, we think, not one which would fall within the class described in section 3287, Civ. Code, which provides for an allowance of interest on unpaid claims. The case cited by appellant, to wit, Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, is in point, and under that authority the interest should not have been allowed.

The judgment appealed from is modified by striking therefrom all allowance to the plaintiffs of interest on the principal sum found to be due to the plaintiffs from appellant; as so modified the judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

44 Cal. App. 564

QUACKENBUSH v. DARROUGH et al.

(Civ. 3031.)

(District Court of Appeal, Second District, Division 2, California. Dec. 3, 1919.)

1. APPEARANCE ⇐8(3) — FILING DEMURRER AN APPEARANCE.

The filing of a demurrer by defendants constituted an appearance by them.

2. MORTGAGES ⇐448—ALLEGATION ON FORECLOSURE SUFFICIENTLY SHOWED NONPAYMENT.

Allegation in a complaint to foreclose a mortgage, "and the principal mentioned in said mortgage and note together with interest thereon at the rate of 7 per cent. per annum from the 16th day of February, 1916, still remains due and unpaid," was a direct and sufficient allegation that all of the interest which accrued subsequent to February 16, 1916, remained unpaid, notwithstanding the fact that according to the complaint the quarterly payment of interest was not due until February 18, 1916.

3. MORTGAGES ⇐448—ALLEGATION OF NONPAYMENT ON FORECLOSURE NEED NOT NEGATIVE PAYMENT BY PURCHASER OF MORTGAGED LAND.

An allegation in a complaint to foreclose a mortgage that the principal and interest "still remains due and unpaid from the said J. and S. (the mortgagors) to the plaintiff" was suffi-

cient, although it did not negative payment by a stranger or by persons who had purchased the mortgaged property, or to some person other than plaintiff.

4. APPEAL AND ERROR ⟸1170(3)—NO REVERSAL FOR ERROR IN OVERRULING SPECIAL DEMURRER WHERE COMPLAINT WAS GOOD AGAINST GENERAL DEMURRER AND DEFENDANT DID NOT ANSWER.

Where an allegation of nonpayment in an action to foreclose a mortgage was sufficient as against a general demurrer, a judgment of foreclosure will not be reversed under Const. art. 6, § 4½, merely because the court erroneously overruled a special demurrer; appellant defendant having failed to answer after the overruling of the demurrer.

Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by C. W. Quackenbush against James W. Darrough and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Sam Ferry Smith and Eugene Ferry Smith, both of San Diego, for appellants.

F. G. Blood, of San Diego, for respondent.

THOMAS, J. This is an action to foreclose a mortgage executed by defendants James W. Darrough and Susan E. Darrough, his wife, to plaintiff to secure the payment of a note for the principal sum of $1,500, dated May 18, 1915, payable on or before five years after date. The defendants Raymond W. Smith and Mary E. Nelson Smith, his wife, are subsequent purchasers of the property from the defendants Darrough, and are made parties to the action for that reason.

All defendants were duly and legally served with summons and complaint. The defendants Darrough defaulted. The defendants Smith appeared and entered demurrer, which was general and special in its terms, and which, after presentation and consideration by the court, was overruled. The defendants Smith did not answer, but the judgment roll does not disclose the filing or entering of their default for not so doing. Subsequently a decree of foreclosure was entered, ostensibly against the defendants Darrough, as no mention is made therein of the defendants Smith, except the erroneous recital in the decree that "defendants Raymond W. Smith and Mary E. Nelson Smith not appearing," when, as a matter of fact, both had appeared by filing a demurrer as aforesaid, and the further recital that they had been duly and legally served with summons, and that all the interest and estate of said defendants so served in said lands and premises, and all their right and title to the same, is subject and subordinate, etc.

The appeal is by the defendants Smith only, and from the judgment on the judgment roll alone. The sufficiency of the complaint and the validity of the judgment are therefore before the court for review.

[1] That the filing of a demurrer by the defendants Smith constituted an appearance by them is, we think, not debatable. Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351; Dollar v. International Banking Corporation, 10 Cal. App. 83, 101 Pac. 34; Maclay Co. v. Meads, 14 Cal. App. 363, 112 Pac. 195, 113 Pac. 364; Altpeter v. Postal, etc., Co., 26 Cal. App. 705, 148 Pac. 241; Clark v. Forbes, 34 Cal. App. 524, 168 Pac. 155.

Notwithstanding this fact, we think these appealing defendants are without standing in this court. They are mentioned in the decree only as already above set forth.

[2, 3] Appellants contend that, being the owners of the land subject to the mortgage in question, they are entitled, under the law, if the land is to be sold under foreclosure decree, to have that done in the manner provided by law, and that, accordingly, they are entitled to the service upon them of a complaint which is at least invulnerable to general demurrer. And with this we agree. But we think the complaint served in this action was such a complaint, although not as carefully drawn as might be desired. The allegation of nonpayment is as follows:

"That no payments have been made on the principal, and no payments on the interest since the 20th day of April, 1916, as provided for in said note and mortgage; *and the principal mentioned in said mortgage and note, together with the interest thereon at the rate of 7 per cent. per annum from the 16th day of February, 1916, still remains due and unpaid from the said James W. Darrough and Susan E. Darrough to the plaintiff.*"

The italicized portion of the foregoing allegation is, we think, the saving clause. It is, in our opinion, a direct and sufficient allegation that all of the interest which accrued subsequent to February 16, 1916, remains "unpaid"; and this notwithstanding the fact that, according to the complaint, the quarterly payment of interest was not due until February 18, 1916, for a reason which must be obvious. Unless it can be successfully maintained that the allegation is insufficient merely because it alleges that the said principal and interest is unpaid from the defendants Darrough to the plaintiff, the complaint must be held to be sufficient. Notwithstanding the strict rule in this state, we think the objection to the complaint cannot be successfully maintained. It is not necessary to negative payment by a stranger, or to some person other than plaintiff. Sanford v. Litchenberger, 62 Neb. 501, 87 N. W. 305; Lincoln County v. Fetterman, 170 Cal. 357, 149 Pac. 811; 8 C. J. 882 et seq.

[4] We think, therefore, the allegation of nonpayment sufficient as against a general

demurrer, and, the special demurrer having been overruled and judgment given for plaintiff, that the judgment should not be reversed merely because the court possibly may have erred in so ruling. Alexander v. Central Lumber, etc., Co., 104 Cal. 532, 38 Pac. 410; Const. Cal. art. 6, § 4½.

For these reasons, coupled with the fact that appellants' attorneys have been frank enough to say that, "while such is our view of the result, and we want to be frank with the court on the point, we have taken the appeal only out of the abundance of precaution," the judgment, we think, should be sustained.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

44 Cal. App. 664

TEAGUE INV. CO. v. SETCHEL.

(Civ. 3077.)

(District Court of Appeal, First District, Division 1, California. Dec. 9, 1919.)

1. SPECIFIC PERFORMANCE ⟸96—VENDEE REPUDIATING CONTRACT NOT ENTITLED TO TENDER OF DEED PRIOR TO VENDOR'S ACTION FOR SPECIFIC PERFORMANCE.

Vendee in a contract of sale of land having repudiated the transaction and attempted to rescind the contract, it was no longer necessary for the vendor, before bringing a suit for specific performance, to tender the vendee a deed or a certificate of title provided for in the contract.

2. APPEAL AND ERROR ⟸1011(1)—FINDINGS OF COURT ON CONFLICTING EVIDENCE NOT DISTURBED.

Findings of trial court based on a substantial conflict in the evidence will not be disturbed.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action for specific performance by the Teague Investment Company against W. Flanders Setchel. Judgment for plaintiff, and defendant appeals. Affirmed.

E. A. Williams, of Fresno, for appellant.
J. P. Bernhard, of Fresno, for respondent.

RICHARDS, J. This is an appeal from a judgment in plaintiff's favor in an action brought by it to recover the sum of $5,784, with interest, costs, and counsel fees, alleged to have become due said plaintiff by reason of defendant's failure to perform the terms of a certain contract for the purchase from said plaintiff of certain real estate.

The facts of the case are briefly these: On December 1, 1913, the plaintiff and defendant entered into an agreement in writing for the sale by the former and purchase by the latter of a certain tract of land in the county of Fresno for the sum of $6,603, of which sum $818 was to be paid in cash, and the balance in a series of installments of $500 a year for the period of three years, at the end of which time the balance remaining due was to be paid. The purchaser was to receive, and in fact did receive, possession of the property at the date of said agreement, and he was thereafter to pay all state, county, and school taxes assessed against said land. By the terms of said agreement the seller, upon receiving from the purchaser the payments provided for therein, was to execute and deliver to the purchaser a good and sufficient deed conveying the premises in question free and clear from all incumbrances except as it might be subject to certain rights of way for ditches, roads, and electric power lines which had theretofore been created in relation to said property, and should also furnish to the purchaser a certificate of title to the same.

The defendant did not make any of the payments of the several installments due or to become due upon said agreement, and did not pay any of the taxes which were assessed against said property, but some time after the agreement was made and after he had entered into possession of the premises the defendant claimed to have discovered that the plaintiff had sold certain other property in the larger tract of which the premises in question were a part for a less sum per acre than that which was provided for in his contract for the purchase of said premises, and this, he claimed, was in violation of an oral agreement and understanding between the parties forming an inducement for the entering into said contract, to the effect that the plaintiff would not offer for sale or sell any portion of said larger tract of land for a less rate than $150 per acre; and that having sold to other parties a large portion of said tract for a sum less than said amount per acre, in violation of its alleged oral agreement with said defendant, he was entitled to, and undertook to, rescind said agreement.

Notwithstanding said attempted recission the plaintiff, on the 11th day of July, 1918, tendered to the defendant a sufficient deed of conveyance to the premises in question, and demanded of him payment of the balance due upon the purchase price thereof, and upon the defendant's refusal to accept said deed or pay said money the plaintiff commenced this action.

Upon the trial of the cause the court made its findings to the effect that all of the allegations of the plaintiff's complaint were true except as to the matter of counsel fees, which it reduced somewhat, and that all the averments of the defendant's answer were untrue

with the exception of the averment therein denying that a certificate of title to the land in question had been tendered by the plaintiff to the defendant at any time; and in respect to that matter the court found that no certificate of title had been tendered by the plaintiff to the defendant, and that none such had been demanded of him, and that the defendant, at the time of his refusal to accept the plaintiff's tendered deed and to pay the balance of the purchase price, had made no objection to the form or mode of such tender. As conclusions of law based upon said findings the trial court held that the plaintiff was entitled to recover the amount remaining due upon said agreement, together with certain other amounts expended for taxes and attorneys' fees, and that said plaintiff was entitled to a lien upon the premises covered by said agreement for the payment of said sums, and to have such lien foreclosed and the amount of its said judgment realized by the sale of the premises.

From the judgment rendered and entered in accordance with these findings of fact and conclusions of law the defendant has prosecuted this appeal.

[1] The first contention of the appellant is that the plaintiff was not entitled to maintain this action or to the relief sought and given therein, for the reason that at the time of its tender of a deed to the premises in question it had not also tendered to the defendant the certificate of title provided for in said agreement. There are several answers to this contention; the first and all-sufficient one being that the defendant having, prior to the plaintiff's tender of a deed to the premises, repudiated the transaction and attempted to rescind said contract, it was no longer necessary for the plaintiff to tender the defendant a deed, and, for a like reason, it was unnecessary to make a tender of a certificate of title to said premises. Ocean Shore Development Co. v. Hammond, 175 Pac. 706; Ehrhart v. Mahony, 170 Cal. 148, 148 Pac. 934.

[2] The appellant's next contention is that the evidence in the case is insufficient to justify the decision of the trial court to the effect that the defendant was not entitled to rescind, and that he did not in fact rescind, the agreement which formed the basis of the plaintiff's cause of action. An examination of the record, however, satisfies us that there is ample evidence to sustain the findings and conclusions of the trial court upon this subject and that, the testimony in regard thereto being in substantial conflict, the determination of this issue against the defendant will not be disturbed upon appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 781

MONDINE et al. v. LABAIG et al. (Civ. 3158.)

(District Court of Appeal, First District, Division 1, California. Dec. 13, 1919.)

1. ADVERSE POSSESSION ⊂=110(4)—ALLEGATION OF OWNERSHIP IN FEE PRESENTS QUESTION OF ADVERSE POSSESSION.

Allegation of plaintiffs' ownership in fee of property *held* to present question whether plaintiffs acquired title to property by adverse possession.

2. ADVERSE POSSESSION ⊂=117—FINDING OF OWNERSHIP IN FEE DISPOSES OF DEFENSE OF ADVERSE POSSESSION.

Finding that plaintiffs are owners in fee of property *held* to dispose of question of whether plaintiffs acquired title to such property by adverse possession.

3. TRIAL ⊂=391—ALLEGATION ADMITTED BY ANSWER TREATED AS FOUND.

An allegation admitted by answer must be treated as found.

4. APPEAL AND ERROR ⊂=1052(6)—ADMISSION OF DEED HARMLESS WHERE DEED FOUND VOID.

In an action to quiet title admission of evidence of tax deed, if error, was harmless, where court found that deed was void and of no effect.

5. ADVERSE POSSESSION ⊂=78 — DECREE OF DISTRIBUTION ADMISSIBLE TO SHOW CLAIM OF TITLE FOUNDED ON WRITTEN INSTRUMENT.

In an action to quiet title, where plaintiffs claimed as devisees of tax sale purchaser and also as holders of title acquired by adverse possession under Code Civ. Proc. § 323, decree of distribution of the estate of the tax sale purchaser was admissible in evidence, notwithstanding finding that tax deed was void, on issue of adverse possession, to show that plaintiffs' claim of title was founded upon a written instrument, under such statute.

6. APPEAL AND ERROR ⊂=1056(4)—EXCLUSION OF EVIDENCE IN ACTION TO QUIET TITLE HARMLESS IN VIEW OF VERDICT.

In an action to quiet title, where plaintiffs claimed as devisees of tax sale purchaser, and also as holders of title acquired by adverse possession, exclusion of testimony as to conversation between defendant and tax sale purchaser, whereby it was agreed that such purchaser was to pay taxes, if error, was harmless, where tax deed was held to be void, and plaintiffs were found to have acquired title by adverse possession, since such agreement as to payment of taxes could not bar plaintiffs' right to acquire title by adverse possession after tax sale purchaser's death.

7. TRIAL ⊂=377(2)—REOPENING OF CASE FOR ADDITIONAL TESTIMONY NOT ERROR.

Court did not err in reopening case to hear further testimony, after it had announced judgment in favor of defendants, and thereafter ordering judgment for plaintiffs, where defendants were offered, and availed themselves of, the opportunity to introduce additional testimony.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

8. ADVERSE POSSESSION ⊂⊃44—CONTINUITY OF POSSESSION NOT BROKEN BY OCCASIONAL VACANCY FOR WANT OF TENANTS.

Plaintiffs claiming property under decree of distribution for 12 years, paying all taxes and assessments upon property during such time, and occupying premises through tenants, acquired title by adverse possession, under Code Civ. Proc. § 323, notwithstanding that premises were at times vacant for want of a tenant; such vacancy not destroying plaintiffs' continuity of possession.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Clemence Mondine and others against Martin Labaig and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellants.

George J. Denis, of Los Angeles, for respondents.

WOOD, Judge pro tem. The complaint in this action is in the ordinary form to quiet title. The defendants in their answer assert ownership of an undivided one-half of the property, and by way of cross-complaint they demand a partition thereof, or, if the same cannot be had without material injury, then that it be sold and that the proceeds be divided; they also ask for an accounting of the rents collected by plaintiffs. Plaintiffs had judgment, and defendants appeal.

The property was at one time owned by the defendant Labaig and one Bertrand Payot as cotenants. In 1902 the premises were sold for a delinquent street assessment, and Payot became the purchaser at such sale and received the tax deed therefor. The trial court expressly found, however, that this deed was void and of no effect. By his last will Payot, assuming apparently that he owned the whole property, devised the same to plaintiffs, and it was so distributed in the decree of distribution in the estate of Payot in March, 1905.

[1, 2] In their answer to the cross-complaint, plaintiffs, in attempting to allege ownership by occupancy and adverse possession, allege that such possession was "under claim of *right*," instead of "under claim of *title*." Appellants contend that the complaint was insufficient to present the question of adverse possession. The action, however, was heard in the superior court upon the assumption that the issue was properly presented, and the findings follow the language of the complaint. The complaint alleges, and the findings also declare, that the plaintiffs are the owners in fee of the property, etc. This was sufficient to present and dispose of the question of title by adverse possession. Jordan v. Beale, 172 Cal. 227, 155 Pac. 990.

[3] Complaint is made that the finding "that the allegations of the cross-complaint herein are untrue, except as otherwise found to be true," is too indefinite to support the judgment. There are, however, specific findings upon all the issues raised by the pleadings, including the cross-complaint and answer thereto, which are sufficient, and which amply support the judgment. The allegation of the cross-complaint as to the collection of rents by plaintiffs, on which the defendants and cross-complainants sought an accounting, was admitted by the answer thereto, and must be treated as found. First Nat. Bank v. Maxwell, 123 Cal. 360, 366, 55 Pac. 980, 69 Am. St. Rep. 64; In re Doyle, 73 Cal. 564, 571, 15 Pac. 125. Appellants do not claim that they were misled by the finding. In Fritz v. Mills, 170 Cal. 449, 150 Pac. 375, the challenged finding was:

"That all the allegations of the * * * amended complaint, 'in so far as such allegations are controverted by the answer of the defendants thereto,' are untrue."

The other findings in the case being clearly sufficient, the court declined to reverse the case, "because of the absence of valid findings."

[4] It is claimed that the court erred in admitting the tax deed in evidence. As the findings declare that this deed was void and of no effect, we are unable to perceive any injury to appellants.

[5] It was proper to admit in evidence the decree of distribution in the estate of Payot. There is no claim made by plaintiffs, as contended by appellants, that the effect of it was to divest them of their title by proceedings in probate. It was admitted to show that the plaintiff claimed title founded upon a written instrument as provided in section 323 of the Code of Civil Procedure.

[6] The wife of the defendant Labaig was a witness. Counsel offered to prove by her that Labaig and Payot, in his lifetime, had an oral agreement to the effect that Payot should pay the city taxes on the lot, and that they were to pay the county taxes; that shortly prior to Payot's death they found that the county taxes had been paid by some one, and that they wrote to Payot that, if he had paid the taxes, to call and that they would pay their share. They received no response. Conceding that the agreement could be proved, as stated by counsel, it could not bar plaintiffs of the right to acquire title by adverse possession after Payot's death.

[7] After the case was submitted, and the court had announced judgment in favor of defendants, over their objection, the court, at the request of plaintiffs, reopened the case to hear further testimony. Thereafter additional evidence was received, and the court then ordered judgment for plaintiffs. There

was no error in this action of the court, as the defendants were offered and availed themselves of the opportunity to introduce such additional evidence as they desired the court to consider.

The point is made that there is no finding that the defendant Law Credit Company knew that its codefendant Labaig had been given actual notice that plaintiffs claimed adversely to him. The Law Credit Company apparently appeared in the action voluntarily, asserting that it was sued by the fictitious name of John Doe. The only evidence in the record relating to its interest in the property is as follows:

"Mr. Odell: I offer a grant deed of Mr. Martin Labaig and Marie Labaig to Law Credit Company of an undivided one-fourth interest.

"The Court: That will be Exhibit 1."

Assuming that the deed related to the property involved in this action, it does not appear that it was ever recorded, or that it was executed until years after plaintiffs had perfected their title by adverse possession. The grantee never asserted any claim to the property until the filing of the cross-complaint in this action. The court found that neither defendant had any right, title, interest, or estate in the property. That was sufficient, taken in connection with the other findings, to support the judgment against the defendant Law Credit Company.

[8] It is claimed that the evidence is insufficient to sustain the findings relating to adverse possession. It appears from such evidence that the property is a vacant single lot in the city of Los Angeles; that in the fall of 1905 the plaintiffs told the wife of the defendant Labaig that they claimed the entire property. She wrote to Labaig, who was away at the time at his ranch, that they had been to see him, and of the object of their visit. Upon his return home a few weeks later he called at the home of plaintiffs, and was informed by Pierre Echardies that the lot had been given to them by Payot and that they were going to uphold their rights. At that time Labaig said "that he had some good lawyers and that he would see who had rights." Plaintiffs paid all taxes and assessments upon the property from the decree of distribution to the time of the trial, in all about 12 consecutive years. In 1906, in order to obtain an income from the place they moved a house upon the lot. They continuously from that time occupied the premises, not in person, but through their tenants, collecting all the rents and retaining them for themselves, claiming to own the property under the decree of distribution adversely to all the world, and no one ever disputed their claim. The defendant Labaig was a witness upon the trial, and while he denied that he had ever had a conversation with the plaintiffs about the property, yet he did not deny that his own wife had informed him of plaintiffs' visit to his home and of their claim of ownership. The wife, however, endeavored as a witness to fix this visit at a period a little less than 5 years before the commencement of the action. Labaig, as a witness, did not deny that he knew that the improvements had been made upon the lot, and that plaintiffs during all the years thereafter had continuously exercised dominion and control over the property, asserting claim of ownership and title adverse to him and the world. There may be some uncertainty in the evidence as to whether upon occasions a loss of income was caused by the failure of the tenants to pay their rent, or for want of a tenant; but, assuming that it was for the latter cause, that would not destroy plaintiffs' continuity of possession. As was said in Montgomery & Mullen Lumber Co. v. Quimby, 164 Cal. 250, 128 Pac. 402:

"It is not essential to such continuity, in every case, that there shall be a continuous personal presence on the lot of some person holding for the adverse claimant. It is enough, under the Code, that it is devoted to the 'ordinary use of the occupant' where the possession is under color of title as it is here."

The evidence is adequate to support the findings.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 558

MERCANTILE TRUST CO. OF SAN FRANCISCO v. STOCKTON TERMINAL & E. R. CO. et al. (Civ. 2008.)

(District Court of Appeal, Third District, California. Dec. 3, 1919.)

PARTIES ⟸43—DEMURRER FILED, WITHOUT LEAVE, BY STOCKHOLDER CLAIMING RIGHT TO APPEAR AS PERSON SUED BY FICTITIOUS NAME IN MORTGAGE FORECLOSURE AGAINST CORPORATION IS PROPERLY STRICKEN FROM FILES.

In a mortgage foreclosure action against a corporation designated by its true name, where in several persons whose true names were alleged to be unknown were designated in the complaint by fictitious names under Code Civ. Proc. § 474, a stockholder claiming to be one of the persons intended to be sued, though he was not served with summons, had no right to appear by filing a demurrer without leave of court and against plaintiff's wishes, and the demurrer was properly stricken from the files on plaintiff's motion before entry of judgment against the corporation, the only defendant served.

Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by the Mercantile Trust Company of San Francisco against the Stockton Terminal & Eastern Railroad Company and others to foreclose a mortgage. From a judgment of foreclosure, the defendant J. A Nesbitt appeals, and plaintiff moved to dismiss the appeal. Judgment affirmed.

A. H. Carpenter, of Stockton, for appellant.

Morrison, Dunne & Brobeck, of San Francisco, and T. S. Louttit, of Stockton, for respondent.

ELLISON, Presiding Judge pro tem. This action was brought to obtain a decree of foreclosure of a mortgage executed by the defendant Stockton Terminal & Eastern Railway Company to the plaintiff to secure an issue of bonds of said railway company.

The defendant Stockton Terminal & Eastern Railway Company was the only defendant designated in the complaint by its true name, and was the only defendant ever served with summons. Several persons were designated in the caption of the complaint and also in the body thereof as First Doe, Second Doe, and so forth, and as to these it was alleged that their true names were unknown to the plaintiff, and it prayed that when their names were ascertained the complaint might be amended by inserting their true names in lieu of said fictitious names.

Before the trial of the action, and without any service of summons on him as one of the defendants whose true name was unknown and who was sued by a fictitious name, and without any service at all of process upon him, one J. A. Nesbitt filed a demurrer to the complaint in the words and figures as follows, to wit (after the title of the court and cause):

"Comes now J. A. Nesbitt, one of the stockholders of the defendant Stockton Terminal & Eastern Railway Company, and as the defendant First Doe mentioned and referred to in the plaintiff's complaint in this action, and demurs to the plaintiff's said complaint on file herein on the ground that the facts therein stated are not sufficient to constitute a cause of action or to entitle plaintiff to any relief whatever, wherefore said defendant prays judgment on this, his demurrer."

Thereafter the plaintiff moved the court to strike said demurrer from the files, which motion was granted.

Mr. Nesbitt appeals from the judgment of foreclosure rendered in this action, and claims that the court erred in striking his demurrer from the files. The only point raised in his appeal is the correctness of the court's ruling in this matter.

[1] Section 474 of the Code of Civil Procedure provides:

"When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly."

The purpose of this section is obvious from the reading. Cases may arise and do arise where the plaintiff has in mind a person he deems a proper or necessary party defendant, but of whose true name he is ignorant. In such case he may bring his suit, alleging the fact of his ignorance of the true name of the party, and designating him by any name, and when his true name is ascertained amend his pleading by inserting it therein, but it must be a genuine case of ignorance of the true name of the party.

The plaintiff's ignorance of the true name of the defendant must be real, and not feigned. It must not be willful ignorance, or such as might be removed by some inquiry or resort to information easily accessible. Rosencrantz v. Rogers, 40 Cal. 491.

It is true, as stated by counsel for respondent, that a litigant has a right to select the persons whom he desires be made defendants in the action.

It must be apparent that, if the plaintiff has not in some way made Mr. Nesbitt a party to the action, he had no right to appear therein by demurrer. He was not by name a party to the suit, and he was not served as one of those sued by a fictitious name. It was for the plaintiff to make known in some way the real persons whom he desired as defendants and whom he sued by fictitious names. This he can do by a service of summons on the person, stating that he was the person sued as John Doe, or by recognizing such person as a proper party litigant if he appeared without service of summons.

The plaintiff did neither of these things in this case. That the plaintiff did not sue Mr. Nesbitt under a fictitious name is apparent from the record in the case. His name, as stated, nowhere appears in the complaint. That he was not intended to be made a party to the action sued by the fictitious name of First Doe finds support in the fact that he did not have any summons served upon him, and by the affirmative act of the plaintiff in that, after he had appeared in the action, the plaintiff made his motion to have his demurrer stricken from the files. If he were the person intended to be designated in the complaint as First Doe, and if the plaintiff had selected him as one of the persons he was suing, he would not have moved to have him dismissed from the action. His voluntary appearance would have been to the benefit of the plaintiff if he desired him as a defendant, in that by so doing it saved him the trouble and expense of getting service upon him.

It would be a novel proposition that in an action wherein certain fictitious names are stated, with the further allegation that their true names are unknown, any person in the county could, without service upon him, decide for himself that he was the person intended to be sued and make his appearance in the case against the wishes of the plaintiff.

Mr. Nesbitt had no more right to assume that he had been sued as First Doe than any other stockholder of the company, or any other resident of San Joaquin county; in other words, it was for the plaintiff to designate by the service of summons whom he intended to sue under the fictitious name of First Doe, and not for any and every person in the county to decide for himself whether he was the person intended.

The case of Dietrich v. Steam Dredge Co., 14 Mont. 261, 36 Pac. 81, throws much light on the matter in review. It appears from the statement of the case that in Montana there is an act of the Legislature providing for an action in rem against a boat to recover for work and labor done upon and with the same. The act provides that any person, master, agent, clerk, or consignee, or other person interested in the boat may appear by himself, as agent or attorney for the defendant and conduct the defense of the suit. Within the time allowed by law to file an answer or demurrer, the Commercial National Bank filed a demurrer to the complaint. The default of the boat was entered and judgment rendered the plaintiff for the amount sued for. At no stage of the proceeding did the court pass upon the demurrer of the Commercial National Bank. It simply ignored it. From this judgment the Commercial National Bank appealed. The Supreme Court of Montana decided that the bank never became a party to the suit, and in discussing the matter used the following pertinent language:

"It [the bank] was not a party when the complaint was filed and the summons issued, it did not become a party by intervening, as permitted by Code Civ. Proc. § 24. It was not brought into the case by the court in pursuance to Id. § 26, nor by the provisions of Id. § 27. If the bank ever became a party in this case, it became so simply by filing the demurrer, but we do not understand what authority it had to file that alleged pleading. The person who may demur to a complaint is the defendant. Id. § 87. The bank was not a defendant. Indeed, the bank neither is now, or ever was, a plaintiff or a defendant or an intervener. It is an outsider, as to this case. It may be conceded in this discussion that the facts were such that the bank could have become an intervener by properly proceeding in time under the provisions of Id. § 24. That section (24) is as follows: 'Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter of litigation in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action, or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both plaintiff and defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.' It is observed that this statute provides how a person may come into a case who has an interest in the litigation, or in the success of either of the parties, or against both. He may not come in of his own motion or 'of course.' He must make a showing by complaint. He must have leave of court to file the complaint. That pleading must be served upon the other parties, who may answer or demur; and the court must determine whether a proposed intervener may come into the case. But this bank ignored all the rules of practice and statute. Being an outsider and stranger to the suit as commenced, it never asked leave of court to come into the case. It never presented any complaint to which the parties already in could have demurred or answered. It never gave the court opportunity to determine whether it had a right to intervene. But it steps into the case with its demurrer, and says that it has an interest in the litigation; and this statement, by itself, it determines for itself, in its own favor. It comes into the case 'of course,' and upon its own motion, and without leave. It is clear that section 24 provides that the court, and not the intervener, determines all these matters. Under these views, we are of opinion that the district court committed no error when it simply disregarded the demurrer filed by the bank, and entered judgment for plaintiff."

The argument above quoted leaves nothing to be added.

If it were true that Mr. Nesbitt as a stockholder of the defendant corporation had an interest which he felt it was his duty to protect by becoming a party to the suit, the law pointed out the method for him to pursue. He could have asked leave of the court to file a petition in intervention, and then, as stated above, the court, and not Mr. Nesbitt, would have passed upon the question of whether he had such an interest in the suit and in the litigation as made it proper for him to become a party thereto.

In Waymire v. San Francisco Railway Co., 112 Cal. 646, 44 Pac. 1086, it is said:

"If the corporation refused to answer the foreclosure complaint, or, having properly and fully answered, probably would not prosecute the defense in good faith, then, upon a proper application to the court, the stockholders, would have been permitted to intervene, and to plead and prove all material facts alleged in their complaint in this action, and also to cause the necessary parties to be brought in."

As to Mr. Nesbitt's point that, "It is irregular to enter judgment against a defendant in whose behalf a demurrer has been filed without disposing of the demurrer, and a judgment so entered will be reversed on appeal," it may be said that in all the cases cited by him bearing thereon it appears the defendants who had filed demurrers were defendants, parties to the suit, and properly before the court. Mr. Nesbitt was not a defendant, was not a party to the suit, and was not properly before the court. It is a defendant's demurrer that must be disposed of before a judgment can properly be entered, but not a paper filed by a stranger to the litigation. It may be added that the so-called demurrer was properly disposed of in this case before the entry of judgment.

The court committed no error in striking the demurrer of Mr. Nesbitt from the files. This disposes of the case upon its merits, and an order will be entered affirming the judgment.

A motion has also been made by the respondent to dismiss the appeal, but, as the case has been disposed of upon other grounds, it is not necessary to pass upon the motion.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 611

FULLERTON SAVINGS BANK v. DES GRANGES et al. (Civ. 2900.)

(District Court of Appeal, Second District, Division 1, California. Dec. 5, 1919. Hearing Denied by Supreme Court Feb. 2, 1920.)

1. MORTGAGES ⟸290—LIEN ATTACHES IN INVERSE ORDER OF ALIENATION OF MORTGAGED PROPERTY ON FORECLOSURE.

Where an owner conveys mortgaged lands in different tracts and at different times, the lien attaches in inverse order of alienation, in which order the tract so conveyed must be sold in satisfaction of the lien.

2. MORTGAGES ⟸290—LAND RETAINED BY MORTGAGOR SELLING LAND TO BE SOLD FIRST TO SATISFY LIEN.

Where an owner of several tracts of land, which are subject to mortgage, sells some of them, that portion which he retains, as between himself and mortgagee, is chargeable with payment of the mortgage debts before recourse can be had to a sale of other tracts so granted.

3. MORTGAGES ⟸290—VENDEE OF PART OF MORTGAGED PROPERTY MUST PAY VALUE TO COMPEL SALE FIRST OF MORTGAGOR'S PROPERTY.

In order to entitle a purchaser of part of mortgaged land to insist that some other portion shall be sold to satisfy the mortgage before recourse is had to his portion according to the rule of subjection of parcels in the inverse order of alienation, it is necessary that he should have paid value for his purchase.

4. MORTGAGES ⟸288—ORDER OF SALE OF DIFFERENT PARCELS TRANSFERRED BY MORTGAGOR SIMULTANEOUSLY.

In the case of the conveyance by the mortgagor of all the mortgaged property to different purchasers at the same time, their equities must be regarded as equal, and each must contribute ratably to the discharge of the common burden.

5. LIFE ESTATES ⟸24—EQUITIES OF REMAINDERMEN AS TO LIFE TENANT'S MORTGAGE NOT AFFECTED BY ASSISTANCE BY ONE REMAINDERMAN OF LIFE TENANT IN MAKING MORTGAGE.

Where life tenant appeared of record as the owner in fee, executed a mortgage on the property, and was assisted in so doing by one of two remaindermen who in good faith believed the life tenant to have title in fee, and such mortgage was executed without the knowledge of the other remainderman, on foreclosure of the mortgage after the death of the life tenant the equities of the two remaindermen must be held equal, and each should equally bear the common burden.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by the Fullerton Savings Bank against Josephine Des Granges and others. Decree for plaintiff, and certain defendants appeal. Modified and affirmed.

Meserve & Meserve and Paul H. McPherrin, all of Los Angeles (E. J. Marks, of Fullerton, of counsel), for appellant Otto Des Granges.

Samuel H. French, of Los Angeles, for respondent John C. Des Granges.

Head & Marks, of Fullerton, for respondent Fullerton Savings Bank.

SHAW, J. Plaintiff brought this action to foreclose a mortgage executed on May 11, 1911, by defendant Josephine Des Granges to secure the payment of her note of like date for $7,500. Upon a statement that Otto Des Granges and John C. Des Granges had, or claimed to have, an interest in the property, which, however, as alleged, was subject to the mortgage, they were joined as parties defendant. Neither Josephine nor Otto demurred or answered the complaint, and judgment by default was entered in favor of the plaintiff against them. With his answer, which constituted no defense to the plaintiff's right to a decree of foreclosure, John C. Des Granges filed a cross-complaint, claiming ownership of part of the property and alleging facts upon which he prayed that in the decree of foreclosure it be declared and adjudged that the lands covered by the mortgage, other than the portion thereof owned by him, be first sold, and only in case the proceeds of such sale proved inadequate to liquidate the amount found due should recourse be had to a sale of that claimed by him.

The court made findings upon which it rendered the usual judgment and decree in favor of the plaintiff for the amount found due, in addition to which it ordered, decreed, and adjudged:

"That the lien of said mortgage attaches to and said mortgage is a lien upon the premises therein (the complaint) described in the following order: (1) To and on the southwest quarter of the north half of the northeast quarter of said section 35, township 3 south, range 10 west, S. B. B. & M." (title to which, subject to the mortgage, was vested in Otto). "(2) To and on the southeast quarter of the north half of the northeast quarter of said section 35, township 3 south, range 10 west, S. B. B. & M." (title to which, subject to the mortgage, was vested in John).

"That the said southwest quarter of said north half of the northeast quarter of said section 35 is primarily liable for the amount of the indebtedness secured by said mortgage, and that the amount of the same should be charged thereon above, before and prior to any liability of the said southeast quarter of the north half of the northeast quarter of said section therefor."

"It being further decreed that at any such sale hereunder the southwest quarter of the north half of the northeast quarter of section 35 of said land be sold first, and that the southeast quarter of said north half of the northeast quarter of said section 35 shall be only subject to sale and be sold only in case the proceeds of sale of the said southwest quarter of said north half of the northeast quarter of said section 35 be not sufficient to satisfy the total amount of plaintiff's judgment hereunder, and then only for any deficiency which there may be after applying all the proceeds of the sale of said southwest quarter of the north half of the northeast quarter of said section 35 to the satisfaction of said judgment."

"It is further ordered, adjudged, and decreed that the defendant and cross-complainant John C. Des Granges have judgment against and recover of and from defendants Otto Des Granges and Josephine Des Granges his costs herein expended, taxed at $———."

The appeal herein is by Otto Des Granges from those parts of the decree above quoted, the effect of which, since the value of his land is in excess of the mortgage debt, is to impose upon the land which he claims to own the entire burden of the lien, and release that of John C. from any part of the lien.

As grounds for reversal, appellant insists: First, that the court erred in overruling his demurrer to the cross-complaint interposed upon the ground that the facts alleged therein were insufficient to constitute a cause of action against defendant Otto Des Granges, and that the alleged cause of action therein stated was not the subject of a cross-complaint herein, by reason of which facts so averred the court likewise erred in overruling his objection to the introduction of any evidence or testimony in support of the allegations of the cross-complaint. Second, that the portion of the judgment from which the appeal is prosecuted has no support in the evidence, findings, or admitted facts.

Under our view of the case, we deem it unnecessary to consider the first assignment of error as ground for reversal. Conceding the rulings of the court in overruling the demurrer to the cross-complaint and receiving evidence therender were correct, nevertheless we are clearly of the opinion that the action of the court in imposing the entire burden of the lien upon that part of the mortgaged land owned by appellant is not justified by the findings, the material substance of which is as follows: Otto Des Granges, Sr., died on June 24, 1898, leaving his widow, the defendant Josephine Des Granges, the two sons, Otto and John C., and another son and daughter. He owned 80 acres of land described as the north one-half of the northeast quarter of section 35, township 3 south, range 10 west, S. B. B. & M., Orange county. Prior to his death, to wit, on or about June 11, 1898, he conveyed the land to his wife, Josephine, by deed absolute, upon the understanding that she should have a life estate therein and that at her death his son Otto, defendant herein, should have the southwest quarter of the tract of land and John C. the southeast quarter thereof; the other two children to share the north one-half of the tract. Josephine Des Granges, on July 2, 1898, executed a grant deed to each of the four children, purporting to convey to each of them that portion of the tract of land so left by deceased which it was understood each should have upon the death of the mother, which deeds at the same time she delivered to John C., with instructions to record them at her death. While Josephine Des Granges appeared of record as the owner in fee of the 40 acres of land upon which she executed the mortgage to plaintiff, her interest in fact was that of a life tenant only, with remainder to her sons Otto and John C., each of whom, by virtue of the estate created in her, as well as by the unrecorded deeds executed by her to each of them, owned in severalty, subject to the life estate, one-half of the tract. The court found that in giving the mortgage she acted in "derogation of the rights of said defendant John C. Des Granges," and "in excess of her rights as life tenant in said land, and without the knowledge or consent of said John C. Des Granges"; "that said Otto Des Granges did not participate in the transactions and dealings in connection therewith; that the said mortgage was given with the consent, but not with the connivance of said Otto Des Granges, nor in any part for his use or benefit, nor did said Otto Des Granges receive any part of the consideration therefor." In addition to this finding as to Otto's connection with the making of the mortgage, the court found that Otto, knowing that his mother was claiming title in fee to that part of the prop-

erty in which John C. was remainderman, aided and assisted her in the conduct and management of an action theretofore brought by her against John C. et al., to which Otto was not a party, the purpose of which was to quiet title to the property and wherein an adverse judgment was rendered, which on appeal was, after the rendition of the judgment herein, affirmed. Des Granges v. Des Granges, 175 Cal. 67, 165 Pac. 13. It also appears that in this action Otto joined with his mother in filing an answer wherein she, as in the suit to quiet title, claimed ownership in fee to the entire 80 acres of land conveyed to her by her husband. Other than these facts, there is nothing to support those portions of the decree appealed from.

Respondent insists that the rule as to inverse order of alienation should apply for the reasons: First, that both the mother and Otto, in the suit brought by the former to quiet title and in their answer to the cross-complaint herein, asserted that the former was owner in fee of the entire tract; and, second, assuming title to the easterly half of the mortgaged tract to be vested in Otto as remainderman, he, as found by the court, consented to the execution of the mortgage.

[1, 2] The rule that where an owner conveys mortgaged lands in different tracts and at different times the lien attaches in the inverse order of alienation, in which order the tracts so conveyed must be sold in satisfaction of the lien, to which respondent cites numerous authorities, is conceded. Wiltsie on Mortgage Foreclosure, § 584. And it is likewise true that where an owner of several tracts of land which are subject to a mortgage sells some of them, that portion which he retains, as between himself and his grantees, is chargeable with the payment of the mortgage debt before recourse can be had to a sale of the other tracts so granted. Pingrey on Mortgages, § 1920; Raun v. Reynolds, 11 Cal. 14. There are no facts, however, presented herein to which either rule is applicable. As found by the court, the estate of the mother, who died pending the trial, was a life estate only. Hence title to no part of the mortgaged property remained in her to which the lien, under the second rule stated, could primarily attach.

[3, 4] It conclusively appears that Otto and John acquired title to their respective tracts, both covered by the mortgage, at the same time, without value and as a gift from the same source and by the same means; and that as to any knowledge of their title the mortgagee was without notice. In 27 Cyc. at pages 1371 and 1372, it is said:

"In order to entitle a purchaser of part of mortgaged land to insist that some other portion shall be sold to satisfy the mortgage before recourse is had to his portion, according to the rule of subjection of the parcels in the inverse order of alienation, it is necessary that he should have paid value for his purchase."

Not only, as stated, was the property of both John and Otto the subject of a gift, but acquired at the same time and by the same means and where this is the case the rule as to the inverse order of alienation does not apply. Black v. Suydam, 81 Wash. 279, 142 Pac. 700, Ann. Cas. 1916D, 1126. In Brown v. Simons, 44 N. H. 475, it is said:

"In the case of the sale by the mortgagor of all the mortgaged property to different purchasers at the same time, their equities must be regarded as equal, and each must contribute ratably to the discharge of the common burden."

See, also, Bank of Ukiah v. Reed, 131 Cal. 597, 63 Pac. 921.

As we have seen, title to no part of the property was left in the mortgagor to which the lien could attach, and, as between Otto and John, there were no facts disclosed which could warrant the court in applying the rule as to inverse order of alienation.

[5] While the point is not presented, it is likewise true that the record is barren as to any facts upon which to predicate an estoppel in favor of cross-complainant. As found by the court, Otto did not participate in the transaction in connection with the giving of the mortgage, it was not made for his use or benefit, and he received no part of the consideration therefor. He labored under an honest belief that his mother was the owner in fee of title to the entire 80-acre tract of land, which included his own and that of his brother John. Save that Otto entertained a belief as to his mother's rights—not shared by John—their positions are identical. Their interests were such that either, at his option, might have taken steps to prevent the giving of a mortgage by the mother upon other than her life interest. Not having pursued such course, their interests are equally bound by the lien of the mortgage. Conceding that John was without notice of the fact that the mother was about to execute the mortgage, to one having no notice of his rights, of which Otto was cognizant, no legal duty devolved upon the latter to look after the interest of John, to whom the mother had delivered the deeds for recordation.

That part of the decree appealed from, the effect of which is to impose upon the land of Otto the entire burden of the mortgage, is not supported by the findings. It is therefore ordered that the decree be modified by striking therefrom the portions of the judgment from which this appeal is prosecuted, and that as thus modified the judgment is affirmed; appellant to recover costs of trial and in the prosecution of the appeal.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 634

PEOPLE v. CORREA. (Cr. 474.)

(District Court of Appeal, Third District, California. Dec. 5, 1919.)

1. CRIMINAL LAW ⊂=1144(13) — TESTIMONY FOR PROSECUTION NOT INHERENTLY IMPROBABLE ACCEPTED AS TRUE ON APPEAL.

Where there appears to be nothing inherently improbable in the testimony of any of the witnesses, the appellate court on appeal must accept as true the statements that correspond with and support the theory of the prosecution.

2. HOMICIDE ⊂=253(3)—EVIDENCE SHOWING GUILT OF MURDER.

In a prosecution of defendant for the murder of his partner in conducting a dairy farm, where a verdict of first degree murder was returned, evidence *held* to show that defendant struck down such partner with a hammer in the evening, having lain in wait for him on their own premises on the path between a separator house and a pig pen.

3. CRIMINAL LAW ⊂=423(2)—DECLARATION OR CONDUCT OF CONSPIRATOR ADMISSIBLE.

The acts and declarations of either of two conspirators to commit a crime committed in pursuance and furtherance of the conspiracy may be shown at the trial of the coconspirator, and it is not necessary to show that defendant on trial was present at the time of such conduct or declarations.

4. CRIMINAL LAW ⊂=427(5) — PRIMA FACIE SHOWING OF CONSPIRACY SUSTAINS ADMISSION OF ACTS AND DECLARATIONS OF COCONSPIRATOR.

It is not necessary to prove by direct evidence that there was an agreement between alleged conspirators to commit the crime, but the fact may be established by circumstantial evidence, and it is enough to make out a prima facie case to warrant the admissibility of the acts and declarations of a coconspirator against defendant on trial.

5. CRIMINAL LAW ⊂=427(4)—PROOF OF CONSPIRACY BY CIRCUMSTANCES.

As a general thing, a conspiracy can be established only by circumstances, and all those bearing in any way on the fact of a conspiracy, or on the acts done pursuant thereto may be shown to prove the fact of conspiracy, and to show the intent or motive of defendant for a crime involved in the commission of an overt act in furtherance and execution of the conspiracy.

6. CRIMINAL LAW ⊂=427(5) — EVIDENCE OF CONSPIRACY BETWEEN MURDERER AND DECEDENT'S WIFE.

In a prosecution for murder of defendant's partner in running a dairy farm, circumstantial evidence *held* sufficient to make out a prima facie case of conspiracy between defendant and the deceased partner's wife to render admissible against defendant the acts and declarations of the wife in furtherance of the conspiracy.

7. CRIMINAL LAW ⊂=1036(1), 1044—ADMISSION OF TESTIMONY AFTER FAILURE TO OBJECT BELOW NOT REVIEWABLE ON APPEAL.

In a prosecution for murder, defendant having conspired with the wife of his partner, whom he killed, where, though defendant had abundant warning that testimony was coming of declarations of the wife showing a conspiracy between him and the wife, he did not object to any of the questions, nor move to strike out her answers, he cannot complain on appeal of the admission of her testimony.

8. CRIMINAL LAW ⊂=424(1)—EVIDENCE OF EFFORTS OF CONSPIRATOR TO COLLECT INSURANCE ON DECEDENT'S LIFE ADMISSIBLE.

In a prosecution for murder, if there was sufficient showing of conspiracy between defendant and decedent's wife, evidence of efforts made by the wife to collect insurance on the life of her husband was admissible against defendant.

9. HOMICIDE ⊂=171(1)—STATE MAY ADVANCE ANY REASONABLE THEORY OF CRIME.

In a prosecution for murder, the peculiar circumstances inspiring the deed necessarily being subject to controversy and uncertainty, it was proper for the people to advance any theory within the range of human experience and reasonable probability, and to support it by appropriate evidence.

10. CRIMINAL LAW ⊂=938(1)—NEWLY DISCOVERED EVIDENCE IN HOMICIDE CASE NOT CALLING FOR NEW TRIAL.

In a prosecution for murder of defendant's partner in operating a dairy farm, motion for new trial on the ground of newly discovered evidence that blood saturating manure at the scene of the killing was not in fact human blood *held* properly denied, in view of lack of diligence and trial judge's conclusion that the case against defendant was complete without such evidence.

Appeal from Superior Court, Stanislaus County; George H. Cabaniss, Judge.

Manuel Correa was convicted of murder in the first degree, and from the judgment and an order denying his motion for new trial, he appeals. Judgment and order affirmed.

Hatton & Scott, of Modesto, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. [1] Defendant was convicted of murder in the first degree, with punishment fixed by the jury at imprisonment for life, and he has appealed from the judgment and the order denying his motion for a new trial. At the outset we may say that there appears to be nothing inherently improbable in the testimony of any of the witnesses, and therefore, under the familiar rule, we must accept as true the statements that correspond with and support the theory of the prosecution. Hence it may be understood that in stating the facts we have taken from the record the version of the affair

which is disclosed by the evidence that tends to support such theory. It appears that during the year 1917 and until August 26, 1918, Anton Sequeira, the deceased, with his family, consisting of a wife and four small children, lived on the Peter Stewart ranch, consisting of about 160 acres, and which was conducted as a dairy farm. This ranch fronted on the highway leading from Crow's Landing to Newman, in Stanislaus county, and the deceased and defendant conducted the same as partners. The defendant was unmarried and lived in the home of the deceased, sleeping in the bunkhouse which was attached to the residence. He had lived in this house continuously for 18 months previous to the murder. No help was employed in conducting this dairy, and the two divided the work between them. They were milking about 60 cows, and each milked about 30 head. The defendant then attended to feeding the calves and some of the other stock, while deceased separated the milk and carried the skimmed milk to the pigs and then washed the separator. On the evening of August 26, 1918, the deceased and defendant were seen about 6 p. m., engaged in milking at the corral, which was at a distance of 520 feet from the residence. They usually finished their work about 9 p. m., and then went to the house for supper, but on this evening defendant did not appear at the house until about 10 p. m., and then came in alone. Supper was had without the presence of deceased, and then, following their usual custom, all the inmates of the house engaged in prayer, and thereafter defendant left, supposedly to go to bed in his bunkhouse. The next morning, about 6 a. m., the dead body of deceased was found in a spring wagon with a horse attached, at the home of Peter Stewart, a distance of nearly two miles from the home of deceased. The wagon wheels had become fastened in a tree, and the horse was standing there when found by Stewart and his employé. Deceased was dressed in the overalls in which he milked, being an extra pair which he slipped over his ordinary clothes when commencing that task. The head of deceased was frightfully mutilated, showing four distinct blows which fractured and crushed the skull. The face and clothes were covered with blood and dried manure, and blood had leaked through the body of the wagon, forming a pool on the ground where the wagon stood. Deceased was lying on his back with his head near the endgate and his feet under the seat, and his hat was in the body of the wagon. This horse and wagon belonged to deceased and were kept on the ranch at the time of the murder, although the horse formerly belonged to Mr. Stewart. After said discovery, Mr. Stewart notified the authorities, and a few hours thereafter the defendant was arrested and charged with the crime. The trial of the case consumed about 11 days, the witnesses being subjected to a very rigid examination by counsel for both parties, and every point being hotly contested by counsel for defendant. The learned judge who presided at the trial, Hon. George H. Cabaniss, of San Francisco, seems to have had a clear conception of the legal principles involved in the charge, and to have conducted the proceedings with striking regard for all the legal rights of the defendant. The instructions to the jury were complete and accurate, and no exception could be taken thereto. The rulings upon the admissibility of evidence were unusually free from error. The evidence itself, though circumstantial in character, is entirely sufficient, in our judgment, to support the verdict of the jury. We have taken pains to read carefully the entire record, consisting of over 900 pages, and we are convinced, not only that the verdict of the jury is supported, but that any fair-minded jury could hardly reach any other conclusion than that the defendant committed the shocking crime.

I. The sufficiency of said evidence, however, to support the conviction is strongly contested by appellant, and it may be well to call attention to some of the salient facts to show how insubstantial is such contention. In doing this we may follow the method of the Attorney General in dividing the inquiry into the following considerations: (1) Where was Sequeira murdered? (2) When did the murder take place? (3) By whom was the deed committed and what are the circumstances showing defendant to be the guilty party?

1. Undoubtedly deceased was killed on his own premises. Indeed, no other theory is advanced by appellant. There is support for the contention of the prosecution that Sequeira was murdered on the path leading from the separator house to the pig pen and near said corral. This path was taken by deceased in carrying the milk to the pigs, and he would undoubtedly pass near the defendant while the latter was feeding the stock in the corral. The sheriff, his deputies, the coroner, and the neighbors present were able to trace the tracks of the wagon and blood stains from the Stewart home out onto the highway and along the same to a panel gate opening upon the road from the premises occupied by deceased and defendant, and on through a rough, uneven field, across a creek and up to the point near the corral, where the ground was covered with fine dried manure. At this point the tracks of the wagon ended, and here was found evidence of blood, and the ground appeared to have been raked over. Two parallel lines in the dry manure indicated that the body had been dragged to a point where the wagon tracks commenced. It may be added that the manure on the face and clothing of the deceased corresponded in appearance with that found at this point. Other circumstanc-

es are disclosed which, in connection with the foregoing, demonstrate to a moral certainty that Sequeira met his death on his own premises, and from which it is at least a reasonable inference that he was struck down at or near the point as claimed by the prosecution.

2. The last seen of Sequeira alive by any person appears by the testimony of the defendant, who says that he saw deceased going into the separator house as he (Correa) was coming out. This was after the cows had been milked and the defendant was then feeding the stock in the corral while deceased was carrying milk to the pigs, and it was about 8:30 p. m. As to when they finished milking, appellant testified: "I think it was after 8 o'clock." It was probably a short time after this that Sequeira was killed. The work of separating the milk, feeding the pigs, and washing the separator occupied about 30 minutes, and it followed immediately after the cows were milked. This additional task was not entirely completed, as the separator was not washed and the cream was not placed in its usual position. One Mattos, who collected the cream, drove into the place a few minutes after 9 o'clock and found the can of cream was not in its accustomed place and the light out in the separator house. It is fair to infer that the light would have been burning if Sequeira had been alive, as his work was not completed. We may add that when Correa went to supper about 10 o'clock the said light was burning. Of course, some one must have lighted it after Mattos left the premises, and the identity of that person is not at all shrouded in doubt when the entire record is considered. Correa was the man. From the foregoing it is a reasonable certainty that Sequeira met his death in the neighborhood of 9 o'clock. It may be stated in this connection that this inference as to the time of death is consistent with the expert testimony as to the number of hours that life had been extinct when the body of Sequeira was examined the next morning, although there was no attempt by said expert to fix the exact time when death ensued.

[2] 3. If Sequeira was killed on said premises after the cows were milked and before Correa went to the house for his supper, then the conclusion is almost irresistible that the defendant was the perpetrator of the crime. That this may be made plain, we shall mention some of the circumstances that point directly to him as the guilty man. Some of them alone would justify the verdict, but, taken together, they constitute an overwhelming vindication of the people's contention. In the first place, Correa was confessedly in such situation that Sequeira could not have been killed without the defendant's knowledge. He must have known who committed the murder, and, of course, if it had been done by another, the defendant would have disclosed it; he would have been the first to acclaim the fact. The truth is he contended, and still contends, that he knows nothing about it. We can understand how the jury, with his testimony and the other circumstances, including the diagram of the premises, before them, could not escape the conclusion that his asserted ignorance was preposterous, and that his story was a weak and simulated attempt to escape a just and merited conviction. Again, a bloody hammer and some pieces of bloody cloth were secreted in the separator house. There is almost indubitable evidence which we need not recite—that the blows on Sequeira's head were struck with this hammer. The hammer belonged on the place, and no stranger would come to the premises with the intention of committing murder and depend upon finding there such a weapon with which to carry out his purpose. He would have brought his weapon with him. If he had come so unprepared to execute his intention, he would certainly have found it difficult to find the hammer in the darkness, and while he was looking for a weapon it is hardly to be supposed that Sequeira would have calmly awaited the end without an outcry or any attempt to escape. The hammer was used for the deadly purpose by one who knew it was on the premises, and at a time when Sequeira was not apprized of the imminent approach of death. It was also concealed by one who was entirely acquainted with the premises. That one was Correa. While the evidence as to the cloths is not so persuasive, yet it is not unreasonable to conclude that they were used also by the same cruel hand that struck the blows. Again, a stranger would not go to the trouble of raking up the ground where the crime was committed. He would let the body lie where it fell and he would hasten to make his escape. Besides, how could he do any or all these things without the knowledge of Correa? Moreover, it is incredible that a stranger would remove the body from the premises, or that he would go within 110 feet from the house to get the wagon when the light was still burning in the Sequeira home; and it is quite improbable that he would know that the wagon was there or that he would be able, in the darkness, to get the horse and the right harness, or that he would be able to put the body in the wagon and drive out without attracting the attention of the inmates or of Correa, who was outside all this time. But what is more improbable is that a stranger would select that particular horse, Bob, which had been purchased from Mr. Stewart, and turn him loose on the highway near Mr. Sequeira's house with the lines dragging on the ground, knowing that the horse, true to his instincts, would take his way to his former home. Nor is it at all probable that the house dog, which was with Correa when he came to

supper, would have failed to manifest, by barking, his resentment at the presence and such activity of a stranger, especially at that hour of the day. It is quite unlikely also that another bent upon murder would wear the same size shoes as defendant and that they would make the same peculiar track. Such, however, was the situation of the one who led the horse out through said panel gate to the highway leading to Mr. Stewart's house. The horse and wagon were taken out onto the highway, about 11 o'clock, as by a witness they were seen going towards Mr. Stewart's at about 11:15 p. m. without a driver. Defendant left the house after supper about this hour for the apparent purpose of going to bed, but actually, no doubt, to try to conceal his crime. Defendant was one hour late for supper that night, without any satisfactory explanation. He arose the next morning and began milking at an earlier hour than usual, realizing that he would not have the help of his partner. His appearance and actions when told of the murder, his appearance when the sheriff first talked to him, his foot prints through the field and out to the highway where the corpse was taken, the route taken by the wagon, indicating a thorough knowledge of the premises by the one leading the horse, his statement at the house when arrested, his quarreling with the deceased, and his unsatisfactory manner of testifying, including his statement that he did not know where his partner slept, although he had resided in the same house for 18 months, constitute an important part of the circumstances that explain and justify the verdict of the jury. We shall dwell no longer upon this phase of the case further than to add that the record has been examined with a realization of the consequences to defendant of the judgment, but it must be said that great consideration was shown him by the jury in fixing the penalty at imprisonment for life.

[3] II. In his opening statement the district attorney advanced the theory that the motive for the crime was to be found in a conspiracy between defendant and the wife of deceased to commit the murder in order to profit by reason of certain life insurance policies. Such theory is important here only to determine whether certain rulings of the court admitting evidence of the conduct and statements of Mrs. Sequeira can be sustained. The rule is, unquestionably, that the acts and declarations of either of the conspirators, committed in pursuance and furtherance of the conspiracy, may be shown at the trial of a coconspirator; and it is not necessary to show that the defendant on trial was present at the time of such conduct or declarations. People v. Brown, 59 Cal. 345; People v. Woods, 147 Cal. 265, 81 Pac. 652, 109 Am. St. Rep. 151.

[4] It is also true that it is not necessary to prove by direct evidence that there was an agreement to commit the crime, but such fact may be established by circumstantial evidence, and it is sufficient to make out a prima facie case to warrant the admissibility of the acts and declarations of the coconspirators. People v. Eldridge, 147 Cal. 782, 82 Pac. 442; People v. Burke, 18 Cal. App. 72, 122 Pac. 435.

[5] As a general rule a conspiracy can only be established by circumstances, and all these bearing in any way upon the fact of a conspiracy, or upon the acts done in pursuance thereof, may be shown to prove the fact of a conspiracy and to show the intent or motive of a defendant for a crime involved in the commission of an overt act in furtherance and execution of the conspiracy. People v. Trim, 39 Cal. 75; People v. Gregory, 120 Cal. 16, 52 Pac. 41; People v. Carson, 155 Cal. 164, 99 Pac. 970.

As evidence of the guilty knowledge and co-operation of Mrs. Sequeira in reference to the murder, the Attorney General calls attention to these circumstances:

(1) She falsely told Mrs. Silveria that she had to get supper early because her husband was going out that night.

(2) She testified that her husband told her not to wait for supper, as he was going out when he finished the chores.

(3) She claimed that Correa was being arrested when he was innocent.

(4) She went to bed the night of the murder with her clothes on.

(5) There was evidence of clothes having been burned in the kitchen stove that night.

(6) She told her brother-in-law not to look for the murderer around the premises.

(7) She testified falsely for Correa that he and her husband never quarreled, whereas she told her son-in-law that she was going to quit her husband because he quarreled continuously with his partner.

(8) She tried to influence her niece to testify falsely that her husband was in the habit of going out at night without his supper.

(9) Before the body of Sequeira was discovered she sent a messenger to Mr. Stewart's house to tell Mr. Stewart that her husband left with the horse Bob and the spring wagon the night before at 10 p. m. and had not returned.

[6] We think the showing was sufficient to make out a prima facie case of conspiracy and to render admissible against the defendant the acts and declarations of Mrs. Sequeira in furtherance of said conspiracy.

[7] III. But, independent of the question of conspiracy, it is quite apparent that no prejudicial error was committed in the admission of the evidence of which complaint was made on the motion for a new trial. One instance is involved in the testimony of Mrs. Rose Azavedo that about two weeks before the murder Mrs. Sequeira was visiting her and they had a conversation in reference

to Mr. Sequeira in which Mrs. Sequeira said that "her husband looked awful queer and said she thought that he was going to commit suicide." This was in response to the question: "What was that conversation?" The preceding question was, "Did you have any conversation with her then relative to the death of her husband, or his dying?" and the answer, "Yes." So that appellant had abundant warning of what was coming, but he made no objection to any of these questions, nor did he move to strike out any of the answers. A subsequent question as to further conversation was objected to and the ruling was in favor of appellant; but, for the reason stated, it is too late to complain of the quoted testimony.

A similar situation is involved in the other instance relating to the testimony of Emil Mattos, the son-in-law of Mr. and Mrs. Sequeira, as follows:

"Q. Did Mrs. Sequeira visit your home, I mean to stop there overnight, along about six weeks before her husband died? A. She did. Q. At that time did you have a talk with her in reference to her husband? A. I did. Q. What was it she said? A. She said she was going to get away from my father-in-law, * * * because Tony Sequeira, my father-in-law, and Manuel Correa, they were quarreling lots of time."

The record shows no objection whatever to any of these questions, and no further comment is necessary.

[8] The only other matter in this connection relates to the evidence of efforts made by Mrs. Sequeira to collect the insurance on the life of the deceased. But she and the defendant both testified without objection that said policies existed, and any effort to collect the money could add nothing to the force of this evidence as a motive for the crime. No one would suppose that she would not try to realize upon the policies, and the probative force of said circumstance was not increased by the showing of such effort. We may add that, if there was a sufficient showing of conspiracy, the evidence was admissible under the doctrine of People v. Fealy, 33 Cal. App. 605, 165 Pac. 1034.

[9] It may be, of course, that the district attorney was entirely mistaken as to the motive for the crime, but it was his privilege to make such contention as to the insurance. Another different impelling force is disclosed in the disagreements of deceased and the defendant, and the jury may have attached great significance to the command of Sequeira for Correa to secure another boarding place, but the peculiar circumstances that inspired the deed must necessarily be the subject of controversy and uncertainty, and it was proper for the people to advance any theory within the range of human experience and reasonable probability and to support it by appropriate evidence.

[10] IV. Really the only consideration worthy of serious controversy involves the contention that a new trial should have been granted on the ground of newly discovered evidence. It seems that a few days after the murder a quantity of manure saturated with what appeared to be blood, and taken from the place where the prosecution claimed that Sequeira was killed, was delivered by the sheriff to Dr. Charles D. Holliger, an expert Röntgenologist and pathologist, of Stockton, who made the usual tests to determine whether the matter contained human blood. He was not called as a witness at the trial, and the result of his examination was not known to appellant until after his conviction. On the motion for a new trial the defendant relied upon the affidavit of said Dr. Holliger, in which he deposed "that said débris contained a large percentage of blood, and that said tests further showed that said blood was not the blood of a human being." This affidavit surprised the trial judge, and he considered it a matter of grave import. He undoubtedly gave the subject very careful attention, and he reached the conclusion that "the blood found in the manure pile was not human blood," but he further declared that it did not follow "that all other blood found at various places indicated by blood stains and the like was of the same character. By beginning at the other end of the trail * * * we find no difficulty—at least I find none—in convincing ourselves that that blood was human blood." This was followed by a statement by the trial judge of his reason for concluding that the case against the defendant was complete without this circumstance of the blood in the manure pile. He therefore denied the motion for a new trial. We think no one can dispassionately read the record without agreeing that his decision was right.

We may add that the force of said affidavit of Dr. Holliger was somewhat weakened by a counter showing that, by reason of the fact that said blood was subjected to the chemical action of the manure and the heat of the sun, the usual tests for determining its character would not be entirely reliable. There would be also ground for holding that appellant did not display that diligence in obtaining said evidence which the law exacts. His affidavit does not allege that he had no knowledge of the existence of said blood in the manure pile. We must assume, therefore, that he knew it was there as early as the morning of August 27th, and it was his duty to inform his counsel in order that they might take the proper steps to have an analysis of it.

A word more, and we are through. Appellant's counsel, with great earnestness and ability, insist in their opening brief, and reiterate in their closing brief, that their client is innocent of the charge and should be

granted a new trial. They very naturally accept his denials and explanations, and they are not to be blamed for it. They think it is incredible that "the appellant could have knelt and prayed with the widow and children of Sequeira if he had taken the life of Sequeira." To the normal mind, incapable of conceiving and planning murder, that does seem almost unthinkable, but the murderer must be judged by a different standard from the ordinary man. That he should do that thing does seem strange, but not so strange as the murder itself. That Sequeira was murdered is beyond question, and the record seems to leave little, if any, doubt that Correa committed the crime. We are not surprised, therefore, at his conduct after Sequeira was killed.

As we believe the defendant has suffered no injustice, and we find in the record no prejudicial error, the judgment and order are affirmed.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

44 Cal. App. 603

BALDARACHI et al. v. LEACH. (Civ. 3026.)

(District Court of Appeal, Second District, Division 2, California. Dec. 4, 1919.)

1. APPEAL AND ERROR ⊂=1002—VERDICT ON CONFLICTING EVIDENCE WILL NOT BE REVIEWED.

Defendant's appeal, grounded on insufficiency of evidence to support the verdict, cannot be maintained, where the testimony was in direct conflict and sufficient evidence to take question to jury.

2. TRIAL ⊂=108½ — PLAINTIFFS' COUNSEL HAS RIGHT TO KNOW IF JURORS WERE INTERESTED IN COMPANIES INSURING AUTOMOBILE OWNERS AGAINST ACCIDENT.

In an action for injuries when struck by defendant's automobile, counsel for plaintiffs were entitled to know if any of the prospective jurors were interested as stockholders, or otherwise, in corporations engaged in insuring automobile owners against liability for accident.

3. APPEAL AND ERROR ⊂=1060(1)—ERROR IN SUGGESTING TO JURY THAT DEFENDANT SUED FOR INJURIES WAS PROTECTED BY INSURANCE CURED BY ACTION OF COURT.

In an action for injuries when struck by defendant's automobile, where a question to jurors by plaintiffs' attorneys was erroneous as informing the jurors that defendant was insured against liability, such error was cured by the action of the court in calling attention to its prejudicial character, and in securing statement from the jurors they could and would disregard the information.

4. TRIAL ⊂=415—ERROR IN SUGGESTING TO JURORS THAT DEFENDANT CARRIED LIABILITY INSURANCE WAIVED.

In an action for injuries when struck by defendant's automobile, error in that plaintiff's attorneys by a question to jurors suggested to them that defendant carried liability insurance was waived by defendant's consenting to proceed to impanel the jury from talesmen in attendance.

5. TRIAL ⊂=207—INSTRUCTION LIMITING EVIDENCE TO PURPOSE FOR WHICH IT WAS ADMISSIBLE MUST BE GIVEN.

Defendant was entitled to an instruction limiting certain evidence to the single purpose for which it was admissible against him.

6. TRIAL ⊂=256(5)—MORE DEFINITE INSTRUCTION LIMITING EVIDENCE MUST BE REQUESTED.

It was incumbent on defendant, if he wanted a more definite and explicit statement of the law limiting certain evidence against him to a single purpose, to ask for it.

7. EVIDENCE ⊂=220(2) — ADMISSION BY SILENCE TO ACCUSATIVE DECLARATION AFTER ACCIDENT ADMISSIBLE DESPITE CHARACTER OF DECLARATION ITSELF.

In an action for injuries when struck by defendant's jitney bus, testimony that a bystander after the accident told defendant he ought to be strung up by the heels for running into a woman in that fashion, and that defendant made no reply, *held* properly admitted as an admission by silence when circumstances called for reply, though the bystander's declaration in itself, apart from the fact that it was unanswered, tended strongly to influence the jury to find defendant had been negligent.

8. MUNICIPAL CORPORATIONS ⊂=706(5)—EVIDENCE SHOWING NO CONTRIBUTORY NEGLIGENCE IN CROSSING STREET BY PLAINTIFF STRUCK BY AUTOMOBILE.

In an action for injuries to a woman struck by defendant's jitney bus when attempting to cross a street through traffic of teams, automobiles, and street cars, evidence *held* to sustain finding for plaintiff on the issue of contributory negligence.

9. TRIAL ⊂=260(1) — REFUSAL OF REQUESTS COVERED OTHERWISE NOT ERRONEOUS.

There was no error in refusing proper instructions requested where the points, so far as material, were covered by other instructions given.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Louise Baldarachi and others against A. Leach. From judgment for plaintiffs, defendant appeals. Affirmed.

Bowen & Bailie, of Los Angeles, for appellant.

Geo. M. Harker and S. M. Bernard, both of Los Angeles, for respondents.

SLOANE, J. The plaintiff in this action, who is respondent on this appeal, is, so her

counsel inform us by the opening paragraph of their brief, "a thrifty and industrious woman, who hired out at washing and ironing and cleaning house, helping to support an invalid husband." It is not improbable that this circumstance was instrumental in securing her a verdict for damages from being run into by defendant's automobile. A dispassionate reading of the evidence, at any rate, leaves it doubtful if a preponderance of proof of negligence in behalf of plaintiff entitled her to the verdict. All of defendant's witnesses, and two of the witnesses for plaintiff, testify to a state of facts which strongly indicate that the plaintiff, in crossing the street, had safely passed in front of defendant's automobile, driven as a jitney bus, and that the accident resulted from her suddenly and unexpectedly stepping back to avoid another machine.

[1] Defendant's appeal in this case is not, however, presented on the ground of insufficiency of the evidence to support the verdict; and, if it were, it could not be maintained on that ground, as there was direct conflict in the testimony, and a sufficient showing of an excessive rate of speed and failure to give warning signals to make the question one solely within the province of the jury. We only call attention to the unconvincing state of the evidence because of its relation to the errors of law presented on the appeal, which assume larger proportions in view of the wavering balance of the facts.

There are only two of appellant's specifications of error that would seem to require serious consideration. One is the alleged prejudicial conduct of plaintiff's counsel in suggesting, on the examination of the jurors, that the defendant was protected by an accident indemnity insurance; and the other, admission in evidence, over defendant's objection and motion to strike from the record, of a declaration to the defendant by a bystander and witness to the accident that defendant "ought to be strung up by the heels for running into a woman in that fashion."

[2-4] As to the first specification, counsel for plaintiffs are doubtless right in claiming that they were entitled to know if any of the prospective jurors were interested as stockholders or otherwise in corporations engaged in that line of indemnity insurance. But the form of the question, coupled with the statement of counsel which followed it, was very suggestive of a purpose to inform the jurors that the defendant was insured against liability for such an accident. It was at least effective for that purpose. The statement made by counsel was that "under the law of this state all jitney bus licensed drivers must and are compelled by law to have indemnity insurance." The law referred to was an ordinance of the city of Los Angeles, and could only have been properly brought to the knowledge of the jury by its introduction in evidence, and would have been clearly inadmissible if offered. But if there was error in this matter, it was cured, in legal contemplation at least, by the action of the court in calling attention to its prejudicial character, and in securing a statement from the jurors that they could and would disregard the suggested information, and was further waived by defendant consenting to proceed to impanel the jury from the talesman then in attendance.

The second point is a more serious and difficult one. The witness Newman, who saw the accident, was asked what he said to the defendant. The question was objected to because no foundation laid, and as immaterial. The objection was overruled, and the witness answered:

"I don't know just exactly what I said, but I remember saying: 'You had ought to be strung up by the heels for running into a woman in that fashion.'"

The witness also testified that the defendant made no reply. Defendant's counsel then moved that the question and answer be stricken out as not being part of the res gestæ and as incompetent, irrelevant, and immaterial. In denying the motion the court said:

"I am not accepting it or admitting it as part of the res gestæ; I am admitting it in the nature of an admission by the defendant.

"Counsel for the Defendant: I don't see any admission there.

"The Court: That is a matter for the jury. Where declarations are made which might be replied to, it is evidence. The weight of it is for the jury."

The declaration made to the defendant, together with defendant's failure to reply thereto, was allowed to go to the jury on the theory that the silence of defendant was susceptible of being construed as in some degree an admission of negligence or fault on his part in running over the plaintiff. Was it primarily a question for the court to determine, in ruling on this objection, whether the character of the statement addressed to the defendant was such that his failure to make response might reasonably suggest to the jury a realization of negligence on his part? or was it the province of the jury to decide, in view of all the surrounding circumstances, whether any significance was to be attached to his silence?

The authorities are seemingly much in conflict on this point. It has been frequently held that it is not all questions or declarations to a party relating to an issue in controversy, regarding which his silence may be used as evidence of an admission; and that, unless the failure to respond is such as to raise a natural and reasonable inference that he admits the truth of the charge, such statements are inadmissible. State v. Hamilton, 55 Mo. 520; People v. Harrison, 261 Ill. 517,

104 N. E. 259; Pederson v. Nixon, 284 Ill. 421, 120 N. E. 323; Fuller v. Dean, 31 Ala. 654.

In a number of cases it has been held error to permit evidence to show that a party failed to respond to a question or declaration imputing guilt or blame, on the ground that it appeared as a matter of law that the nature of the remarks or the circumstances under which they were addressed to the party did not call for a response. Larry v. Sherbourne, 2 Allen (Mass.) 34; Rafter v. Chicago City Ry. Co., 139 Ill. App. 81; Lane v. Bryant, 9 Gray, 245, 69 Am. Dec. 282; Rolfe v. Rolfe, 10 Ga. 143.

On the other hand, there are many decisions, and, as we think, constituting the weight of authority and the better reasoning, which hold that all such declarations or questions directed to a party which challenge or suggest a response from one who could truthfully dispute or negative them are properly admissible in evidence, and it is for the jury to determine whether, in consideration of all the circumstances, any significance attaches to a failure to reply. Section 1870, subdivision 3, of the Code of Civil Procedure, provides that evidence may be given upon a trial of "an act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto." This is a legislative statement of a generally recognized common-law rule of evidence. As is said in Wheat v. Croom, 7 Ala. 349:

"This rule of evidence rests upon that universal principle of human conduct, which leads us to repel an unfounded imputation, or claim."

In Estate of Snowball, 157 Cal. 301, 107 Pac. 598, it is said:

"The evidence here was admissible as tending to show admissions * * * of the truth of the charges. * * * Whether it did show such admissions was for the jury to determine in view of all the circumstances."

The extent of the rule is that it is a question for the jury, in the light of all the circumstances, to say whether the silence of a party amounts to an admission, the weight to be given the evidence depending upon how provocative the situation is to speech and how significant is the silence. State v. Ellison, 266 Mo. 604, 182 S. W. 996, Ann. Cas. 1918C, p. 9; International Harvester Co. v. Voboril, 187 Fed. 973, 110 C. C. A. 311; Hagenbaugh v. Crabtree, 33 Ill. 225; Blanchard v. Hodgkins, 62 Me. 119; Morrill v. Ritchey, 18 N. H. 295. In the case last cited the court says:

"What is said in a party's hearing may be proved, but it is the province of the jury to put a construction upon the party's behavior at such time. They may say he is silent because he is afraid to speak, or because he is struck dumb with amazement, * * * or because he acquiesces in the thing said; * * * or, in short, they may draw such inference as they think ought to be drawn from conduct that, in itself, without the aid of surrounding circumstances to explain it, is extremely equivocal."

In Vail v. Strong, 10 Vt. 457, it is said:

"The mere silence of the party creates no evidence, one way or the other. There are, indeed, cases, where the silence of the party creates a presumption or inference against him: but this presumption derives all its force from the circumstances under which the statement is made, and which call for a denial. If the party is under a moral or honorary obligation to disclose, or his reputation or interest is jeopardized by the statement, he has a strong inducement to deny it, if he can do so with truth. His silence under such circumstances, affords an inference against him, which is more or less strong in proportion to the inducement to make the denial. But even here the evidence thus created rests altogether upon the attendant circumstances. * * * But we know of no obligation upon the party to answer every idle or impertinent inquiry. He has the right to be silent, unless there be good occasion for speaking. * * * The true rule we understand to be this: Evidence of this character may be permitted to go to the jury, whenever the occasion upon which the declaration is made in the presence of the party and the attendant circumstances call for serious admission or denial on his part; but the strength of the evidence depends altogether on the force of the circumstances and the motives which may impel him to an explicit denial if the statement be untrue. But if no good reason exists to call for disclosure, and the party declines to enter into useless discussion or answer idle curiosity, no legitimate inference to his prejudice can be drawn from his silence."

It is apparent in the case at bar that the declaration testified to did not entitle the party making it to a reply. He was a mere bystander, with no more interest in the affair than any other one of the crowd that doubtless had already assembled. The nature of his statement was truculent and offensive, and did not in terms call for a response. It was a situation where any self-respecting and self-restraining man in the position of defendant, no matter how conscious of innocence, might properly keep silent, and where, if a response had been made, it would most likely have been an angry retort. At the same time, the statement to defendant that he ought to be strung up "for running into a woman in that fashion" did apprise him that he was being accused of having negligently and recklessly run his car upon the plaintiff. He could have answered by denying fault or responsibility for the accident. Without doubt many men so situated would have repudiated the implication conveyed in the charge. Was it a question properly left to the jury whether, under the circumstances shown here, his failure to make such answer signified a sense of guilt?

It clearly could not be held, as a matter of

law, that failure to make a response in this case did indicate a sense of guilt, and that is the point upon which many of the decisions on this line of evidence divide—some of the courts admitting the declarations and failure to reply as presumptive evidence of acquiescence, while others have held the admission of such evidence error, on the ground that it could not be held as a matter of law that such silence was evidence of acquiescence in the facts alleged. The other theory on which the evidence complained of here is sought to be upheld is that the question of the significance to be attached to a failure to reply becomes a mixed question of law and fact, to be submitted to the jury under proper instructions as to how to weigh the circumstances in determining what, if any, significance is to be given to the silence of the party under the given state of facts. The admissibility of the evidence in question here plainly depends upon the surrounding circumstances and the temperament and disposition of the party addressed, and it is contended that, where these conditions rest upon various collateral and attending facts, it is for the jury to determine what would be the natural and usual conduct of an ordinary man under these given conditions.

It is probably true, under the circumstances of this particular case, that a man of an outspoken, combative temperament would have been likely to have repudiated the insinuation of culpable negligence contained in the declaration of the witness, if he could do so truthfully; while one of a reserved and timid disposition would be likely to remain silent, even in the face of an unjust imputation. The jurors had the party before them, and opportunity to form an estimate of his disposition in this regard; and it was within their province to determine what, if any significance attached to his silence.

[5, 6] It may be apparent in this case that the nature of the declaration and surrounding circumstances make it so clear that no fair inference of an admission of negligence could be inferred from defendant's failure to reply that it is extremely improbable that the jury attached any significance to his silence, and yet the matter be one that was properly left to the jury's determination. In fact, the prejudicial part of the admitted evidence, if its admission was error, is in the declaration itself. It was of such a character as to indicate an excited state of mind and a highly unfavorable opinion of the manner in which the defendant had handled his car, and was calculated to impress the jury with a conviction that the defendant must have been driving with great recklessness and want of care to arouse such a state of mind on the part of a disinterested witness. It is beyond dispute that, if this declaration—that defendant ought to be strung up for running into a woman in that fashion—had been made out of the presence and hearing of the defendant, its introduction in evidence would be prejudicial error. It is equally so if, having been made in his presence, it must be held as a matter of law that no unfavorable inference could be drawn from his silence. It is true that in this case the person who made the declaration testified on the trial as to all the facts that came under his observation relating to the accident, and the jury was placed in a position to decide for themselves whether what he claimed to have seen justified his heated conclusions. But the very fact of the excitement and resentment displayed, as a result of what he saw, in this indictment of the defendant, might have convinced the jury of the truthfulness of this witness' narrative of the accident. If the declaration was improperly admitted, it would constitute prejudicial error. But if it was properly before the jury for the purpose of showing acquiescence by silence, the fact that it was not competent as proof of any fact implied in the declaration itself would not exclude it. The law provides what may be an inadequate, yet a legal protection against the prejudicial results of such testimony. The defendant was entitled to an instruction of the court limiting the evidence to the one purpose for which it was admissible. The trial judge did, in this instance, rather inadequately, perhaps, indicate in his ruling on the motion to strike out this testimony that it was only received as tending to show acquiescence on the part of the defendant. But it was incumbent upon defendant, if he wanted a more definite and explicit statement of the law, to ask for it. People v. Mallon, 103 Cal. 513, 37 Pac. 512; Byrne v. Byrne, 113 Cal. 294, 45 Pac. 536. No such request was made in this case, either as to the limited application of this evidence, or as to the conditions under which silence should be construed to imply acquiescence in the statement made, and defendant is therefore not in a position to complain at the omission of such further instruction.

[7] While it may seem clear to us that the significance of defendant's silence in the face of this declaration was practically negligible as evidence of an admission, we are not prepared to say that the court was not right in holding it to be a matter for the jury to pass upon, in view of the fact that it in effect charged defendant with negligence, and would, at least, be suggestive and provocative of an answer denying fault, if the person arraigned felt that he was not to blame. It was necessary to weigh the attending circumstances in order to determine what would be the usual and natural course for one to pursue when confronted with such a statement. In view of the extreme uncertainty and confusion of the law on this point, as shown in numerous court rulings, we are led to leave the action of the trial court undisturbed.

[8] On the issue of contributory negligence,

we are satisfied that the jury was justified in finding for the plaintiff. The manner in which plaintiff entered upon the street crossing and attempted to make her way through the traffic of teams and automobiles and street cars was one of the constantly recurring problems of negotiating crowded and traffic congested streets; and her prudence and care in the matter were for the jury to determine in the light of the facts of this particular case.

[9] We have carefully considered the instructions given and refused, and find no prejudicial error. There were one or two of defendant's refused instructions that might have been properly given, but the points, so far as material, were covered by other instructions which were given.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

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182 Cal. 111

HAWLEY et al. v. STATE ASSUR. CO., LIMITED, OF LIVERPOOL, ENGLAND.

(L. A. 4759.)

(Supreme Court of California. Jan. 26, 1920. Rehearing Denied Feb. 24, 1920.)

1. APPEAL AND ERROR ⟸757(1)—NO REVIEW WHERE BRIEF DOES NOT SET OUT SUFFICIENT OF THE RECORD.

In an action to set aside decree because foreclosure mortgagor was not summoned and the appearance in her behalf was unauthorized, where no portion of the pleadings or findings in the foreclosure case is printed in the brief, the record being brought up under Code Civ. Proc. § 953a et seq., appellants have failed to print sufficient of the record to establish any error on the part of the court.

2. MORTGAGES ⟸497(2) — FORECLOSURE DECREE BINDING ON FORMER OWNER NOT MADE A PARTY WHERE CONVEYANCE OF RECORD RESERVED NO RIGHTS.

Under Code Civ. Proc. § 726, as to parties on foreclosure, a decree of foreclosure, in action brought after conveyance of record in which the owner of the premises reserved no rights, was binding on such owner, though not served with process; her grantee having appeared and defended.

3. JUDGMENT ⟸447(1) — PLAINTIFF IN SUIT TO VACATE DECREE OF FORECLOSURE SHOULD SHOW MERITORIOUS DEFENSE AGAINST INCUMBRANCE.

A former owner who sues to vacate foreclosure decree against her grantee of record, claiming she reserved a right in the premises, should show a meritorious defense against the incumbrance.

In Bank.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action by Anna M. Hawley and husband against the State Assurance Company, Limited, of Liverpool, England. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hamilton A. Bauer, of San Francisco, for appellants.

Lloyd W. Moultrie, of Los Angeles, for respondent.

WILBUR, J. [1] The record in this case is made up under section 953a et seq., Code of Civil Procedure. The appellants do not print in their brief the pleadings, findings, or judgment, nor any portion thereof, nor is there more than a fragmentary statement of some of the evidence. From the statement in appellants' brief it appears that the action is to set aside a decree in a previous action for the foreclosure of a mortgage upon the ground that appellant Anna M. Hawley, the owner of the property mortgaged, was never served with summons in the foreclosure proceeding, and that the appearance entered in her behalf was unauthorized. No portion of the pleadings or findings in the foreclosure case is printed in appellants' brief. Under these circumstances appellants have failed to print sufficient of the record to establish any error on the part of the trial court. Notwithstanding this, we have examined the typewritten transcript sufficiently to determine that there is no merit in the appeal.

[2, 3] Appellants allege that Anna M. Hawley is the owner of the property in question "subject only to a certain mortgage made by Horace Cline and Mildred L. Cline and a deed of trust executed to Libbie H. Bathrick." The findings are that previous to the bringing of the foreclosure proceedings Mrs. Hawley had conveyed the property by grant deed, on June 6, 1907, to Libbie H. Bathrick, which deed was on that date duly recorded, and that appellant Anna M. Hawley did not thereafter own the property. Proceeding was instituted by respondent to foreclose the above-mentioned mortgage of the Clines, appellants' grantors, and also to foreclose a deed of trust, executed by Mrs. Bathrick after the conveyance to her, to secure an obligation of appellant C. O. Hawley. In that action the record owner, Mrs. Bathrick, appeared and defended, and judgment was rendered against her. This decree was sufficient to foreclose any interest of the appellant Mrs. Hawley, reserved by her when she conveyed the property to Mrs. Bathrick, not shown by the record. Code Civ. Proc. § 726. Furthermore, the appellants do not show that they have any meritorious defense to the incumbrances foreclosed. Gregory v.

Ford, 14 Cal. 138, 73 Am. Dec. 639; Gibbons v. Scott, 15 Cal. 284; Matson v. Batto & Sons, 173 Cal. 800, 161 Pac. 1144, and cases cited; Lee v. Colquhoun, 175 Cal. 16, 164 Pac. 894; 2 Freeman on Judgments (4th Ed.) §§ 495, 498; Black on Judgments (2d Ed.) §§ 376, 377; High on Injunctions (4th Ed.) §§ 126, 229a; Janes v. Howell, 37 Neb. 320, 55 N. W. 965, 40 Am. St. Rep. 494; Thomas v. West, 59 Wis. 103, 17 N. W. 684; McDonald v. Cawhorn, 152 Ala. 357, 44 South. 395; Hockaday v. Jones, 8 Okl. 156, 56 Pac. 1054; Jeffery v. Fitch, 46 Conn. 601; Wilson v. Shipman, 34 Neb. 573, 52 N. W. 576, 33 Am. St. Rep. 660; Meyer v. Wilson, 166 Ind. 651, 76 N. E. 748, and cases cited; Coon v. Jones, 10 Iowa, 131; Newman v. Taylor, 69 Miss. 670, 13 South. 831; Masterson v. Ashcom, 54 Tex. 324.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; LAWLOR, J.; OLNEY J.

182 Cal. 93

BOA v. SAN FRANCISCO-OAKLAND TERMINAL RYS. (S. F. 8739.)

(Supreme Court of California. Jan. 22, 1920. Rehearing Denied Feb. 19, 1920.)

1. APPEAL AND ERROR ⊂=1001(1)—VERDICT SUPPORTED BY SUFFICIENT EVIDENCE CONCLUSIVE.

A verdict cannot be disturbed by the Supreme Court, if there is any evidence to support it.

2. CARRIERS ⊂=318(1)—EVIDENCE SUFFICIENT TO SUPPORT FINDING OF NEGLIGENCE.

In an action for injuries to a street railway passenger struck by the overhang of a turning car from which she had alighted at a curve, evidence *held* to support the jury's finding that the railway's negligence caused the accident.

3. CARRIERS ⊂=247(4)—TERMINATION OF RELATIONSHIP OF PASSENGER AND CARRIER ON ALIGHTING FROM STREET CAR.

Where a street car passenger had alighted upon the street for the purpose of transferring to another car, but before she had reasonable opportunity of getting away was injured by the overhang of the car from which she had alighted when it turned on a curve, the relation of carrier and passenger had not terminated.

4. TRIAL ⊂=296(4, 5)—ERRONEOUS INSTRUCTION ON CONTRIBUTORY NEGLIGENCE CURED BY OTHER INSTRUCTIONS.

An instruction on contributory negligence as constituting "some act on the part of plaintiff which was proximate cause of the injury," objected to because contributory negligence may arise from an omission as well as from an act, was cured by other instructions defining such negligence as an act or omission.

5. TRIAL ⊂=295(6)—INSTRUCTION NOT PREJUDICIAL AS EMPHASIZING ISOLATED FACTS.

In an action for injury to a street railway passenger struck by car from which she had alighted, an instruction that the jury might consider the surrounding circumstances, including plaintiff's age and knowledge or ignorance of her surroundings, *held* not prejudicial, when reading the instructions as a whole, as singling out or bringing into prominence any isolated facts.

6. DAMAGES ⊂=214—INSTRUCTION ON RIGHT TO REFUSE TO UNDERGO MEDICAL OPERATION NOT ERROR WHERE EVIDENCE CONFLICTING AS TO CURE THAT OPERATION WOULD EFFECT.

An instruction that one injured by the negligence of another is not required to undergo a serious or critical operation which might be attended by some risks of failure, if such person exercises reasonable diligence in care for her injuries and reasonable means to prevent aggravation of them and to effect her speedy and complete recovery, was not error, where there was conflicting medical testimony as to the efficacy of the proposed operation.

7. DAMAGES ⊂=34—FAILING TO SECURE SKILLFUL PHYSICIAN TO TREAT INJURIES, THOUGH USING ORDINARY CARE, NO DEFENSE.

If plaintiff was injured through defendant's negligence and used ordinary care in selecting a physician and surgeon to treat her injuries, that such physician or surgeon was unskillful or failed to give the best or proper treatment was no defense, provided plaintiff complied with the directions and submitted to the treatment prescribed.

8. TRIAL ⊂=260(1) — REFUSAL OF INSTRUCTIONS COVERED BY OTHERS GIVEN PROPER.

It is not error to refuse requested instructions upon matters covered by others.

9. DAMAGES ⊂=132(6)—FOR FRACTURE OF FEMUR CAUSING PERMANENT DISABILITY, $8,000 NOT EXCESSIVE.

Where plaintiff was 72 years of age, had been attending to housework while living with her daughter, who was engaged in steady employment, and by reason of the accident suffered a fracture of the neck of the femur, thereby becoming an invalid with a probability of remaining so for the balance of her life and unable to care for herself or move without assistance, it cannot be said that the trial court abused its discretion in determining that a verdict of $8,000 was not excessive.

10. TRIAL ⊂=234(7)—INSTRUCTION ON BURDEN OF PROOF OF CONTRIBUTORY NEGLIGENCE NOT MISLEADING.

An instruction that contributory negligence is an affirmative defense which must be established by the defendant to the jury's "satisfaction" by a preponderance of the evidence, and that if in the jury's mind the evidence is evenly balanced such defense fails, *held* not likely to mislead the jury to the prejudice of appellant by requiring a higher degree of proof than the law exacts.

11. DAMAGES ⊂⊃34—SELECTING AND CONTINUING TREATMENT WITH UNSKILLFUL PHYSICIAN NOT CONTRIBUTORY NEGLIGENCE.

In a personal injury action, evidence of improper medical treatment is inadmissible, where there is no evidence showing that plaintiff had any information of the physician's lack of skill prior to employment or that she continued with him after being informed of any lack of skill or failure to give proper treatment.

12. DAMAGES ⊂⊃178—RECOVERY ALLOWED FOR MENTAL SUFFERING FROM REASONABLE APPREHENSION OF NEVER RECOVERING USE OF LEG.

In personal injury action, the physical and mental condition of plaintiff resulting from the accident was material, and mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from plaintiff's injury was a proper element for the jury in assessing damages, so it was proper for plaintiff to testify to her belief that she would never have the use of a broken leg.

13. APPEAL AND ERROR ⊂⊃1053(4)—ERRONEOUS HEARSAY EVIDENCE HARMLESS IN VIEW OF LIMITING INSTRUCTION AND OTHER EVIDENCE.

Though erroneous to admit testimony of plaintiff suing for injuries, as to what she had been told regarding permanence of her injuries by physician not regularly employed by her, error was harmless, where court instructed that such statement should be considered solely in determining how plaintiff felt about her injuries and the other evidence sufficiently showed permanence.

In Bank.

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Susan D. Boa against the San Francisco-Oakland Terminal Railways, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

A. L. Whittle, of San Francisco, W. H. Smith and Louis W. Bennett, both of Oakland, and Morrison, Dunne & Brobeck, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for appellant.

J. E. White, of San Francisco (John J. Long and Sven Svenson, both of San Francisco, of counsel), for respondent.

LENNON, J. The facts upon which this appeal is based are stated in the opinion of the District Court of Appeal for the First Appellate District, Division 2, written by Mr. Justice Haven (28 Cal. App. Dec. 1005). We adopt that opinion, in part, as follows:

"Defendant appeals from a judgment, after verdict, in an action for damages resulting from personal injuries. The plaintiff and her daughter were passengers on a street railway car owned and operated by the defendant. They alighted from this car at the corner of University avenue and Oxford street, in the city of Berkeley, for the purpose of transferring to another car of the defendant, and were instructed by the conductor in charge of the car from which they alighted to proceed across the street to the opposite corner and there await the car to which they were to transfer. After they had alighted and were upon the street, the car which they had left proceeded to turn around the corner from Oxford street into University avenue. In making this turn the overhang of the car struck the plaintiff, threw her to the ground, and inflicted serious personal injuries.

[1, 2] "The appellant contends that the evidence proves without conflict that the plaintiff was herself guilty of negligence in not having proceeded, while the car was stationary, a sufficient distance from the track to have avoided being struck by the overhang as it rounded the curve; and, further, that if her negligence did not cause the injuries, it at least contributed thereto. As is usual in such cases, the statements of the several witnesses differed as to the time which elapsed after the plaintiff had reached the street before the car proceeded on its way, and also as to the distance which had been traversed by the plaintiff prior to the accident, and the exact point at which the accident occurred. The verdict of the jury must be considered as being based upon implied findings that the accident was caused by the negligence of the defendant and not by any negligence, contributory or otherwise, of the plaintiff. These implied findings and this verdict cannot be disturbed by this court if there was any evidence to support them. Plaintiff stated that she thought she had gone a very short distance when the car came upon her; that she had taken just a few steps—possibly three or four, but not more—but that she did not count the steps. She located upon a diagram used at the trial a point which in her best judgment was the point where the car collided with her. This point appears from the diagram to be about 40 feet from the point where she alighted from the car. A witness to the accident, who stated that he was driving his wagon at a point about 150 feet to the rear of the car when the plaintiff stepped therefrom, testified that, when the car started, the plaintiff could not have gotten away from the car at all; that she was just about taking her hand off the post ready to make a step, or had made a step; that she had not made two steps when the car struck her. * * * This testimony is sufficient to support the finding of the jury as to the cause of the accident. It was for the jury to determine the weight of the evidence in connection with the conflicting statements of the witnesses.

[3] "Appellant further complains of errors of law occurring at the trial, and excepted to by the defendant, with regard to the giving and refusing of certain instructions, and to the reception and exclusion of certain evidence. * * * [Certain] instructions objected to by appellant have reference to the degree of care which defendant owed to the plaintiff at the time of the accident, as dependent upon whether or not her relation to the defendant as a passenger had ceased at that time. These instructions are as follows:

"(Instruction No. 17.) 'I instruct you that the law of this state requires a carrier of passengers for reward to use the utmost care and diligence for their safe carriage, and if you find

from the evidence submitted in this case that the plaintiff was a passenger upon one of the defendant's cars, and that before she had a reasonable opportunity to reach a place of safety upon alighting from said car she was struck by the car from which she had alighted, then the burden is cast upon the defendant to prove that the injury was occasioned by an inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff.'

"(Instruction No. 18.) 'The relation of passenger and carrier continues to exist while the passenger is expeditiously alighting from the car; and the carrier is bound to exercise the same high degree of care in affording a passenger a reasonable opportunity to alight in safety as in carrying her safely; and if you find from the evidence submitted to you in this case that while the plaintiff was alighting from the car of the defendant company the car upon which she had been riding was started by the defendant before she had a reasonable opportunity to reach a place of safety and by reason thereof the injuries complained of were inflicted, then your verdict should be for the plaintiff.'

"(Instruction No. 19.) 'If you find from the evidence that the plaintiff became a passenger on one of the defendant's cars; that she paid her fare and received a transfer entitling her to continue her journey on another of the defendant's cars from the transfer point; that she alighted at the point indicated by the conductor of the car upon which she was riding; and that the car from which she had alighted was started before she had a reasonable opportunity to reach a place of safety, using in that behalf the care which an ordinarily prudent person would have used under the circumstances, then your verdict should be for the plaintiff.'

"It is claimed by appellant that the relation of carrier and passenger ceased as soon as the plaintiff alighted from the car and stood upon the street. In support of that contention reliance is placed chiefly upon the cases of Creamer v. West End Street Railway Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456, and Chattanooga Electric Railway v. Boddy, 105 Tenn. 666, 58 S. W. 646, 51 L. R. A. 885. These cases announce the general rule that: 'When a passenger steps from the car upon the street, he becomes a traveler upon the highway, and terminates his relations and rights as a passenger, and the railway company is not responsible to him as a carrier for the condition of the street, or for his safe passage from the car to the sidewalk.' In each of the above-cited cases the plaintiff was injured, not by the car from which he had alighted, but by another car of the defendant. Respondent relies upon the case of Cody v. Market Street Railway Co., 148 Cal. 90, 82 Pac. 666, in which an instruction very similar to the one now under consideration was approved by the Supreme Court. In that case the plaintiff was injured while alighting from the defendant's car. It is claimed by appellant that that fact distinguishes the Cody Case from the case at bar; that the status of a person while in the act of getting down from a street car is different from that of a person who has fully gotten down from the car and upon the street and is walking along the pavement. The rules contended for by the respective parties upon the question now under consideration are both of them well established within their proper limitations. The question for determination here is: Which rule applies under the facts of this case? The reason of the rule contended for by appellant is well stated in the case of Creamer v. West End Street Railway Co., supra, particularly relied upon by appellant, as follows: 'The street is in no sense a passenger station, for the safety of which a street railway company is responsible. * * * When a common carrier has the exclusive occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that persons intending to take passage upon or leave a train have the relation and rights of passengers in leaving or approaching the cars at a station.' (Citing cases.) 'But one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger.' As appears from the foregoing quotation, the reason that the relation of carrier and passenger does not continue after the passenger has stepped upon the street is that the company has no control over a public highway. If an accident happens to a person who has been a passenger, after he has alighted upon a street, it is clear that the railway company does not then sustain to him the relation of a carrier; but, on the other hand, the relation does continue, not only while the passenger is upon the car, but while he is in the act of alighting therefrom and until he has safely left the instrumentality by which he has been transported. The fact that his feet may be upon the street instead of upon the step of the car can make no difference in the application of the rule. The duty of the railway company to him as a passenger continues until he has had a reasonable opportunity of leaving the car; and if, before that opportunity is afforded him, he is injured by the very car upon which he has traveled, it cannot be said that the responsibility to him as a passenger has terminated. In the Cody Case the plaintiff when injured had one foot upon the ground and the other on the bottom step of the car. In this case the plaintiff had two feet upon the street and possibly had taken a few steps from the car. The principle upon which liability was declared in the Cody Case is that responsibility continues until the passenger has had a reasonable opportunity of getting away from the car without injury. That principle applies in this case with the same force that it did in the Cody Case. Appellant relies upon the case of Niles v. Boston Elevated Ry. Co., 225 Mass. 570, 114 N. E. 730, as being determinative in its favor of the question here under discussion. The facts of that case are in most respects similar to those in the instant case. It appears, however, that the plaintiff * * * had been afforded a reasonable opportunity of escaping the danger of the turning car. The court said: 'The plaintiff when injured, was not on the defendant's premises, nor at a station or platform in use for the purpose of transferring passengers and within the control of the carrier; neither was she under its direction and within its care. She was upon a public highway where she was exposed to dangers not caused by the defendant. In passing from one car to the other she could go on either side of the car, she could choose her

own way and her movements were entirely under her own guidance. While so walking on a public highway and in transferring from one car to the other, as matter of law, she was not a passenger.'

"In the case at bar the question which was submitted to the jury was whether or not the defendant allowed plaintiff a reasonable opportunity to leave its car in safety and thus to pass beyond its care. The fact that this question seems not to have been in controversy in the Massachusetts case destroys its authority here.

"The applicability of the rule announced by the Cody Case, and not that contended for by appellant, to the facts of the instant case, is illustrated by two cases in Connecticut cited by the opposing parties to this case. In White v. Connecticut Co., 88 Conn. 614, 92 Atl. 411, L. R. A. 1915C, 609, the facts were very similar to those in the instant case, and it was held that: 'A passenger alighting from a car after it has stopped at a regular stopping place is entitled to have a reasonable opportunity after leaving the car to get beyond danger from its movements and operation.' In the case of Powers v. Connecticut Co., 82 Conn. 665 [74 Atl. 931, 26 L. R. A. (N. S.) 405], it was held that the relation of carrier and passenger had ceased prior to the accident when the passenger, attempting to cross the track in the rear of the car, brushed against the fender and caught her dress so that she fell. In the latter case, the accident was caused by the plaintiff's own act in using the street. In the former case, the accident was caused by the negligent use by the railway company of its own instrumentalities. We are satisfied that, under the facts as stated in the instructions, the relation of carrier and passenger had not terminated at the time the plaintiff in this case received her injuries, and for that reason the instructions complained of were not erroneous.

[4] "Appellant further complains of instructions Nos. 21 and 22, which define contributory negligence as consisting of some act on the part of the plaintiff which was a proximate cause of the injury, and such an act as a person of ordinary prudence and care would not have done. The objection to these instructions is that contributory negligence may arise from an omission as well as from an act, and that the failure to include the word 'omission' in the instruction was prejudicial error. The above instructions were given at the request of plaintiff. It appears that other instructions were given at the request of the defendant in which contributory negligence was defined as an act or omission on the part of the plaintiff. These latter instructions cured any defect there may have been in the instructions on this subject given at the request of the plaintiff.

[5] "The further objection made to instruction No. 21 that it was error to advise the jury that they might take into consideration all the surrounding circumstances, including the age of the plaintiff, her knowledge and her ignorance of her surroundings, etc., is without merit. Reading the instructions as a whole, the instruction does not prejudicially single out or bring into prominence any isolated facts, as claimed by appellant.

[6] "Objection is also made to instruction No. 23, which reads as follows: 'You must determine from the evidence introduced in this case the nature and extent of the injuries suffered by the plaintiff, and, in determining whether or not such injuries are permanent in character, the court instructs you the law does not require one injured by the negligence of another to undergo a serious or critical operation which might be attended by some risks of failure, if such person exercised reasonable diligence in caring for her injuries and reasonable means to prevent aggravation of them, and to effect her speedy and complete recovery; and a refusal to undergo such an operation cannot be considered in mitigation of damages, even though under the evidence it might lessen the effects of the injury.' The argument is that the medical evidence introduced at the trial proved that the operation referred to in this instruction, if submitted to by the plaintiff, would have effected a permanent cure. It appears, however, that there was conflicting medical testimony upon this point, and, under such circumstances, the giving of this instruction cannot be said to have been erroneous.

[7] "Instruction No. 24 was as follows: 'If you find from the evidence that the plaintiff was injured through the negligence of the defendant, that she used ordinary care in the selection of a physician and surgeon for the purpose of treating her said injuries, it will be no defense to show that the physician or surgeon thus selected by her was unskillful or failed to give her the best or proper treatment, providing she complied with the directions and submitted to the treatment prescribed by such physician and surgeon.' This instruction is claimed to have been erroneous, and in this connection it is contended by appellant that the employment of an unskillful physician or surgeon, or failure to obtain proper medical attention, is negligence on the part of the plaintiff which should have prevented her recovery herein. In our opinion, the above instruction contains a correct statement of the law as established by the following authorities: Baker v. Borello, 136 Cal. 160, 165, 68 Pac. 591; Reed v. City of Detroit, 108 Mich. 224, 65 N. W. 967; Pullman Palace Car Co. v. Bluhm, 109 Ill. 20, 50 Am. Rep. 601; Chicago City Ry. Co. v. Saxby, 213 Ill. 274, 72 N. E. 755, 68 L. R. A. 164, 104 Am. St. Rep. 218, and other cases cited in a note in 48 L. R. A. (N. S.) 116.

[8] "Appellant further contends that the court erred in refusing to give sundry instructions requested by the defendant. We have examined the various proposed instructions, as set forth in the transcript, and are satisfied that the court did not err in its ruling upon any of them. In some cases the matters had been covered by other instructions, and other proposed instructions are based upon the defendant's theory of the law of the case, which we deem to be erroneous. * * *

[9] "It is next claimed * * * that the damages were so excessive as to appear to have been given under the influence of passion or prejudice, and that a new trial should have been granted upon that ground. This is a matter which is very largely in the discretion of the trial court. The plaintiff was 72 years of age; she had been living with her daughter prior to the accident, attending to the housework, the daughter having been engaged in steady employment elsewhere, and the two of them maintaining a home in reasonable comfort. By reason of the accident, the plaintiff suffered a fracture of the neck of the femur, has thereby been

made an invalid, and probably will so remain for the balance of her life. She is unable to care for herself or to move without assistance, or to perform any useful service, and requires constant attendance. Under these circumstances, we cannot say that the trial court abused its discretion in determining that a verdict of $8,000 was not excessive."

[10] This brings us now to a consideration of instruction No. 20, which was given upon the court's own motion and was in effect the modification of an instruction requested by the plaintiff. The question of the correctness and effect of this instruction presents one of the strongest points urged for a reversal. The instruction reads as follows:

"The defense of contributory negligence on the part of the plaintiff is an affirmative defense, and, unless it appears from the evidence on the part of the plaintiff, must be established by the defendant to your satisfaction by a preponderance of the evidence, and, if in your minds the evidence is evenly balanced, the defense fails in that particular."

The portion of this instruction objected to by appellant is the phrase "to your satisfaction," which, it is contended, made the instruction require a higher degree of proof than the law exacts. In commenting upon a similar instruction, the Appellate Court of Indiana said:

"The form of the expression used in this instruction is not to be commended, and has been expressly condemned by the Supreme Court of Illinois. Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916. In the case just cited it appeared that an instruction which stated that plaintiff was 'bound to prove to the satisfaction of the jury by a clear preponderance of the evidence,' etc., had been requested and refused by the trial court. It was held on appeal that the instruction was erroneous and that it was properly refused. The language used in the instruction under consideration is not identical with that condemned in the Illinois case to which we have referred, but it was sufficiently objectionable to have justified the trial court in refusing the instruction. An instruction may contain such an inaccurate statement of the law as would warrant the trial court in refusing to give it, and still the objection may not be so serious as to warrant a reversal of a judgment on that account. In this case the trial court could have very properly refused to give the instruction in question, and such a ruling would have been commendable; but, having given the instruction, this court is now required to determine whether the language employed, when considered in connection with the other instructions given, was such as would probably mislead the jury to the prejudice of appellant. This court has repeatedly decided that an instruction that in substance informs the jury that a party having the burden of proof as to a certain fact or issue must establish it to the satisfaction of the jury by a fair preponderance of the evidence is not reversible error, where the other instructions in the case clearly define what is meant by a preponderance of the evidence and distinctly advise them that a preponderance of the evidence will be sufficient to justify a finding in favor of the party having the burden. In such cases it is held that the words 'to the satisfaction of the jury,' are equivalent to 'find' or 'believe.' Terre Haute, etc., Co. v. Payne, 45 Ind. App. 132, 89 N. E. 413; Baltimore, etc., R. Co. v. Walker, 41 Ind. App. 588, 84 N. E. 730; Sams Automatic Car Co. v. League, 25 Colo. 129, 54 Pac. 642; Callam v. Hanson, 86 Iowa, 420, 53 N. W. 282; Stewart v. Outhwaite, 141 Mo. 562, 44 S. W. 326." Sherman v. Indianapolis Traction Co., 48 Ind. App. 623, 625, 96 N. E. 473, 475.

It may well happen in some cases that an instruction in the form here given would necessarily be considered prejudicially misleading. This is especially apt to be true of an instruction regarding the burden of proving the defense of insanity in a criminal case where the other instructions concerning burden of proof are of course framed to impress upon the jury that guilt must be proved to a moral certainty and beyond a reasonable doubt. People v. Miller, 171 Cal. 649, 154 Pac. 468; People v. Preciado, 31 Cal. App. 519, 160 Pac. 1090. We have carefully considered the instructions given in this case in so far as they bear upon the question of the burden of proof, and we are of the opinion that the language employed in the instruction under consideration was not such as would be likely to mislead the jury to the prejudice of appellant.

[11] Error is also claimed in the ruling of the court sustaining plaintiff's objections to various questions propounded to a medical witness, the purpose of which was to show that the plaintiff had not received proper treatment. Improper treatment, if proved, would be no defense if ordinary care had been used by plaintiff in choosing a doctor. The evidence excluded should therefore have been received only in event there was evidence in the case from which the jury might reasonably have found that the plaintiff was negligent in her choice of a physician. The evidence in this behalf is to the effect that the accident occurred at about 7 o'clock in the evening in a city wherein plaintiff and her daughter were strangers. They had but one friend in this city, a lady who had been a nurse and was at the time the house mother for a club of girls. Plaintiff's daughter asked this lady if she knew anything about the physician who was engaged to treat plaintiff, and the lady said:

"Yes, he has doctored in my home, and some of those girls have been sick and we have had him. I think he is all right."

We have discovered no evidence tending to show that any information of this physician's lack of skill was brought to the knowledge of plaintiff prior to the employment or that she continued with him after being informed of any lack of skill or failure to give proper treatment. We are therefore of the opinion that the defendant failed to lay a sufficient foundation for the reception of evi-

dence of improper treatment and that the objections to this evidence were properly sustained.

[12] A rehearing of this cause, after decision by the court in bank reversing the judgment, was granted solely for the purpose of reconsidering the single point upon which the judgment was order reversed, namely, the prejudicial nature of the admission in evidence of statements to the plaintiff by certain physicians as to the possibility of the permanency of the plaintiff's injuries. Upon that point, in the light of the petition for a rehearing and a further perusal of the record, we now have this to say:

Unquestionably the physical and mental condition of plaintiff resulting from the accident was material, and mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from her injury was a proper element to be considered by the jury in assessing the damages. Sedgwick on Damages (9th Ed.) § 44, and cases cited. The disability apprehended was one arising from the blow occasioned by defendant's car and cannot be considered in any sense remote. It follows that plaintiff had a right to testify as to her belief at the time of the trial that she would be a permanent invalid.

[13] It is insisted, however, that the court erred in allowing plaintiff, as it did, to state over objection that various physicians with whom she had talked concerning her injury had informed her that "in all possibility" she would never recover the use of her limb. Even if it be conceded that the advice of physicians regularly retained in the case is a natural result of an injury to the person, plaintiff failed to show that the physicians expressing the opinion in question had been regularly retained in a professional capacity. The statements, therefore, can at most be considered as purely casual and not connected with defendant's tortious act by an unbroken chain of causation. If therefore, as we thought upon our original consideration of this case, plaintiff's mental suffering is to be considered as occasioned by these statements which bore no legal relation to the injury, the admission of the testimony was not only error but prejudicial error as well. While we are still of the opinion that the admission of the testimony was erroneous, we are now satisfied that the error was not prejudicial. The record shows that the jury was instructed to consider the objectionable statements solely for the purpose of determining how plaintiff felt about her condition at the time of the trial and its effect upon her mind. If therefore independent circumstances naturally and proximately resulting from plaintiff's injury were made to appear at the trial which, standing alone and regardless of the opinion of the physicians, were sufficient to compel the conclusion in the minds of the jury that the plaintiff must have been possessed of a present fear of permanent injury, it cannot be said that the admission of the objectionable testimony resulted in a miscarriage of justice. It did in fact appear that for two months immediately after the accident plaintiff underwent treatment in a sanitarium, making no recovery at that time. It further appeared that subsequent treatment under the supervision of other physicians was equally unsuccessful, and that a year after the accident the fractured bone had not yet healed; plaintiff being at that time well over 70 years of age. It also appeared that at the trial of the case the physicians testified in the presence and hearing of the plaintiff that there was no chance of mending the bone save possibly after a long and tedious course of treatment. Furthermore, the plaintiff appeared in person in the presence of the jury, unable to walk unassisted, with her limb hanging helpless. These circumstances, we take it, were sufficient in and of themselves to have impressed the jury with the fact that the plaintiff must have been irresistibly impelled to believe that she was and would be permanently crippled. Consequently, the objectionable statements could not have been considered the controlling or even a materially contributing cause of the belief expressed by the plaintiff at the time of the trial that she would never recover the use of her limb. Since it was only in that connection that the jury was allowed to consider the statements, it follows that the admission of the testimony objected to and complained of, while error, was harmless error.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LAWLOR, J.; OLNEY, J.; WILBUR, J.; SHAW, J.; KERRIGAN, Judge pro tem.

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In re REID. (Cr. 2244.)

(Supreme Court of California. Jan. 21, 1920.)

1. ATTORNEY AND CLIENT ⊂=49—NO SUMMARY DISBARMENT OF ATTORNEY REMOVED AS PUBLIC OFFICER OTHERWISE THAN BY IMPEACHMENT.

The summary procedure for disbarment of an attorney provided by Code Civ. Proc. § 288, in cases where the attorney has been convicted of a felony or misdemeanor involving moral turpitude, is not applicable in the case of proceedings for removal of the attorney from public office, as the office of district attorney of a county, under Penal Code, § 758 et seq., relating to the removal of public officers other than by impeachment for alleged misconduct in office; the provisions in section 288 being limited to prosecutions for a criminal offense defined by statute in which the judgment finally determines for all purposes the question of guilt or innocence of the particular crime.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. OFFICERS ⊜74—PROCEEDING FOR REMOVAL FOR MISCONDUCT THOUGH A "CRIMINAL CASE" NOT A PROSECUTION FOR "CRIME."

The proceeding under Pen. Code, § 758 et seq., relating to the removal of public officers other than by impeachment for alleged misconduct in office, while in its nature a "criminal case," is not a prosecution for a "crime" in the ordinary sense of the word, having as sole object the removal from office.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Crime; Criminal Case or Cause.]

3. OFFICERS ⊜74—WHEN ADJUDICATION OF REMOVAL FOR MISCONDUCT OTHER THAN BY IMPEACHMENT IS CONCLUSIVE.

An adjudication, in a proceeding under Pen. Code, § 758 et seq., relating to removal of public officers other than by impeachment for alleged misconduct in office, is conclusive only in connection with the matter of incumbency of the office.

4. ATTORNEY AND CLIENT ⊜48—ATTORNEY REMOVED AS DISTRICT ATTORNEY FOR MISCONDUCT MAY BE DISBARRED ONLY ON NOTICE AND TRIAL.

An attorney removed as district attorney of a county pursuant to Pen. Code, § 758 et seq., other than by impeachment for alleged misconduct, though not subject to summary procedure for disbarment under Code Civ. Proc. § 288, is nevertheless subject to disbarment proceedings on account of matters alleged in the accusation against him in the removal proceedings, but the disbarment proceedings must be based on accusation in writing, stating the matters charged and entailing notice and trial.

In Bank.

In the matter of the disbarment of John S. Reid, an attorney and counselor at law. On order to show cause as to the applicability of a statute in the matter of disbarment because of removal from public office. Order to show cause discharged.

See, also, 186 Pac. 634.

ANGELLOTTI, C. J. Order to show cause as to the applicability of section 288, Code of Civil Procedure, in the matter of disbarment, because of removal from office in a proceeding under section 758 et seq., Penal Code. Order to show cause discharged.

As the result of a proceeding initiated against J. S. Reid, district attorney of Trinity county, in the superior court of Trinity county, by an accusation presented by the grand jury under section 758 et seq., Penal Code, relating to the removal of public officers other than by impeachment, for alleged misconduct in office, judgment of removal from office was given. It may be conceded that the matters charged, if true, involved moral turpitude. Thereupon the clerk of such superior court transmitted to this court a certified copy of the judgment, apparently deeming this course necessary in view of section 288, Code of Civil Procedure, which requires such action by the clerk "in case of the conviction of an attorney or counselor of a felony or misdemeanor involving moral turpitude." Section 287, Code of Civil Procedure, specifying grounds of removal or suspension of attorneys, specifies in subdivision 1 as one of such grounds "his conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence," and sections 289 and 299, Code of Civil Procedure, substantially provide that in such cases, upon the receipt of the certified copy of the record showing the fact, this court must give judgment, striking the name of the attorney from the roll. In all other cases, accusation, citation, hearing, etc., are essential prerequisites to disbarment. Entertaining serious doubt whether the summary procedure provided for cases where an attorney has been convicted of a felony or misdemeanor involving moral turpitude is applicable in the case of proceedings for removal from office under section 758 et seq., Penal Code, we made this order to show cause.

[1-3] Further consideration has brought us to the conclusion that this summary procedure should be held not applicable in such a case. The proceeding under section 758 et seq., Penal Code, while held to be in its nature a "criminal case" (see People v. McKamy, 168 Cal. 531, 143 Pac. 752), is not a prosecution for a "crime" in the ordinary sense of the word. Its whole object is the removal of the incumbent from office, and the judgment can go to no further extent. As said in the Matter of Burleigh, 145 Cal. 35, 37, 78 Pac. 242, 243:

"The misconduct charged need not necessarily include an act which would constitute a crime, and, *if it does include such crime, the judgment on the accusation would not be a bar to a subsequent prosecution for such crime.*" (Italics ours.)

We think the provisions of the Code of Civil Procedure to which we have referred may fairly be construed as being limited to prosecutions for a criminal offense defined by our statute (see section 15, Pen. Code), and in which the judgment finally determines for all purposes the question of guilt or innocence of the accused of that crime. This view is borne out by the provision of subdivision 1 of section 287 that "the record of conviction shall be conclusive evidence." It is hardly to be assumed that the Legislature intended to so provide as to a record which does not finally adjudicate the question of the guilt of a party of a crime. The adjudication in a proceeding under section 758 et seq. is conclusive only in connection with the matter of incumbency of the office. If we assume that the illegal matters upon which the

charge of misconduct was based constituted a crime under our laws, and a criminal prosecution is had against Mr. Reid for such crime, it may well be that an acquittal might result despite the judgment of removal from office. It is the conviction in *such* a prosecution that we think the statute refers to.

[4] This view, of course, does not preclude proceedings for disbarment on account of matters alleged in the accusation preferred against him in the removal proceedings, but such disbarment proceedings would necessarily be based on verified accusation in writing, stating the matters charged, and would entail notice and trial.

The order to show cause is discharged.

We concur: SHAW, J.; OLNEY, J.; LENNON, J.; LAWLOR, J.; WILBUR, J.; KERRIGAN, Judge pro tem.

182 Cal. 83

In re SCOTT et ux. (L. A. 5118.)

(Supreme Court of California. Jan. 20, 1920.)

1. APPEAL AND ERROR ⇐1099(1)—ADJUDICATION ON FORMER APPEAL CONCLUSIVE ON SUBSEQUENT APPEAL.

Adjudication on former appeal that under Act Cong. July 1, 1902, resurvey of school land superseded original survey, regulates the disposition of the public land within the area affected as to all persons not in the actual occupancy thereof, and that section 57 of new survey is identical with section 36, and not section 33, of old survey, is conclusive on subsequent appeal, where the pleadings and evidence presented on subsequent appeal are identical with those presented on former appeal.

2. RECORDS ⇐9(10½)—JUDGMENT GIVING PLAINTIFFS POSSESSION AS AGAINST DEFENDANTS PROPER IN PROCEEDINGS FOR CERTIFICATION OF TITLE.

In proceedings for certification of title under Torrens Land Title Act, where specified defendants appeared in lower court and in appropriate pleadings denied petitioners' claim of ownership and alleged title in themselves, court properly adjudged petitioners entitled to the immediate possession as against such defendants; the proceeding being in effect, in view of the issues raised by such pleadings, one to quiet title to real property.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Application by C. A. Scott and wife for certificate of title under the Torrens Land Title Act. From judgment rendered, defendants appeal. Affirmed.

Conkling & Brown and Phil D. Swing, all of El Centro, for appellants.

Haines & Haines, of San Diego, for respondents.

PER CURIAM. This case, originally appealed to this court, was transferred to the District Court of Appeal of the First Appellate District, Division 1, for hearing and determination. Subsequent to decision by that court, a hearing was ordered in this court, and the matter has been ordered submitted herein for decision upon the briefs on file.

The opinion of the District Court of Appeal, prepared by Mr. Justice Kerrigan, was in part as follows:

"This is an action brought under the provisions of the Torrens Land Act wherein the petitioners seek a decree establishing in themselves title to certain school lands described in the complaint.

"The facts are stated in the decision of a former appeal in this case. Matter of Application of Scott, 172 Cal. 363, 156 Pac. 872. Briefly stated they are as follows: Petitioners claim to be the owners of school section 36, township 13 south, range 13 east, S. B. M. in Imperial county, according to the original United States survey made in 1856, and as delineated on the map thereof, which was approved March 2, 1857, and which section was located as tract 57 of the resurvey of the township under the Act of Congress of July 1, 1902, c. 1377, 32 Stat. 728. The petition states that tract 57 of the resurvey is section 36 of the original survey, and that defendants are occupants of a portion thereof. Defendants admit by their answers that Scott is the grantee of the state of California of section 36, but claim that that section is not identical with tract 57 of the new survey, but that the latter is identical with section 33; and defendants asserted ownership in themselves of tract 57 as being section 33, township 13, under their respective desert land entries. Judgment went for petitioners.

[1] "Every material argument here advanced by appellants was presented by them on the former appeal, and those necessary for a decision were decided adversely to their contention in that case, and the material questions here presented were there finally adjudicated and disposed of. In substance it was there held that under the Act of Congress of July 1, 1902 providing for a resurvey of certain townships now situated in Imperial county, to cure the obliterations of the monuments of the original survey, the new survey supersedes the old one, and regulates the disposition of the public lands within the area affected as to all persons not in the actual occupancy of the land; and school sections which had passed to the state of California upon the approval of the old survey are governed, in respect of their boundaries, by the resurvey, which absolutely controls. In re Application of Scott, 172 Cal. 363, 156 Pac. 872.

"The pleadings and evidence presented on this appeal are identical with those presented on the former appeal. There has been a de-

termination that section 36 is identical with plat 57 of the new survey. The material questions here involved have not only been settled by prior decisions of the Supreme Court (see Nichols v. McCullom, 169 Cal. 611, 147 Pac. 271; Miller v. Marchus, 171 Cal. 257, 152 Pac. 730), but have been decided adversely to appellants' contentions in this very case (Matter of Application of Scott, 172 Cal. 363, 156 Pac. 872)."

We are entirely in accord with this and accept the same as a part of the opinion of this court.

The judgment of the superior court not only decreed petitioner C. A. Scott to be the owner of the land entitled in fee simple, as the community property of himself and his wife, petitioner Jennie E. Scott, subject to unpaid taxes and certain public highways, but it further adjudged petitioners entitled to the immediate possession against specified defendants who had appeared and contested their claim of ownership, setting up claims of ownership and interest in themselves. It was claimed by them on this appeal that this portion of the judgment was improper in a judgment given in a proceeding under the so-called "Torrens Land Act," and should be stricken therefrom. The theory of the appellants is that the entire scope of the act, which is entitled "An act for the certification of land titles and the simplification of the transfer of real estate" (St. 1897, p. 138), is indicated by its title, and that the purpose of the special proceeding provided by the act was simply the obtaining of conclusive evidence of title which shall be final in the courts. An examination of the act suggests that there is some force in the claim of appellants in this regard. But we think the contention of appellants in this behalf may be conceded without affecting the judgment given by the trial court.

[2] As already noted, the appellants appeared in the lower court and, in appropriate pleadings, denied the claim of ownership made by petitioners and alleged title in themselves. The issues in that behalf made by the pleadings were fully tried and determined against their contention. Under these circumstances, what was said by this court in Faxon v. All Persons, 166 Cal. 707, on pages 711 and 712, 137 Pac. 919, 921 (L. R. A. 1916B, 1209), fully answers appellants' claim. As there, so here, "as between these parties, by reason of the issues made by the pleadings, the proceeding was in substance and effect one to quiet title to real property," presented by the parties in controversy to the court having jurisdiction of such action, and determined by that court. As shown in the opinion in that case, it is immaterial in this connection that the proceeding was entitled as a proceeding under the Torrens Act, or that notice of the hearing was given in the manner required by that act. And inasmuch as between these parties, by reason of the issues made by the pleadings, the proceeding was in substance and effect one to quiet title, the court below was warranted in decreeing that petitioners (who were out of possession) recover possession of the property and have a writ of possession therefor. The judgment of the superior court should be affirmed in all respects.

In concluding, we feel that we cannot refrain from saying that we deeply regret that counsel for petitioners have seen fit in their petition for modification of the judgment of the District Court of Appeal to indulge in certain disparaging remarks relative to the opinion and conclusion of that court that are entirely unwarranted. Coming as they do from counsel who have justly attained and hold high and honorable position at the bar, they are all the more to be regretted, and we can only account for them upon the theory that learned counsel have been unwittingly carried beyond the legitimate line of fair criticism by their zeal for their clients' cause and their deep-seated belief in the justice of that cause. There was nothing in the opinion of the District Court of Appeal that in the slightest degree merited anything other than respectful treatment by counsel in their petition. Looking solely to the provisions of the Torrens Act, on which alone counsel seemed to rely in their brief, the question discussed by the court was by no means as easy of solution as they evidently believed, and the case of Faxon v. All Persons, supra, does not appear to have been brought by counsel to the attention of that court, or indeed, to our attention. In any event, there is never element of either justification or profit to counsel in indulging in disparaging remarks or ridicule relative to a court opinion which they are seeking to have reviewed.

The judgment is affirmed.

ANGELLOTTI, C. J., and SHAW, OLNEY, WILBUR, LENNON, and LAWLOR, JJ., concur.

182 Cal. 91

In re VERNON'S ESTATE.

KURTZ v. VERNON.

(S. F. 9243.)

(Supreme Court of California. Jan. 21, 1920. Rehearing Denied Feb. 19, 1920.)

1. WILLS ⟸306—EVIDENCE INSUFFICIENT TO SHOW REVOCATION.

Evidence *held* to show that the will admitted to probate was the last will of decedent, not revoked by another will subsequently made.

2. WILLS ⟸205—BANK ACCOUNT SUFFICIENT PROPERTY TO AUTHORIZE PROBATE.

Evidence that decedent left $50 in a bank in his name at his death which was not transferred to his wife was sufficient to authorize admission of his will to probate, if it was necessary at all to show the existence of property subject to administration.

3. EXECUTORS AND ADMINISTRATORS ⟸16—FAILURE TO FILE WILL FOR PROBATE NOT RENUNCIATION OF WIDOW'S RIGHT TO LETTERS.

Where testator's property, except $50 in bank, was transferred by him to his wife after execution of his will and before his death, and the widow after the death did not seek to probate the will until forced to do so by subsequent conduct of contestant in bringing action to set aside testator's deed to his wife by failing to file the will for probate within 30 days after testator's death his widow did not forfeit her right to letters testamentary under Code Civ. Proc. § 1301, and had not renounced her right to such letters.

4. WILLS ⟸410—PENALTY FOR APPEAL TO DELAY ADMINISTRATION.

Where, in a will case, the Supreme Court can see no reason for contestant's appeal, except a desire to delay administration of the estate, the case is proper for imposition of penalty, which, where the estate is not seriously injured, will be fixed at as small a sum as $50.

Department 1.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of George R. Vernon, deceased, Maria J. Vernon offering for probate decedent's will, contested by Mary C. Kurtz. From an order admitting the will to probate, contestant appeals. Affirmed.

George D. Collins, Jr., of San Francisco, for appellant.

Whitmore & Henion, of Oakland, for respondent.

SHAW, J. This is an appeal from an order admitting a document to probate as the last will of the decedent.

[1] It is claimed that the will admitted to probate was not the last will of the decedent, but was superseded or revoked by another will made afterwards. This claim is without any substantial support in the evidence. The evidence shows that on October 30, 1916, while his wife was in Philadelphia, the testator, in California, wrote the will admitted to probate and at the same time copied it, partly but not wholly, and sent to her by mail the copy, with a footnote thereon as follows: "This I copied in a new will which was about the same, few alterations." In May, 1917, the testator gave to his wife the document admitted to probate, informing her that it was his will and instructing her to put it in the bank for safe-keeping. The paper stated in the footnote to have been copied with few alterations in a new will indicates clearly that the will probated is the "new will" referred to in the footnote. The order admitting said document to probate demonstrates that the court below took this view. We are unable to perceive any other reasonable inference. Even without such inference, the delivery of the document to his wife in May, 1917, as his will, was sufficient to support the conclusion that it was his last will. Its due execution is not in dispute.

[2] With respect to the claim there was no property to be administered upon, even if that would be cause for refusing probate of a will, which we do not concede, the evidence shows that the decedent left $50 in a bank in his name at his death, which was not transferred to his wife. This was sufficient to authorize the admission of the will to probate, if it was necessary to show the existence of property subject to administration.

[3] The failure to file the will for probate within 30 days after the death of the testator does not forfeit the right of the widow to letters testamentary, under section 1301 of the Code of Civil Procedure. Under that section, the court, in its discretion, might hold that by such delay the widow had renounced her right to letters. The court below, however, did not so hold, and, we think, its decision is supported by the facts explaining the delay. The property of the testator, except the $50, was transferred by the testator to his wife, the respondent, after the execution of the will and before his death. The necessity for probate arose from the subsequent conduct of the contestant here in bringing an action to set aside the deed made by the testator to her before his death.

[4] The court can see no reason for this appeal except a desire to delay the administration of the estate. It is a proper case for the imposition of a penalty. It does not appear that the estate is seriously injured by the delay, and the court does not feel disposed to impose a very large penalty. We think $50 is a sufficient amount.

The order is affirmed, and it is ordered that the respondent recover of the appellant the sum of $50 as damages.

We concur: LAWLOR, J.; OLNEY, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

182 Cal. 114

WHITNEY v. SUPERIOR COURT OF ALAMEDA COUNTY et al. (S. F. 9356.)

(Supreme Court of California. Jan. 26, 1920.)

1. PROHIBITION ⟸10(3)—WRIT NOT AVAILABLE WHERE TRIAL COURT HAS JURISDICTION.

Where no meritorious point is made against the jurisdiction of the superior court, prohibition to prevent criminal trial is not available to the petitioner.

2. PROHIBITION ⟸3(1)—REMEDY BY MOTION WHERE INFORMATION IS FILED WITHOUT PREVIOUS COMMITMENT.

The remedy where an information is filed in the superior court without a previous commitment by a magistrate is by motion to set aside the information on that ground (Pen. Code, § 995 et seq.), with a right to review of the trial court's action thereon by appeal from the judgment.

3. PROHIBITION ⟸5(4)—SUFFICIENCY OF INFORMATION TO STATE PUBLIC OFFENSE NOT CONSIDERED.

Objections to the sufficiency of an information to state a public offense will not be inquired into in an application for a writ of prohibition.

In Bank. Application by Charlotte A. Whitney for writ of prohibition to be directed to the Superior Court of Alameda County and Honorable James G. Quinn, Judge thereof, to prevent trial of petitioner. Writ denied.

J. E. Pemberton, of San Francisco, for petitioner.

PER CURIAM. This is an application for a writ of prohibition. We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of provisions of our federal and state Constitutions.

[1-3] No other point made goes to the jurisdiction of the superior court, and consequently prohibition is not available to petitioner. The remedy where an information is filed in the superior court without a previous commitment by a magistrate is by motion to set aside the information on that ground (section 995 et seq., Pen. Code), with a right to review of the action of the trial court on an appeal from the judgment. The objections to the sufficiency of the information to state a public offense fall within the rule announced in Re Ruef, 150 Cal. 665, 89 Pac. 605. We express no opinion on the merits of the claims made by petitioner in regard to these matters.

The application for a writ of prohibition is denied.

ANGELLOTTI, C. J., and LAWLOR, OLNEY, LENNON, SHAW, and WILBUR, JJ., concur.

182 Cal. 108

WIRTHMAN v. ISENSTEIN et al. (L. A. 4629.)

(Supreme Court of California. Jan. 26, 1920. Rehearing Denied Feb. 24, 1920.)

1. MUNICIPAL CORPORATIONS ⟸706(8)—INSTRUCTION IN LANGUAGE OF MOTOR VEHICLE ACT AS TO REQUIREMENT OF BRAKES WAS PROPER.

In plaintiff's action for personal injury, resulting from being struck by defendant's automobile, an instruction that, in the words of the statute, "all motor vehicles upon public highways must be provided at all times with adequate brakes kept in good working order,"[1] was not tantamount to a charge that defendants were under an insurer's liability for the proper working of the brakes, where the controlling question was negligent driving of the car, and the defective condition of the brakes was an element in determining the existence or absence of such negligence; the instruction not being for the purpose of establishing plaintiff's right to recovery, but purely incidental to the question of negligence.

2. MUNICIPAL CORPORATIONS ⟸706(8)—INSTRUCTION IN ACTION FOR INJURY FROM AUTOMOBILE PROPERLY PRESENTING PROXIMATE CAUSE.

In an action for personal injuries, resulting from plaintiff being struck by defendant's automobile upon a street, where the court instructed that, to entitle plaintiff to recover, defendants must be guilty of negligence "as alleged in the complaint," and that plaintiff must be blameless and free from contributory negligence, it must have been clear to the jury that a finding of defendant's negligence and plaintiff's being blameless would amount to finding that defendant's negligence was the proximate cause of injury.

3. APPEAL AND ERROR ⟸216(2)—PARTY FAILING TO ASK OR PRESENT QUALIFYING INSTRUCTIONS CANNOT COMPLAIN.

In an action for personal injury from being struck by defendant's automobile, where the instruction upon defendant's negligence being the proximate cause was not satisfactory, defendants should have requested or presented qualifying instructions, and, having failed to do so, they cannot complain.

In Bank.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by J. A. Wirthman against Charles Isenstein and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Duke Stone, Thos. A. Sanson, and R. P. Gibbs, all of Los Angeles, for appellants.

I. B. Dockweiler and Dockweiler & Mott, all of Los Angeles, for respondent.

LENNON, J. This is an action wherein plaintiff sought and recovered a judgment for damages for personal injuries occasioned by being struck by the automobile of defendant Isenstein, which was at the time

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] St. 1915, p. 406, § 14.

being operated by defendant Truber. Defendants have appealed, alleging error in the action of the trial court in giving and refusing certain instructions.

The accident which gave rise to this proceeding occurred when defendant Truber suddenly increased the speed of the machine and swerved onto the left-hand side of the street. This he did, it is claimed, to avoid a collision with another machine which was impending because of the failure of his brakes to hold properly. Defendants' failure to keep the brakes in proper condition was not alleged in the complaint; the testimony as to the defective brakes was relied upon by defendants as an explanation of and defense to the alleged improper driving of the car.

[1] The trial court charged the jury in the words of the state Motor Vehicle Act that—

"All motor vehicles upon public highways must be provided at all times with adequate brakes kept in good working order."

Defendants insist that this instruction was tantamount to a charge that defendants were under an insurer's liability for the proper working of the brakes. Plaintiff suggests that, even if it be so construed, the instruction was not erroneous. We express no opinion on this point, since the instruction was not, we think, susceptible of the construction placed upon it by defendants. The controlling question in the case was the negligent driving of the car, and, as an element to be considered in determining the existence or absence of negligence, defendants raised the question of the defective condition of the brakes. It was therefore proper for the court to instruct the jury as to the statutory obligation imposed on defendants in regard to maintaining the brakes in good working order. It will be noted that the court did not instruct the jury that a failure to perform the duty defined was in itself negligence, or, if negligence, a ground for recovery by the plaintiff; it merely informed the jury concerning the duty of defendants in regard to the brakes in the language of the statute. The instruction was not given for the purpose of establishing plaintiff's right to recovery, but was purely incidental to the question as to whether or not, under all the circumstances, the defendants were driving the car negligently, and, in view of the evidence in the case, was properly given.

[2] Defendants and appellants also complain because the court failed to specifically instruct the jury that, to entitle plaintiff to recover, defendants' negligence must have been the proximate cause of his injury. This contention was correctly disposed of in the opinion of Finlayson, P. J., prepared in this case in the Second Division of the District Court of Appeal for the Second Appellate District. We adopt that opinion, in part, as follows:

"The court carefully and accurately instructed the jury as to what is 'negligence' and 'contributory negligence'; also, as to the meaning of the phrase 'proximate cause of the injury'; also, that respondent cannot recover if he was guilty of contributory negligence. Having done this much, the court instructed the jurors that 'the mere happening of the accident * * * is not sufficient to entitle the plaintiff to recover, but the burden * * * is upon plaintiff to show * * * that the defendants are guilty of negligence *in some particular as alleged in the complaint.*' (The italics are ours.) The complaint charges the appellants with three distinct acts of negligence: (1) Driving their automobile at a high and excessive rate of speed; (2) driving upon the wrong side of the street; and (3) failing to give notice or warning. After alleging these acts of negligence, it is alleged that appellants 'did thereby throw plaintiff violently to the pavement * * * causing the plaintiff the injuries hereinbefore stated.' The negligence, therefore, *as alleged in the complaint*, directly contributed to the accident as the sole and proximate cause. So that the instruction to the effect that respondent cannot recover unless he shows 'that the defendants are guilty of negligence in some particular, *as alleged in the complaint*,' is the equivalent of an instruction that he cannot recover unless appellants' negligence was the proximate cause of the injury. It was within the province of the court to state the conditions which should be shown to be present to constitute the conduct of appellants, and its tortious consequences, negligence for which they would be liable. And where, as here, the court instructs that, to entitle respondent to recover, appellants must be guilty of negligence 'as alleged in the complaint,' and that respondent himself must be blameless and free from any contributory negligence, it must have been made perfectly clear to the jury that a finding by them that appellants were guilty of the negligence so described, the respondent himself being blameless, would of necessity amount to a finding that such negligence was the proximate cause of the injury. Weaver v. Carter, 28 Cal. App. 241, 152 Pac. 323.

[3] "Furthermore, the court's instructions, so far as they went, correctly stated the law, and if appellants desired a qualifying instruction to the effect that, to entitle respondent to recover, appellants' negligence must be the proximate cause of the injury, it was incumbent upon their counsel to either ask the court to give such qualifying instruction, which it undoubtedly would have done, or have presented an instruction embodying it. Having failed to do either, appellants are in no position to complain of the instructions given. Weaver v. Carter, supra; Townsend v. Butterfield, 168 Cal. 564, 143 Pac. 760; O'Connor v. United Railroads, 168 Cal. 43, 141 Pac. 809."

We concur: ANGELLOTTI, C. J.; SHAW, J.; LAWLOR, J.; WILBUR, J.; OLNEY, J.

182 Cal. 69

UNION OIL CO. OF CALIFORNIA v. PACIFIC SURETY CO. et al. (L. A. 5276.)

(Supreme Court of California. Jan. 12, 1920. Rehearing Denied Feb. 9, 1920.)

1. EVIDENCE ⊂=441(1), 445(1)—WRITTEN CONTRACT NOT MODIFIED BY PAROL NEGOTIATIONS OR AGREEMENT.

A written contract cannot be modified by the oral negotiations leading up to its execution or by subsequent or contemporaneous oral agreement in contradiction of its terms.

2. MECHANICS' LIENS ⊂=74—BUILDING CONTRACT INVALIDATED BY SEPARATE AGREEMENT AS TO PAYMENT NOT FILED WITH CONTRACT.

A contract between owner and contractor with reference to payments, separate and distinct from building contract but not filed with building contract and contractor's bond as required by Code Civ. Proc. § 1183, would invalidate the building contract.

3. PRINCIPAL AND SURETY ⊂=42—CONTRACTOR'S SURETY NOT LIABLE IN VIEW OF UNDISCLOSED SEPARATE AGREEMENT MODIFYING THE CONTRACT.

If owner made a side agreement with contractor modifying the building contract as to making of payments, but did not disclose existence of such agreement to contractor's surety, the side agreement would be a fraud upon and would release surety.

4. PRINCIPAL AND SURETY ⊂=42—CONTRACTS WITH SURETY NOT INVALIDATED BY UNDISCLOSED SEPARATE AGREEMENT WITH CONTRACTOR BY SEPARATE CORPORATION HAVING SAME STOCKHOLDERS AS OWNER.

Agreement with contractor by corporation having same officers and stockholders as owner corporation, providing for loans to contractor from former corporation at stated intervals, would not release contractor's surety upon ground that, without surety being informed thereof, it modified the building contract providing for payments to contractor at different stages of the work, under Code Civ. Proc. § 1184, the building contract and the contract as to loans being two separate and distinct contracts involving obligations on the part of two distinct legal entities which would not and could not be merged except by some additional agreement between the parties.

5. CORPORATIONS ⊂=426(1)—RATIFICATION OF UNAUTHORIZED CONTRACT MAKES CONTRACT THAT OF CORPORATION FROM INCEPTION.

Ratification by corporation of unauthorized contract made the contract that of the corporation from its inception.

6. PRINCIPAL AND SURETY ⊂=42—SURETY'S CONTRACT NOT AFFECTED BY THIRD PARTY'S AGREEMENT TO MAKE CONTRACTOR LOANS.

Where contractor was induced to accept contract to construct oil reservoirs for oil company by an agreement of oil pipe line company, 60 per cent. of the stock of which was owned by the oil company and whose general manager was the same as that of the oil company, to make contractor specified loans at specified intervals, but such contract was at no time authorized or ratified by oil company, the oil pipe line company's agreement did not discharge contractor's surety upon ground that building contract providing for payments at particular stages of the work under Code Civ. Proc. § 1184, was modified without disclosure thereof to surety; the contract being that of a separate and distinct corporation.

7. PRINCIPAL AND SURETY ⊂=117—CONTRACTOR'S SURETY NOT DISCHARGED BY LOANS TO CONTRACTOR BY THIRD PARTY.

Where pipe line company, 60 per cent. of whose stock was owned by oil company, and who had same general manager as oil company, made contract with oil company's building contractor agreeing to make certain loans to contractor at specified intervals during construction of oil reservoirs, in return for contractor's notes secured by assignment of payments due under building contract, such payments made by pipe line company to contractor did not discharge contractor's surety upon the ground that payments were not made as specified by the building contract providing for payments at different stages of the work as required by Code Civ. Proc. § 1184, in absence of a showing that pipe line company's agreement was made for purpose of defrauding surety.

8. PRINCIPAL AND SURETY ⊂=59—SURETY ENTITLED TO STAND ON STRICT LETTER OF CONTRACT.

A surety is entitled to stand on the strict letter of his contract and insist that the same shall not be altered.

9. INDEMNITY ⊂=15(2)—CONTRACTOR'S SURETY'S INDEMNITOR MAY BE SUED BY OWNER.

Owner was entitled to sue upon contract to indemnify contractor's surety from all loss sustained upon the bond.

Department 2.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by the Union Oil Company of California against the Pacific Surety Company and another. Judgment for defendants, and plaintiff appeals. Reversed.

A. V. Andrews and Thomas O. Toland, both of Los Angeles, and Paul M. Gregg, of San Luis Obispo, for appellant.

Sheldon Borden, Hunsaker, Britt & Edwards, and Goodrich & Martinson, all of Los Angeles, for respondents.

WILBUR, J. Plaintiff, hereinafter referred to as the oil company, brought this action to recover upon a surety bond in the sum of $50,000, executed by the defendant Pacific Surety Company, hereinafter called the surety company, and upon an agreement executed by Carl Leonardt, hereinafter called the indemnitor, to indemnify the surety company. The bond was to insure the faithful performance by Weber-Duller Company, hereinafter called the contractor, of a con-

tract dated June 28, 1910, for the construction at San Luis Obispo of two reinforced concrete oil reservoirs for appellant, each of a capacity of 1,000,000 barrels. That contract, hereinafter referred to as "the contract," among other things, guaranteed the plan for the reservoirs as well as the proper construction of the work. One reservoir having partially collapsed, and the other having shown indications of weakness when only two-thirds full, by reason of a defective plan and material, plaintiff was damaged to the extent of $286,534.86, as follows: $161,662.57 by reason of defects in said reservoirs; the loss of 80,000 barrels of oil valued at $48,000; $76,872.10 by reason of having to pay mechanics' liens filed on such reservoirs. Judgment was rendered for defendants upon the finding that the time and amount of installment payments fixed in the written contract between the plaintiff and the contractor were not the actual terms of payment, and that the terms and times of such payments were concealed from the respondents at the time of the execution of their respective bonds, and that because of such concealment the respondents were relieved from all liability to appellant. The findings were based upon the conclusion that an agreement, hereinafter called the "side agreement," signed by the Producers' Transportation Company, hereinafter called the transportation company, by which the latter company agreed to make "loans" to the contractor in installments equal to 10 per cent. of the contract price at intervals of 15 days during the progress of the work, plus 5 per cent. 104 days after the first payment (which was to be made when the working crew was organized and work well started on each reservoir), aggregating 75 per cent. of the contract price, was in fact an agreement of the oil company, and consequently modified the contract, which provided for different payments at different stages of the work, as required by the provisions of section 1184, Code of Civil Procedure, then in force. The contract being thus modified, it was held that the surety was never advised of the true contract, and because of the fraud involved in such concealment was released from its obligation upon such bond. It is not shown or claimed that surety company made any inquiries that called for information as to the side agreement from the contractor who secured the bond, or that the oil company ever came into contact with the surety company. The bond and contract were attached together and filed with the county recorder, as required by section 1183, Code of Civil Procedure.

[1] The contract of the oil company, being in writing, could not be modified by the oral negotiations leading up to the execution of that contract, nor could it be modified by a subsequent or contemporaneous oral agreement in contradiction of its terms. Any subsequent or contemporaneous agreement with relation to the terms and times of payment, in order to affect the written contract between the parties, must have been in writing. Without considering, for the moment, the evidence which convinced the trial court that the written agreement of the transportation company was in effect the written agreement of the oil company, it should be noted that there was nothing on the face of this agreement which justified the conclusion that the contract of the oil company was modified in any way by the contract of the transportation company, if we regard these two corporations as separate and distinct entities. The agreement does not purport to be that of the oil company, was not executed by the oil company, and did not purport to modify the contract of the oil company. It purported on its face to be a separate and distinct agreement of a corporation not a party to the oil company's contract, for the advancement to the contractor of loans in consideration of 6 per cent. interest, and to be repaid by the contractor, and as a means of such repayment to have assigned to it the various installments of the contract price as they became due from the oil company to the contractor. It is only by going back to the written contract of the parties and taking evidence as to the negotiations between the parties, the relationship between the oil company and the transportation company, and the method of payment thereafter carried out, that we can arrive at the conclusion that the transportation company was in effect the oil company so far as the transaction in question was involved. In order to justify this inquiry, the defendants alleged the perpetration of a fraud upon them in the securing of the bond and indemnity contract.

[2-4] At the outset of this inquiry, it will be observed that no motive can be suggested for the perpetration of such a fraud as would be involved in the making of two separate and distinct contracts by the oil company with reference to the time of payment of the installments of the contract price. If such a separate and distinct contract was made, it would invalidate the contract because of the failure to record the side agreement. Section 1183, Code Civ. Proc. The only person to be defrauded by the failure to incorporate the side agreement into the original contract would be the oil company, for thereby the contract would be invalidated and the bond released. The surety company claims that, without showing any injury by reason of the side agreement, it was nevertheless entitled to stand upon the fact that the contract of which it guaranteed performance was not the real contract between the parties, and that the failure to disclose the terms of the side agreement with the surety company amounted to a fraud upon it. If

it were true that the side agreement did modify the building contract, this position is no doubt well taken; but it cannot be said that a written agreement of the transportation company would modify an agreement of the oil company in law, and as no actual fraud or misrepresentation is shown there is no basis for inquiring into the relation between the transportation company and the oil company for the purpose of invoking equitable principles and powers. It cannot be said, then, that, as a matter of law, the implied representation made to the surety company that the building contract was the contract between the parties was in fact a misrepresentation made by the contractor to the surety company, for it was, in fact, the contract. Even if we should assume that the stockholders and officers of both corporations were the same, the fact that in executing the original contract they acted as the oil company, and in executing the side agreement they acted as the transportation company, would nevertheless result in two separate and distinct contracts, involving obligations on the part of two distinct legal entities which would not, and could not, be merged except by some additional agreement between the parties. In considering the finding of the trial court that the side agreement modified and controlled the terms of payment of the original agreement between the contractor and the oil company, it will be necessary to state some of the evidence bearing upon the relation between these two corporations. The transportation company was formed for the purpose of constructing a pipe line for the transportation of oil from the San Joaquin Valley to the coast at San Luis Obispo. It was capitalized at $7,000,000, 60 per cent. of which had been issued to and was owned by the oil company. It had issued bonds which had been taken by the Union Oil Company, funds had been advanced by the oil company in payment of its stock subscription and for bonds of the transportation company, and with the money so advanced an oil pipe line had been constructed from the San Joaquin Valley to the coast. The transportation company's charge for transporting oil from the valley to the coast was 22½ cents a barrel. The board of directors of the two corporations were different with the exception of W. L. Stewart, who was also vice president and general manager of both corporations. The business of the transportation company, while conducted through the office and by means of the officers and employés of the oil company, amounted to nearly $300,000 a month. A record of these transactions between the two corporations was entered upon books kept by the employés to the oil company. Viewed as a distinct entity, the transportation company had a special interest in the completion of the reservoirs in question, for, in order to transport oil from the valley to the coast, it was essential that storage facilities be provided at the coast. The transportation company would have received $450,000 for transporting to the coast the 2,000,000 barrels of oil required to fill the reservoirs agreed to be constructed by the contractor at San Luis Obispo. It should be stated at this juncture that the trial court found that the execution of the side agreement by the transportation company was not authorized by the company. It was signed in the name of the company by L. W. Andrews and W. B. Robb. L. W. Andrews was attorney for the oil company and conducted the negotiations and drew the building contract, and Andrews and Robb were both directors of the transportation company. It was also found:

"That the said recorded contract and said side agreement were simultaneously prepared, and that the purported signature of the last-mentioned agreement by the Producers' Transportation Company was affixed thereto by the said L. W. Andrews and W. B. Robb simultaneously with the execution of said recorded contract."

It is also found that the side agreement was executed by the direction of W. L. Stewart, who was the general manager and vice president of both corporations. It appears also that Andrews and Robb were members of the executive committee of the transportation company who conducted their business between the meetings of the board of directors. At the first meeting of the board of directors of the Union Oil Company after the execution of said contracts, it ratified the execution of the building contract, and at the first meeting of the transportation company, which occurred April 12, 1911, it ratified the side agreement.

[5, 6] The directors of the Union Oil Company did not ratify the side agreement. Whatever might be the result of the controversy between the Union Oil Company and the transportation company growing out of the conduct of the officials, who were connected with both corporations, the act of the directors of the transportation company in ratifying the contract executed on its behalf made it the contract of that company from its inception, so that the question of the initial authority of those who executed the transportation company's side agreement becomes immaterial so far as the rights of the respondents are concerned. The finding of the trial court that the side agreement was the agreement of the oil company, and the terms of payment of such side agreement were the real terms of payment by the oil company, is not justified by the evidence. If, at the time of the signing of the bond, the oil company, instead of remaining silent, had represented the fact to be that payments were to be made in accordance with the side agreement by the oil

company, the statement would have been untrue. The implied representation involved in presenting the original agreement to the surety, as the agreement between the parties, was in accordance with the fact. It was their agreement.

[7] It is next claimed that, if the terms of payment in the contract of the oil company were the agreed terms of payment, the payments made the contractor by the transportation company in accordance with the side agreement were, in fact, payments by the oil company, and, that being the case, the oil company by making such premature payments, altered its contract, and thus released the surety company. This contention, it will be observed, is based upon the theory that the side agreement was not a part of the original contract and not binding upon the oil company. The transportation company made the initial payment of 10 per cent., amounting to $23,000, July 7, 1910, to the contractor, and thereupon a promissory note for that amount, payable in 30 days at 6 per cent., was given by the contractor to the transportation company, and an assignment of the payments subsequently to become due from the oil company to the contractor under the contract was also taken as security, all as provided by the side agreement. It is true that this amount, as well as all subsequent installments called for by the side agreement, were furnished to the transportation company by the oil company, as was a total of nearly $1,000,000 during the five months these reservoirs were being constructed. In case of each 10 per cent. payment under the side agreement, the oil company issued a check for that amount, charging the same on its books to the transportation company in its account. The check was then issued by the same officers as officers of the transportation company, to the contractor, and his note and assignment taken as above stated. When payments became due under the contract, the amount thereof was credited back to the transportation company. The legal effect of the transaction was that the Union Oil Company loaned or paid to the transportation company the several amounts of these payments; the transportation company loaned the same to the contractor, taking his note in exchange therefor, expecting reimbursement from the Union Oil Company as the work on the contract progressed, in accordance with the assignment made to it of such installment payments. There is nothing fraudulent or immoral in such a transaction. The purpose of the transportation company's side agreement was to facilitate the building of the reservoirs, for, without such payments during the course of the work, it is in evidence that the contractor could not have performed the work and would not have entered into the contract. A sufficient explanation for this circuitous method of financing the contractor is that the contract of the transportation company called for such advances and that all moneys expended by the transportation company were advanced to it by the oil company. The payments made by the transportation company in accordance with its separate agreement could not be taken as payment by the oil company. This statement, however, leaves unanswered the question as to why the side agreement was entered into in the first instance. Appellant's contention is that the interest of the transportation company in the building of the reservoirs was a sufficient reason for the acceptance by that corporation of the hazard involved in making the advancements required, and this may well be true. The testimony of Mr. Weber, who acted for the contractor, is to the effect that the attorney for the oil company insisted upon the payments as specified in the contract with the oil company, for the reason that such payments were necessary to comply with the law of California, referring, no doubt, to the Mechanics' Lien Law. Section 1184 of the Code of Civil Procedure, relating to contracts for improvements which might result in a mechanic's lien, provided:

"No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, at least twenty-five per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract."

It also provided:

"No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract," etc.

It also provided:

"In case such contract and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

The attorney for the oil company evidently took the position that payments in accordance with the side agreement, if included in the contract, would have either inval-

idated the contract, or so far violated the provisions of section 1184 as to allow all materialmen and laborers liens for their work regardless of the limitation of the contract price. The attorney flatly refused to make alterations of payments in the draft of the contract to conform to the wishes of the contractor, and it was for this reason, apparently, that the side agreement was proposed. It will therefore be observed that, if the side agreement is treated as a portion of the contract between the parties, the very result which both of the contracting parties were seeking to avoid will, by construction, be accomplished, and they will be held to have entered into a contract which neither of them intended to make. The trial court found that—

> The side agreement "was in truth and in effect a device adopted by the plaintiff and the said contractor to avoid disclosing the actual terms of payment agreed upon between plaintiff and said contractor."

[8] It is not specifically found that the purpose of the parties was to deceive the surety company, although it is found that the terms of payment contained in the side agreement were not disclosed to the surety company, and that that company had no knowledge concerning the side agreement at the time it executed its bond, and that the failure to disclose the true terms of payment "constituted and was a concealment of material facts and circumstances important for said Pacific Surety Company to know, and that the surety company was thereby exposed to a risk and liability greatly in excess of that to which it would have been exposed under the terms of payment set forth in the recorded contract." It is difficult to see how the surety was in any wise prejudiced by the transaction. The oil company having insisted on the arrangement was in no position to claim that the payments by the transportation company were, in fact, advance payments of the contract price made by it, and as against materialmen and laborers it was confronted with the proposition that if the loans made by the transportation company were, in fact, payments by the oil company, under the express terms of the statute such payments could not be used to diminish the amount due the contractor as against such lien claimants, and if it claimed in such litigation that the side agreement was a part of the original agreement, and that payments made in accordance therewith were made by the company, in strict accord with its contract, it would be met with the proposition that, such side agreement not having been recorded, the whole contract was void, and therefore the lien claimants would be entitled to foreclose liens regardless of the amount of payments or of the contract price. It was necessary for the contractor to secure money from some source during the progress of the work for the payment of material and labor used in the work, and we see no greater hazard to the surety because such payments were advanced by the transportation company than if they had been advanced by a bank or other money lender, secured by assignments of the contract payments to become due thereunder. The surety is entitled to stand upon the strict letter of his contract and insist that the same shall not be altered. But this does not mean that he is entitled to invoke equity to read into the written contract provisions not contained therein, for the purpose of defeating his own obligation. If, as we have said, the transportation company, a separate entity, had been used by the officers of the oil company for the purpose of perpetrating a fraud upon the surety company, the court would relieve the surety company from its obligation so fraudulently procured. But there is no suggestion in the record which justifies the conclusion that this scheme was adopted for the purpose of defrauding the surety company.

Respondents contend that, even if we assume that the side agreement was the agreement of the transportation company, and that payments by the transportation company were not the payments of the oil company, nevertheless the oil company made payments to the transportation company under the terms of the contract before such payments were actually due thereunder, and that these payments so made by the oil company to the transportation company of such installments so far altered the contract guaranteed by the surety company as to release the surety. From an examination of the record printed in the briefs, however, it does not appear that the defendants counted on these payments in their answers, nor did the court find that they were made. It appears that the judgment was based upon the payment of the installment of the contract price as provided in the side agreement and at the times therein specified. An examination of the typewritten transcript confirms the contention of the appellant that the decision of the trial court was not based upon the theory of the premature payments by the oil company to the transportation company.

[9] There remains to be considered the question of the responsibility of the respondent indemnitor, Carl Leonardt. In consideration of the sum of $6,000 he executed to the surety company a contract of indemnity, by which he agreed:

> "That in consideration of the said Pacific Surety Company becoming surety upon said bond, the said parties of the first part should and would at 'all times indemnify and keep indemnified and save harmless the said company from and against all loss, costs, damages, charges, counsel fees and expenses whatsoever, which said company shall or may for any cause, at any time sustain, incur or be put to for or by reason, or in consequence of, said company hav-

ing executed said bond'; and the said parties of the first part in and by the said contract did 'further covenant and agree to pay to said company and its representatives all damages for which said company or its representatives shall become responsible upon the said bond, before said company or its representatives shall be compelled to pay the same; any sums so paid, however, to be applied to the payment of such damages.'"

Plaintiff was entitled to sue upon this contract. Goff v. Ladd, 161 Cal. 257, 118 Pac. 792. The same reasoning which requires us to hold that the surety company was not exonerated because of the execution of the side agreement or the advancements made thereunder by the transportation company to the contractor requires us to hold that Carl Leonardt, the indemnitor, is not thereby released.

The judgment is reversed.

We concur: LENNON, J.; KERRIGAN, Judge pro tem.

182 Cal. 151

CUTTING et al. v. VAUGHN, City Treasurer, et al. (S. F. 8000.)

(Supreme Court of California. Jan. 29, 1920.)

1. MUNICIPAL CORPORATIONS ⊂=266—CHARTER DOES NOT PREVENT CITY FROM ADOPTING PROVISIONS OF STREET IMPROVEMENT ACT.

The charter of the city of Richmond, approved by the Legislature of 1909, being wholly silent as to the mode of exercising authority to improve streets, a resolution of intention by the city council adopting the provisions of the Improvement Act of 1911, approved April 7, 1911, was an adoption of all the provisions of such act as to the mode of doing work, was authorized by law, and was not invalid under Const. art. 11, § 6, providing that cities organized under charter shall be governed by general laws, except in municipal affairs.

2. MUNICIPAL CORPORATIONS ⊂=488, 489(1)—WRITTEN WAIVER OF OBJECTIONS BY ABUTTING OWNER CONCLUSIVE ON HIM.

Where owners of land abutting street made written agreement with contractor expressly waiving any right of protest against the performance of the work or against the validity of assessment district, such owner will not thereafter be heard to complain of any matter or thing embraced within the terms of the waiver.

3. MUNICIPAL CORPORATIONS ⊂=493(6)—CITY COUNCIL'S DETERMINATION OF VALIDITY OF ASSESSMENT CONCLUSIVE IN ABSENCE OF FRAUD.

The city council in hearing an appeal, under Street Improvement Act 1911, § 26, involving the validity of street improvement assessment, acts judicially, and, no appeal being provided by the act, its action must be held conclusive, in the absence of fraud, whenever its determination is brought into question collaterally before any other tribunal.

4. EVIDENCE ⊂=83(1)—OFFICERS PRESUMED TO PERFORM DUTY.

It is presumed that all public officers perform their duties in a lawful manner.

5. MUNICIPAL CORPORATIONS ⊂=493(6)—DETERMINATION OF COUNCIL ON APPEAL FROM STREET IMPROVEMENT ASSESSMENT PRESUMED VALID.

Where a city council had a full hearing on an appeal, under Street Improvement Act 1911, § 26, to determine validity of street improvement assessment, and heard witnesses and arguments, and their determination was supported by the evidence, the presumption that the decision of the board was based on the merits is not rebutted by evidence of statements made by one or more councilmen, expressing an opinion "that the assessment was unjust, but, as the matter would go to the courts in any event, it would be fair to the contractor to uphold the assessment."

6. MUNICIPAL CORPORATIONS ⊂=484(3)—OBJECTION THAT ASSESSMENT WAS NOT ACCORDING TO BENEFITS NOT SUSTAINED EXCEPT BY CONCLUSIVE EVIDENCE.

Plaintiff, in proceedings to restrain sale of land on the ground that there was clear failure to assess the property according to benefit, under Improvement Act, cannot complain of nonsuit on this ground, unless there appears in the record of appeal to council convincing and conclusive evidence that under no conceivable conditions could his land have been benefited in the proportion stated by the assessment.

7. MUNICIPAL CORPORATIONS ⊂=484(3)—EVIDENCE HELD INSUFFICIENT TO SHOW LANDS NOT BENEFITED AS ASSESSED.

In proceedings to enjoin sale of land for street assessments on the ground of failure to assess the property according to benefit, evidence *held* not to clearly and convincingly show that under no conceivable conditions could plaintiff's lands have been benefited in the proportion stated by the assessment.

8. MUNICIPAL CORPORATIONS ⊂=469(1) — ASSESSMENT NOT SHOWN TO BE INVALID FOR FAILURE TO ASSESS IN ACCORDANCE WITH BENEFITS.

That plaintiff's land was assessed to a depth of 200 feet, while other land was assessed only to a depth of 100 feet, that a narrow strip of land separating plaintiff's property from the street for a portion of its length was assessed at the same rate per square foot as the lands whose frontage it obstructed, and that plaintiff's lots situated more than 100 feet distant from the avenue were assessed at the same rate per square foot as lots bordering on the avenue, *held* not to sufficiently establish the invalidity of the assessment of plaintiff's land for failure to assess the property according to benefit.

9. TRIAL ⊂=375—FACTS GAINED FROM VIEW CONSTITUTE EVIDENCE.

A view of the premises by the court and the facts gained therefrom constitute independent evidence to be considered by the court in arriving at its conclusion.

10. APPEAL AND ERROR ⟸931(1)—THAT TRIAL COURT FOUND NOTHING FROM A VIEW WHICH WOULD AFFECT HIS FINDING SUSTAINING ASSESSMENT PRESUMED.

In proceedings involving the validity of a street assessment, where the trial court viewed the premises, it must be presumed, on appeal from his decision sustaining the assessment, that nothing was revealed by the view which would make it inconceivable that plaintiff's land might have received a substantially uniform benefit from the improvement work in question.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Suit by H. C. Cutting and another to enjoin I. R. Vaughn, City Treasurer of Richmond, and others from selling land to satisfy city street improvement bonds. Judgment for defendants, and plaintiffs appeal. Affirmed.

H. C. Cutting and Wm. H. H. Hart, both of San Francisco (T. John Butler, of San Francisco, of counsel), for appellants.

D. J. Hall, of Richmond, M. R. Jones, of San Francisco, and Everts & Ewing, of Fresno, for respondents.

LENNON, J. [1] The facts upon which this appeal is based are stated in the opinion of the District Court of Appeal for the First appellate district, division 1. We adopt that opinion in part as follows:

"This is an appeal from a judgment for defendants, entered after the granting of their motion for nonsuit, in an action wherein plaintiffs sued as the owners of certain lands lying to the north and northeast of Richmond avenue in the city of Richmond; and the defendants are said city, its councilmen, street superintendent, and treasurer, certain street improvement corporations, and the John Nicholl Company, which is the owner of the land lying to the south and southwest of Richmond avenue, and of a narrow strip to the north and northeast thereof as well. The suit involves the validity of the proceedings for the improvement of Richmond avenue taken by the city under the provisions of the Street Improvement Act of 1911 (St. 1911, p. 730), and the relief sought by plaintiffs is an injunction to restrain the city's treasurer from selling their property to satisfy the lien of certain street improvement bonds issued thereon. Plaintiffs also pray for a decree declaring invalid the proceedings for the creation of the street improvement district, and canceling the assessments on plaintiff's property on the ground that the same was not made in proportion to benefits received. * * *

"Plaintiffs urge upon the court with particular emphasis a contention that the Street Improvement Act of 1911 is not applicable to the city of Richmond, and that the city was without power to proceed to improve its streets under the terms of that act. The city of Richmond is governed by a charter approved by the Legislature of 1909, and in that charter power is granted to the city to establish, open, pave, and otherwise improve its streets, and to levy special assessments to defray the cost thereof. Plaintiffs claim that under the provisions of section 6 of article 11 of the state Constitution, that 'cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, except in municipal affairs, shall be subject to and controlled by general laws,' any street laws adopted by the Legislature subsequent to the approval of the city's charter are inapplicable to it. Plaintiffs' contention is not tenable in the present instance, because the charter of Richmond is wholly silent as to the mode of the exercise of the authority to do street work; and the city council in their resolution of intention to do the work in question expressly provided that 'this resolution of intention is adopted under the provisions of the Improvement Act of 1911, approved April 7, 1911.' This amounted to an adoption of all of the provisions of the act in question as to the mode of executing the power granted, and was clearly authorized by law. Clouse v. San Diego, 159 Cal. 434, 114 Pac. 573; Park v. Pacific Fire Extinguisher Co. (App.) 173 Pac. 615; City of Petaluma v. Hughes (App.) 174 Pac. 336."

See, also, Cole v. Los Angeles, 182 Pac. 436.

[2] The plaintiffs present a number of points concerning the claimed invalidity of the resolution of intention, alleged defects in the postings and in the contract. While these points are argued at great length and with much detail and in a variety of form, the answer to them all is, we think, to be found in the fact pleaded by the answer of the defendants and adduced in evidence at the behest of the plaintiffs that, after the execution of the contract for the doing of the work and while said work was in progress, the plaintiff entered into a written agreement with the defendant Worswick Street Paving Company which recited the fact that the plaintiff was the owner of certain lands abutting upon the portion of Richmond avenue which was to be improved; that the paving company had, pursuant to the terms and conditions of the resolution of intention, entered into a contract with the city of Richmond for the improvement of Richmond avenue; that plaintiff as the owner of property on Richmond avenue was desirous of having the improvement of said avenue completed without unnecessary delay and therefore expressly waived "any right of protest against the performance of said work by the party of the second part [defendant Worswick Street Paving Company] under said contract [for the doing of the work] or against the assessment district created under said resolution of intention No. 105." It will thus be seen that the plaintiff waived every objection which might have been made, in limine, against the validity of the assessment district and the proceedings had thereunder, save and except that the method of assessing the

property of the plaintiff was not in accordance with the benefits received. In short, the work in question having been completed upon the faith of the undisputed fact that plaintiff had waived all objection to the proceedings connected with the doing of said work save as to the manner of apportioning the cost of the work, and consented to, accepted, and ratified said proceedings, and desired and acquiesced in the making of said improvements, the plaintiff will not now be heard to complain of any matter or thing embraced within the terms of the waiver; for to permit him to do so would be giving countenance to a fraud upon the contractor and the owner of the bonds issued pursuant to the proceedings, and this, of course, the law will not tolerate. Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759. See, also, Allen v. Hance, 161 Cal. 189, 118 Pac. 527, and Remillard v. Blake, etc., Co., 169 Cal. 277, 283, 146 Pac. 634, Ann. Cas. 1916D, 451.

The only questions remaining to be discussed are those relating to plaintiff's contention that the granting of the motion for a nonsuit was error by reason of the presence in the record of evidence indicating that the assessment of the property of the plaintiff corporation was not made in accordance with benefits received, but was, on the contrary, made on a purely arbitrary basis. In making this contention plaintiff is met by a difficulty arising from the terms of section 26 of the Street Improvement Act of 1911. That section provides for an appeal to the city council by persons interested in determining the validity of an assessment made pursuant to the terms of the act, and also provides that the decision of the council upon the questions presented upon such appeal shall be final. Pursuant to the provisions of this act an appeal was taken to the city council in the instant case. That body considered the appeal very seriously, witnesses were examined, arguments were made, and all of the formalities of a full hearing were observed. The city attorney and all of the trustees composing the council were present. At the conclusion of the hearing the council duly entered its resolution upholding the assessment and overruling the appeal. The resolution recited that the council had heard and considered the evidence in relation to the appeal and the clerk certified that the resolution had been duly passed and adopted by a unanimous vote of all of the councilmen. Plaintiffs attack this resolution upon two grounds.

[3-5] It is first contended that the resolution should be disregarded for the reason that there is some evidence in the record to the effect that the council, not realizing the finality of its decision, and believing that the case would have to go to the courts in any event, may, for this reason, have upheld the assessment as a matter of form. This contention is based upon testimony to the effect that during the course of the hearing one or more of the councilmen expressed an opinion that the assessment was unjust, but that, as the matter would go to the courts in any event, it would be fairer to the contractor to uphold the assessment. The contention is without merit. The council acted judicially in its determination upon the appeal, and, as in the case of the judgment of any tribunal for which there is no review provided by statute, its action must be held conclusive, in the absence of fraud, whenever the fact determined by it is brought into question collaterally before any other tribunal. Lambert v. Bates, 137 Cal. 676, 678, 70 Pac. 777. The complaint herein contains no allegation of fraud in the conduct of the hearing, nor does the record reveal evidence of such fraud. Moreover, it is, of course, presumed that all public officers perform their duties in a lawful and proper manner. 16 Cyc. 1076. When it is recalled that all of the formalities of a full hearing were observed, witnesses being examined, arguments being made, and the city attorney and all of the councilmen being present, when it is considered that the council was presumably acquainted with the terms of the statute providing that its determination upon the appeal should be final, and when these facts are considered in connection with the solemn recitations of the resolution itself, and in connection with the fact, determined elsewhere in this opinion, that the decision of the council is supported by the evidence we cannot say that the evidence of the statements made by one or more councilmen before the conclusion of the hearing was sufficient to rebut the presumption that the ultimate decision of the board was based upon a full and fair consideration of the case upon its merits.

[6] It is next insisted that it appears from the record that there was a clear failure to assess the property according to benefits, and that therefore, under the rule announced in Spring Street Co. v. Los Angeles, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197, the court should set the assessment aside irrespective of the action of the city authorities in confirming the assessment upon the appeal to them. Plaintiff cannot, however, complain of the nonsuit on this ground, unless there appears in the record convincing and conclusive evidence that under no conceivable conditions could the several parcels of land have been benefited in the proportion stated by the assessment. Rockridge Place Co. v. City Council of the City of Oakland, 172 Pac. 1110; Nutting v. Los Angeles, 35 Cal. App. 519, 170 Pac. 680; Thoits v. Byxbee, 34 Cal. App. 226, 235, 167 Pac. 166.

[7] It appears that the property in the improvement district with which we are here concerned was assessed at a uniform rate per square foot. It is claimed that this amounted to an arbitrary assessment by

reason of the fact that much of the land of the plaintiff corporation is swampy and lies below the level of the street, while the land assessed to the John Nicholl Company is upland. While it is true that the evidence shows that plaintiff's land is in part only swamp and overflowed land, it is also true that the evidence shows that much of the land of the John Nicholl Company is made up of precipitous cuts and steep hills. While the expense of making use of either parcel of land for any purpose would be considerable, there is evidence to the effect that the expense of filling in the swamp land would be no greater, if as great, as that of grading down the upland. Such being the state of the record, we cannot say that the evidence is clear and convincing to the effect that under no conceivable conditions could the lowland have derived a benefit from the street work substantially less per square foot of land assessed than that derived by the upland.

[8] Complaint is also made because plaintiff's land was assessed to a depth of 200 feet, while much of the upland across the street on the southerly side of Richmond avenue was assessed only to a depth of 100 feet. The least depth of the assessment district on the south is, it is true, about 100 feet, but it is also true that the greatest depth on the south is 575 feet, and that at various places it runs 225, 240, and 257 feet south of the avenue. Considering the broken and uneven character of the land, it is certainly not inconceivable that the areas included within the irregular boundary on the south and within the 200-foot boundary on plaintiff's land may have received a substantially uniform benefit from the improvement work. Possibly more land should have been included in the district on the south side of Richmond avenue, but we cannot say from anything appearing in the record before us that that might not have been a genuinely debatable question.

[9, 10] The same answer must be made to the complaint that the narrow strip separating plaintiff's land from Richmond avenue for a portion of its length was assessed at the same rate per square foot as the land whose frontage it obstructed and that the plaintiff's lots, which are situated between 100 and 200 feet distant from the avenue, were assessed at the same rate per square foot as the lots bordering on the avenue itself. It might indeed be plausibly argued that the land cut off from the highway should have been assessed at a lower rate than the narrow strip which lies between it and the avenue. It might just as well be argued, however, that on account of its shape and size the strip could be put to no valuable use, and did not, therefore, receive the substantial benefit from the improvement received by plaintiff's land. Upon this view of the matter it seems a fairly debatable question as to whether the assessment of plaintiff's lots was unduly high in comparison with the narrow strip assessed to the John Nicholl Company. Likewise, it cannot be said that the mere fact that the land situated between 100 and 200 feet from the avenue was assessed as much per square foot as the land fronting on the highway in itself incontestably establishes a patent failure to make the assessment in accord with benefits. When it is remembered that Richmond avenue was designed, not merely to create an outlet for the immediately adjacent land, but to serve as a main artery of travel directly benefiting a large territory, and when it is further considered that the relative benefit derived by the various parcels of land depends, not only upon mere proximity to the improvement, but largely, also, upon their availability for use resulting from relative topographical advantages, it is certainly not inconceivable that the whole of plaintiff's land may have received a substantially uniform benefit from the improvement. Not only do we find no evidence in the record which is necessarily inconsistent with this conclusion, but we find that the decision of the court was based, in part at least, upon the facts gained from a view of the premises. Such a view, as held in Hatton v. Gregg, 4 Cal. App. 537, 88 Pac. 592, constituted independent evidence to be considered by the court in arriving at its conclusion. It must be presumed that nothing was revealed by the view which would make it inconceivable that all of plaintiff's land might have received a substantially uniform benefit from the improvement work in question.

Upon these considerations we are of the opinion that none of the various differences claimed to exist between the several parcels of land included in the assessment district afford convincing and conclusive evidence that under no conceivable circumstance could the assessment have been made in proportion to benefits. In the absence of such evidence it is impossible to hold that the city council of the city of Richmond were guilty of an abuse of discretion in overruling plaintiff's appeal so clear and convincing as to bring the case within the rule laid down in Spring Street Co. v. Los Angeles, supra.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LAWLOR, J.; OLNEY, J.; KERRIGAN, Judge pro tem.

182 Cal. 130

MARTIN v. SHEA. (L. A. 5205.)

(Supreme Court of California. Jan. 27, 1920.)

1. MUNICIPAL CORPORATIONS ⊂=809(2)—CONTRACTOR NEGLIGENT IN LEAVING TRENCH UNGUARDED, RESULTING IN INJURY TO PASSENGER IN AUTOMOBILE.

In finding that defendant sewer contractor's trench was maintained by him, unguarded either by lights or barriers, in violation of a section of the ordinances of the city, the court found in effect that the contractor was guilty of negligence per se in relation to a passenger in an automobile, injured when the car went into the trench.

2. MUNICIPAL CORPORATIONS ⊂=819(3)—EVIDENCE SHOWING ACCIDENT TO AUTOMOBILE THROUGH RUNNING INTO UNGUARDED SEWER TRENCH.

In an action against a sewer contractor for injuries to a passenger in an automobile, which ran into a trench left unguarded by the contractor, evidence *held* to show how the accident happened, not being uncertain on that point.

3. MUNICIPAL CORPORATIONS ⊂=819(3, 7)—EVIDENCE SUPPORTING FINDINGS THAT SEWER CONTRACTOR GAVE NO WARNING OF TRENCH IN STREET BY LIGHTS.

In an action against a sewer contractor for injuries to a passenger in an automobile which ran into his unguarded trench, evidence *held* to support findings that defendant contractor failed and neglected to give warning by lights or otherwise of the existence of the trench, and that the driver of the automobile did not know the trench was there.

4. MUNICIPAL CORPORATIONS ⊂=819(3)—LIABILITY OF SEWER CONTRACTOR TO AUTOMOBILE PASSENGER FOR MAINTAINING UNGUARDED TRENCH WITHOUT LIGHTS.

A passenger in an automobile, injured when it ran into a sewer contractor's trench, sufficiently established her case against the contractor by showing that he maintained the trench between two tracks without any guard or barrier to prevent persons, teams, and automobiles from falling into it, and without any light or lights to give warning of the danger, as required by ordinance of the city.

5. MUNICIPAL CORPORATIONS ⊂=816(8)—ORDINANCE REQUIRING BARRIERS AND LIGHTS ADMISSIBLE IN AUTOMOBILE PASSENGER'S ACTION FOR INJURIES BY DRIVING INTO CONTRACTOR'S UNGUARDED DITCH.

In an action against a sewer contractor for injuries to a passenger in an automobile which fell into his unguarded and unlighted trench, ordinance of the city requiring barriers and lights about such an excavation was admissible under plaintiff's allegation that defendant contractor negligently maintained the trench without any barrier or lights.

6. DAMAGES ⊂=185(2)—EVIDENCE OF PERMANENT INJURIES TO ELDERLY WOMAN SUSTAINING $1,200 VERDICT.

In an action against a sewer contractor for injuries to an elderly woman, passenger in an automobile which ran into the contractor's open trench, evidence *held* to sustain trial court's finding that plaintiff's injuries were permanent in their character, and had permanently injured her health, strength, and activity, so that verdict of $1,200 for her was not excessive.

7. APPEAL AND ERROR ⊂=1013—FINDING ON DAMAGES WILL NOT BE SET ASIDE AS EXCESSIVE UNLESS SHOCKING TO SENSE OF JUSTICE.

The rule that only where verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice and raise a presumption of prejudice and passion rather than sober judgment will it be set aside applies equally to the findings of a trial court, when considered on appeal, as well as to the verdict of a jury.

Department 1.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Hannah W. Martin against T. J. Shea. From judgment for plaintiff, defendant appeals. Affirmed.

Geo. E. Whitaker, of Bakersfield, for appellant.

Sullivan & Sullivan and Theo J. Roche, all of San Francisco, and N. E. Conklin, of Bakersfield, for respondent.

LAWLOR, J. This is an appeal from a judgment of the superior court of Kern county in favor of the plaintiff in the sum of $1,200 rendered against the defendant in an action for personal injuries sustained by the plaintiff in an automobile accident.

The accident occurred in the city of Bakersfield shortly after dark and some time between 7:30 and 8 o'clock on the evening of April 18, 1913, at the intersection of Nineteenth and I streets. The plaintiff, an elderly lady, accompanied by her granddaughter, Miss Alice Fleischman, was riding as a guest in a Ford automobile owned and being driven by one Louis Russ. The driver was proceeding down the right-hand side of Nineteenth street, along which runs a double street car track, in an easterly direction toward the business center of the city. The defendant, under contract with the city of Bakersfield, was constructing a public sewer in a northerly and southerly direction along I street, which crosses Nineteenth street at right angles. For the purpose of this construction a ditch about 2 feet wide and 9 feet deep had been dug. In order to carry the sewer ditch across Nineteenth street, it was necessary to tunnel under the street car tracks. The ditch, however, was dug into Nineteenth street in the space on each side of the car tracks, which is 18 feet wide, to within 3½ feet of the outside rails. Instead of tunneling the entire distance beneath the tracks and the space between them, about 25 feet in all, a shaft or hole about 5 feet long, more than 3

feet wide and 9 feet deep, was dug between the tracks for the purpose of facilitating the work.

It was into this hole that the left front wheel of the machine in which plaintiff was riding plunged, while the driver was attempting to cross the line of excavation, bringing the machine to a sudden stop and throwing the plaintiff, who was sitting in the rear seat on the left-hand side, forward against the back of the front seat with such force as to break two of her ribs—the fourth and fifth on the left side. She also sustained bruises on her arm and leg on the same side.

Plaintiff alleged in her complaint that "defendant negligently and carelessly failed and neglected to place barriers or guards of any kind around said trench, to prevent persons, teams, and automobiles traveling upon said street aforesaid from falling into said trench, and failed and neglected to give warning, by lights or otherwise, of the existence of said trench in said street"; that neither the plaintiff nor the driver knew of the existence of the trench between the tracks; that as a result of the negligence and carelessness of defendant, in failing to place barriers or guards around the trench, or to give warning by lights or otherwise, the plaintiff received the injury complained of; that the injuries were permanent, and that plaintiff has been damaged in the sum of $10,000. The prayer was for $50 doctor's fees in addition to the damages alleged.

In his answer the defendant denied that he had for any reason failed to place barriers or guards around the excavations, or failed to mark the place with lights, and denied that the injuries sustained by the plaintiff were in any way the result of negligence or carelessness on his part. He then alleged as a separate defense that plaintiff's injury was the result of her own negligence and carelessness, and the carelessness and negligence of the person who was operating the car.

The case was tried before the court sitting without a jury, both parties having waived a jury trial, and the court found that all of the allegations of the complaint were true, except as to the amount expended for the services of a physician, which the court found to be $25, instead of $50; also that the damage sustained amounted only to $1,175, instead of $10,000, as alleged. Judgment was entered accordingly for $1,200.

[1] The court found further that plaintiff was riding as the guest of Louis Russ in his automobile; that she had no interest in the machine, and no control over it at the time the accident occurred; that the injuries sustained by the plaintiff were not caused by her own negligence; that the injuries to the plaintiff were not caused by the negligence of the owner and operator of the car, but, on the other hand, that they were caused by the negligence and carelessness of defendant, "as particularly set forth in plaintiff's complaint." And the court also found that the trench in question was maintained by defendant unguarded either by lights or barriers, in violation of section 32 of Ordinance No. 8 of the Ordinances of the City of Bakersfield. In making this finding the court found in effect that the defendant was guilty of negligence per se. Baillargeon v. Myers, 182 Pac. 37; Fresno Traction Co. v. A., T. & S. F. Ry. Co., 175 Cal. 358, 165 Pac. 1013; Simoneau v. Pac. Elec. Ry. Co., 166 Cal. 264, 136 Pac. 544, 49 L. R. A. (N. S.) 737; Stein v. United R. R., 159 Cal. 368, 113 Pac. 663; Siemers v. Eisen, 54 Cal. 418; Scragg v. Salee, 24 Cal. App. 133, 140 Pac. 706; Connell v. Harris, 23 Cal. App. 537, 138 Pac. 949; Fenn v. Clark, 11 Cal. App. 79, 103 Pac. 944.

Appellant contends that the judgment should be reversed for the reasons that: (1) The evidence does not show how the accident happened. (2) The findings are not supported by the evidence. (3) The court erred in its rulings on the admissibility of certain evidence. (4) The judgment is excessive.

[2] 1. As to the appellant's first point we think the record presents no uncertainty as to how the accident happened or as to what caused it. Miss Fleischman, a witness for plaintiff, testified that the machine proceeded along the south or right-hand side of Nineteenth street in an easterly direction toward I street; that as it approached I street both she and the driver observed the pile of dirt directly ahead, which had been thrown from the trench; that the driver remarked, "I guess I'll turn to the track to get away from that;" that he then turned and went upon the south track, and in attempting to cross the line of the sewer ditch the left front wheel of the machine went into the trench which had been dug between the two tracks. Witness C. J. Sheehan, the foreman of the work at that point at the time of the accident, introduced as a witness on behalf of defendant, testified to substantially the same effect. He described the course taken by the machine to the point of the accident much the same as did Miss Fleischman and added:

"When the machine was in the ditch, one wheel was on that place there, and the other wheel was in the hole; one wheel was in the track, the southerly track."

It is an unquestioned fact in the case that the defendant had opened a large, deep hole between the street car tracks in the middle of a busy street crossing in the city of Bakersfield, and it is plain that such an opening in such a place is extremely dangerous and a menace to the traveling public, unless properly safeguarded by barriers and lights to warn people of the danger and to keep them

from falling into the trench. Aside from the ordinance requirements of the city, which we will discuss under another head, all that the plaintiff had to do in order to prove a case of negligence against the defendant was to show (1) that the pitfall was maintained without barriers or lights to safeguard the public; and (2) in order to establish the liability of the defendant for her injuries it was necessary for the plaintiff to show that such negligence on the part of the defendant was the direct or proximate cause of her injuries. In order for the defendant to escape liability it was incumbent on him to show, either that he was not negligent, or that the injuries were the result of some intervening cause, such as the negligence of the plaintiff herself, or the negligence of the operator of the machine in which she was riding. An attempt was made by the defendant to establish the former; but, so far as the record discloses, no attempt was made by the introduction of evidence to establish either contributory negligence on the part of the plaintiff or negligence on the part of the driver.

[3] 2. The contention of appellant that the findings are not supported by the evidence is entirely without merit. There was considerable evidence introduced on behalf of the defendant to show that barriers and lights had been placed around the trenches in Nineteenth street on the north and south sides of the tracks, and this fact was not disputed by the plaintiff; but plaintiff's contention was that around the trench between the tracks, the one into which the machine fell, there were no barriers or guards of any kind to protect the public. An examination of the testimony of the witnesses for both the plaintiff and the defendant shows that there was also no conflict on this point. All of the witnesses who touched upon the matter at all said that there were no barriers around the opening between the two tracks. We quote from the testimony of the defendant himself on this point:

"No boards of any kind were placed at the excavation between the two tracks; couldn't barricade that."

Upon this state of the record we are at a loss to understand why counsel is urging on appeal that:

"The court below erred in finding that the defendant negligently and carelessly failed and neglected to place barriers or guards of any kind around said trench to prevent persons, teams, or automobiles traveling upon the streets from falling into the trench."

Under this same head it is contended that "the court below erred in finding that the defendant failed and neglected to give warning by lights or otherwise of the existence of the trench." On this point Miss Fleischman testified that "there was no light of any kind at or about the opening between the two tracks." E. P. Herrington, a business man in the city of Bakersfield, was introduced as a witness on behalf of the plaintiff, and testified that he had passed the scene of the accident a few minutes before the Russ machine went into the hole, and that he observed that "there was an opening there between the tracks, not guarded; no lights or trestles to prevent any one from going in." Witness Norman E. Conklin, called by the plaintiff, also testified that there were no lights to indicate the location of the trench between the tracks, his testimony on this point being as follows:

"I observed that particular portion of the trench located between both tracks. There was nothing but some dirt around it. My recollection is that dirt was on the east side of the trench. There was no light there."

These were the only witnesses produced by the plaintiff who testified on this point. There were a great many witnesses produced by the defendant, however, who testified positively that a red light was placed on the ground in the center of the space between the two tracks on the west side of the trench, or on the side nearest the machine as it approached. The court, however, found that there was no light there, and under the conflict rule this finding must be accepted as conclusive.

In paragraph VI of her complaint the plaintiff alleged, among other things, that she and the operator of the automobile were unaware of the existence of the trench between the two tracks. The court found that all of the allegations of the paragraph were true. The appellant now complains that there is no evidence to support the finding that the driver of the automobile did not know that the trench was there. As we have stated, the operator of the car did not testify. It is not contended, however, that through the absence of any formal proof on this point the appellant has suffered any prejudice, and we do not perceive that he has.

[4] We think that the plaintiff sufficiently established her case by showing that the defendant maintained the pitfall between the two tracks, without any guard or barrier to prevent persons, teams, and automobiles from falling therein and without any light or lights to give warning of the danger. As a separate defense, the defendant alleged that the injury to the plaintiff was due to the negligence of the operator of the car. The burden of establishing this defense rested upon the defendant, and, so far as the record shows, no proof was offered thereunder. Moreover, the court found that the operator of the automobile exercised ordinary care and that the accident occurred without any negligence on his part.

[5] 3. Under the head of errors in the rulings of the court on the admissibility of certain evidence, appellant lays special stress on the contention that the court erred in admitting in evidence a copy of section 32 of Ordinance No. 8 of the ordinances of the city of Bakersfield, which provides that:

"Any person by whom or, under whose immediate direction or by whose immediate authority, as principal or as contractor or as employer, any portion of a public street may be made dangerous is guilty of a misdemeanor, unless he shall erect and, so long as the danger may continue, maintain around the portion of the street or highway so made dangerous, a good and substantial barrier and shall cause to be maintained during every night from sunset to daylight, lighted lanterns at the points of danger sufficient to give fair warning from every point of approach."

The plaintiff alleged that the defendant negligently maintained the opening or trench at Nineteenth and I streets, without any barrier or guard to prevent persons, teams, and automobiles from falling therein, and also negligently failed to place lights at or near said trench or opening, so as to give warning of the existence thereof. It is clear that the ordinance introduced in evidence dealt with this particular subject. There is, therefore, no merit in appellant's contention that the ordinance "is immaterial and does not bear upon the point at issue." In Cragg v. Los Angeles Trust Co., 154 Cal. 663, 669, 98 Pac. 1063, 1066 (16 Ann. Cas. 1061), it was said:

"The ordinance hereinbefore referred to was not alleged in the complaint, plaintiff simply alleging negligence in the manner we have specified. It is urged that it was necessary to plead the ordinance in order to make it available as evidence and that the trial court therefore erred in admitting it over the objections of defendant. The precise question thus presented appears never to have been decided by this court, but it appears to us that, upon elementary principles, it was admissible without having been pleaded. *The cause of action here alleged was not a violation of the ordinance, but the negligence of the defendant, and the ordinance was simply evidence offered to show such negligence.* Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action. In Brasington v. South Bend R. R. Co., 62 S. C. 325, 89 Am. St. Rep. 905, 40 S. E. 665, an action for damages for injuries for falling into an excavation left unguarded in violation of the provisions of an ordinance, where the complaint simply alleged negligence in leaving the excavation unguarded and did not properly allege the existence of any ordinance, it was held that the ordinance was admissible to show the alleged negligence, the court quoting approvingly from an earlier case as follows: 'This is not an action to enforce the performance of any duty imposed by an ordinance of the city of Charleston, or to enforce the payment of any tax or penalty imposed by such ordinance, but the cause of action here is the negligence of the defendant company resulting in the death of the intestate, and the ordinances of the city are only referred to as showing such negligence.'" (Italics ours.)

An examination of the other objections made by appellant under this head shows that they are without sufficient merit to warrant consideration.

[6] Plaintiff alleged in paragraph VII of the complaint that:

"Since said injuries were inflicted upon said plaintiff, as aforesaid, said plaintiff has suffered, and will continue for a long period of time hereafter to suffer great pain and mental anguish. Said injuries are permanent in their character, and have permanently injured plaintiff's health, strength, and activity."

The court found that all of the allegations in this paragraph were true. Appellant contends that there is no evidence to support this finding and that, therefore, the judgment of $1,200 is excessive. It is pointed out that about 18 months after the plaintiff received the injuries which are made the basis of this action she fell from a hammock and sustained a similar injury on the left side; that is to say, that she had two ribs broken, but on the second occasion it was the fifth and sixth ribs, whereas it was the fourth and fifth that were broken the first time. Appellant urges that plaintiff was suffering from the effects of this second injury at the time of the trial, and that this injury formed in a large measure the basis for the award of damages. We are of the opinion that appellant's contentions in this regard are without force. The plaintiff herself testified that following the injuries herein complained of she was confined to her bed for 4 weeks; that she was attended by Dr. Pawlicki; that—

"In May I was in such terrible pain that I called in Dr. Kellogg. He made an examination. I don't remember if he repeated that visit. I left in June for San Francisco. While I was in bed I suffered pain. At the time of my accident I was very nervous. My stomach was so upset that it was 48 hours after the accident that the doctor could stop the vomiting. I suffered intense pain all the time in the region over my heart during that time. The vomiting recurred at periods. I was unable to stoop all of 9 or 10 months. I had made attempts to stoop and had suffered pain when I did. * * * After the accident happened I was bruised all down my left arm, my knee and limb, where I had been thrown in the automobile. There is a mark there yet. While in San Francisco I received medical attention from Dr. Waldeyer. I think he attended me in January. I called in another doctor previous to that. I think it was in August. The tape around my body was removed 3 days before I went to San Francisco. It was around the upper part of the body. In January I was very much depressed. I was a very sick and nervous woman. I was ill for the 9 or 10

months I was in San Francisco and suffered pain. I didn't suffer pain in any other portion of my body than already indicated by me. * * * I have been an invalid ever since I returned to Bakersfield. I have suffered pain on this left side. It is a sort of constant sore pain. I can't do anything without I hold myself, and I cannot turn on my left side in bed. That continued up until October 1914. I fell out of the hammock and broke those ribs again. I think one; I am not sure."

Dr. Pawlicki testified that he attended plaintiff both when she was injured in the automobile accident and at the time she fell out of the hammock. As to the former injury he said:

"I found Mrs. Martin in bed in rather a nervous condition. She complained of pain on her left side, though she also had some pain in her arms and legs. I found two fractured ribs, the fourth and fifth on the left side. I set the ribs; that is, I put on adhesive plaster. * * * There was some evidence of pain after the first visit. I don't remember if the plasters were still on her May 9th; but I imagine they may have been. The effects of a fracture of ribs in an elderly person is, of course, shock naturally to a person of any age. Mrs. Martin was considerably shocked. Her nervous system was rather in bad condition during the time I attended her."

With respect to the second injury he testified:

"I treated Mrs. Martin a second time for a broken rib, when she fell off the hammock. She suffered some shock that time. The shock was due to the second accident. The fifth and sixth ribs were broken that time. The former was the fourth and fifth. I think I treated her on that occasion about the same length of time."

In view of this testimony, and considering the advanced years of the plaintiff, we cannot hold that there is no support for the finding that the injuries sustained by the plaintiff "were permanent in their character and have permanently injured plaintiff's health, strength, and activity." The rule governing the question of excessive damages has thus been expressed in Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019, approved in Zibbell v. S. P. Co., 160 Cal. 237, 116 Pac. 513, and in Smith v. Royer, 183 Pac. 660:

"It is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts, as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury."

[7] While this rule was stated with relation to the verdict of a jury it applies equally to the findings of a trial court when considered on appeal. We cannot say that the judgment herein is "so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice."

The judgment is affirmed.

We concur: SHAW, J.; OLNEY, J.

45 Cal. App. 191

DILLON v. DILLON. (Civ. 3148.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1919.)

1. COURTS ⟸39—QUESTION OF JURISDICTION IS FIRST QUESTION TO BE DETERMINED.

The first question which must be determined by the trial court in every case is that of jurisdiction.

2. DIVORCE ⟸184(4) — RESIDENCE IN STATE FOR REQUIRED PERIOD TO BE PRESUMED ON APPEAL FROM DIVORCE DECREE.

On appeal on the judgment roll alone from interlocutory divorce decree, it must be presumed in support of the judgment, in the absence of evidence, and under the rule that all intendments are in favor of the action of the superior court, that there was ample evidence of residence within the state for a period of one year before the commencement of the action, as required by the Civ. Code, § 128.

3. PLEADING ⟸252(1)—AMENDED COMPLAINT RELATES BACK TO COMMENCEMENT OF ACTION.

Amended complaint ordinarily relates back to the commencement of the action.

4. LIMITATION OF ACTIONS ⟸127(1)—AMENDED COMPLAINT RELATES BACK TO COMMENCEMENT OF ACTION UNLESS NEW OR DIFFERENT CAUSE OF ACTION IS PRESENTED.

In an action involving the statute of limitations, an amended complaint relates back to the commencement of the action, unless it states a new or a different cause of action.

5. DIVORCE ⟸103—AMBIGUOUS ALLEGATION AS TO RESIDENCE SUBJECT TO SPECIAL DEMURRER.

In a divorce action, an ambiguous or uncertain allegation as to residence of parties may be reached by special demurrer.

6. DIVORCE ⟸98—DEFENDANT MAY DEFEND BY ANSWER PUTTING IN ISSUE ONLY THE JURISDICTIONAL QUESTION OF RESIDENCE.

In a divorce action, if the jurisdictional fact of residence, under Civ. Code, § 128, did not exist, defendant might have defended the action under an answer putting in issue only the jurisdictional question of residence.

7. COSTS ⟸260(4) — DAMAGES WILL BE ASSESSED FOR FRIVOLOUS APPEAL IN DIVORCE ACTION.

In a divorce action where amended complaint filed four months after the commencement of action alleged residence of plaintiff

"for more than one year last past," and where defendant appealed from interlocutory decree upon ground that complaint did not allege jurisdictional fact of residence for one year before commencement of action, *held*, that the appeal was not taken in good faith, and that respondent should recover $100 for a frivolous appeal.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Effie Hazel Dillon against George C. Dillon. From interlocutory decree of divorce, defendant appeals. Affirmed.

W. R. Law, of Los Angeles, for appellant.
E. A. Klein, of Bakersfield, for respondent.

BRITTAIN, J. The defendant, George C. Dillon, appeals from an interlocutory decree of divorce.

From the transcript it appears the original complaint was filed February 21, 1917. An amended complaint, on which the case went to trial, was filed June 13, 1917. After general demurrer overruled the case was tried, and the court found that all the allegations contained in the first count of plaintiff's amended complaint were true. The appeal is on the judgment roll alone. In the amended complaint it was alleged:

"The plaintiff has been a resident of the state of California for more than one year last past and of the county of Kern for more than three months next preceding the commencement of this action."

The appellant contends the quoted allegation does not show the plaintiff had been a resident of the state of California one year prior to the filing or commencement of the action. Civ. Code, § 128. Further, that the findings that the allegations of the amended complaint were true do not cure the claimed defect. After the appellant's demurrer to the amended complaint was overruled, he failed to answer. His default was entered and he did not appear at the trial. The allegations of the complaint, which were found to be true, disclosed an ingenious cruelty on the part of the husband not surpassed in the Middle Ages nor equaled in the harems of the time of the Caliph Haroun al Raschid.

[1, 2] It is elementary that the first question which must be determined by the trial court in every case is that of jurisdiction. Clary v. Hoagland, 6 Cal. 685. In the absence of all evidence and under the rule that all intendments are in favor of the action of the superior court, it must be presumed that there was ample evidence of residence within the state for a period of one year before the commencement of the action to support the judgment. The appellant relies on the rule that the fact of residence for the statutory period must be alleged. Flynn v. Flynn, 171 Cal. 746, 154 Pac. 837.

[3, 4] The appellant contends that since the action was commenced in February, 1917, and the amended complaint was not filed until four months later, the allegation of residence within the state for "one year last past" is an allegation only of residence within the state for eight months prior to the filing of the amended complaint. The amended complaint ordinarily relates back to the commencement of the action. Collins v. Gray, 3 Cal. App. 723, 86 Pac. 983. This rule is applied in cases where the statute of limitations is involved, unless it appears that a new or different cause of action is presented by the amended complaint.

[5, 6] The respondent maintains that in the quoted allegation the words "last past" may be disregarded as surplusage, in which event the allegation would meet the most carping criticism. If the allegation was in any way ambiguous or uncertain, the defect might have been reached by a special demurrer. If the jurisdictional fact of residence did not exist, the defendant might have defended the action under an answer putting in issue only the jurisdictional question of residence. It is inconceivable that any man sufficiently interested in such an action to employ counsel to represent him and to appear for the purpose of demurring and prosecuting an appeal could have refrained from answering if he could have shown any facts to defeat a suit in which the charges against him were such as the court in this case found to be true.

[7] The appeal does not appear to have been taken in good faith. The judgment is affirmed, and it is adjudged that respondent recover from the appellant $100 for taking the frivolous appeal.

We concur: LANGDON, P. J; NOURSE, J.

44 Cal. App. 648

BLANCHARD et al. v. SCARPA. (Civ. 2969.)

(District Court of Appeal, First District, Division 1. California. Dec. 8, 1919.)

1. ANIMALS ⊂⊃61—FINDING AS TO DEMAND FOR ANIMALS IMPOUNDED UNDER ESTRAY LAW NOT WARRANTED BY EVIDENCE.

In an action of claim and delivery for live stock impounded by defendant as estrays, evidence *held* insufficient to sustain finding that defendant demanded of plaintiffs as a condition of releasing the stock a sum not under the estray law, but as damages suffered by him at other times.

2. ANIMALS ⊂⊃61—IMPOUNDER ENTITLED TO LIEN FOR EXPENSES UNDER ESTRAY ACT.

Where defendant properly took up plaintiffs' live stock under the Estray Act, becoming entitled to $42 for his expenses and cost for keeping and care of the estrays while in his possession, he was entitled to his lien on the stock under the act until plaintiffs had tendered to him the amount to which he was entitled in satisfaction of his lien.

3. ANIMALS ⊂⊃61—OWNERS OF ESTRAYS NOT ENTITLED TO POSSESSION WITHOUT SATISFACTION OF IMPOUNDER'S LIEN.

Where the owners of stock impounded under the Estray Act by defendant did not tender to defendant the amount to which he was entitled for keeping and care of the estrays in satisfaction of his lien, they were not entitled to possession of their stock when their action of claim and delivery was brought, unless defendant had waived his right to insist on his lien.

4. ANIMALS ⊂⊃61—OWNERS OF IMPOUNDED STOCK BOUND TO TENDER PROPER AMOUNT OF IMPOUNDER'S LIEN DESPITE EXCESSIVE DEMAND.

Where defendant, who had impounded plaintiffs' live stock as estrays, when plaintiffs demanded their property claimed a larger sum than that to which he was entitled under the Estray Act, nevertheless, under section 4, it was plaintiffs' duty, if dissatisfied, to tender the amount to which defendant was properly entitled before commencing action of claim and delivery to recover the stock.

5. ANIMALS ⊂⊃61—ERROR AGAINST IMPOUNDER OF LIVE STOCK NOT CURED BY JUDGMENT FOR AMOUNT OF LIEN.

In an action of claim and delivery by the owners of stock impounded under the Estray Act, error in awarding to plaintiffs possession and in mulcting defendant with costs, though plaintiffs, when they demanded the animals, had not tendered to defendant the proper amount of his lien, *held* not cured by judgment for defendant against plaintiffs for the amount to which he was lawfully entitled under the act.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by George Blanchard and another against Joseph Scarpa. From judgment for plaintiffs, defendant appeals. Reversed.

Geo. D. Collins, Jr., of San Francisco, for appellant.

Louis Oneal, James P. Sex, and Maurice J. Rankin, all of San Jose, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiffs and against the defendant in an action of claim and delivery for certain live stock claimed by the defendant and appellant to have been lawfully impounded by him under the act concerning estrays. Upon the trial of the case the court found that the plaintiffs were at all times the owners of the stock in question, and further found that on the 6th day of October, 1916, the animals in question were taken into possession by the defendant as estrays, and that said animals were at the said time of their taking estrays under the terms and meaning of the act of the Legislature entitled "An act relating to estrays," etc., approved March 23, 1901 (St. 1901, p. 603), and, with its several amendments, in force at the time of the impounding of said animals by the defendant. The court further found that the defendant had incurred expenses and costs by reason of the taking up of such stock amounting in all to the sum of $42, being at the rate of 50 cents per day for the keeping and care of each head of stock for the period of one day.

[1] The foregoing findings of the court were sufficiently supported by the evidence in the case; but the trial court, in making these findings, further found:

"That before the commencement of this action plaintiffs demanded of defendant possession of said personal property, but that said defendant wrongfully refused to deliver possession of said personal property or any of it to these plaintiffs unless said plaintiffs pay to said defendant a certain sum of money, but that said sum was not demanded or claimed under the provisions of the act above set forth, but as damages to the property of said defendant which he claimed to have suffered at other times than the time at which said taking up took place."

We have scrutinized the record in vain to find any evidence whatever which supports the portion of the above finding wherein, after reciting that the defendant demanded of said plaintiffs the payment of a certain sum of money as the condition of the redelivery to them of their said personal property, it is declared:

"But said sum was not demanded or claimed under the provisions of the act above set forth, but as damages to the property of said defendant which he claimed to have suffered at other times than the time at which said taking up took place."

The only evidence which the record contains on this subject is that embraced in the testimony of the plaintiff Blanchard in said action, and of his employé McNamara,

each of whom stated that at the time they demanded the possession of the plaintiffs' property the defendant demanded payment of $1.50 a head before he would give them up. There is nothing whatever in the record which we have been able to discover which in any way tends to show that this demand on the part of the defendant was predicated upon a claim for damages other than that arising out of the fact that he had impounded said stock as estrays. The evidence in the case is also lacking in any showing that the plaintiffs, either at the time of said demand or at any time prior or subsequent to the commencement of this action, tendered to said defendant any sum whatever in payment of the sum to which he would have been entitled under the provisions of the Estray Act as a condition precedent to the retaking of said stock. On the contrary, the record discloses that the plaintiffs at all times insisted that said animals were not estrays within the meaning of said act, and that said defendant was entitled to no sum whatever for the keeping and care of said stock.

The judgment of the trial court, based upon its foregoing findings of fact, was that the plaintiffs were entitled to recover the possession of their said stock, and were also entitled to their costs, and that the defendant was entitled to recover from the plaintiffs the sum of $42, being the amount to which he was entitled under the terms of the Estray Act.

[2-5] The defendant appeals from said judgment, and upon said appeal insists that he is entitled to a reversal thereof. We are unable to see how this contention can be seriously disputed. The trial court having found that the defendant had properly taken up the plaintiffs' stock under the Estray Act, and having found that the said defendant was entitled to the sum of $42 for his expenses and costs incurred for the keeping and care of said estrays while they were in his possession, it follows necessarily that the defendant was entitled to his lien upon the stock in question under the Estray Act until the owners of said stock had tendered to him the amount to which he was entitled under said act in satisfaction of his said lien. No such tender having been made, the plaintiffs were clearly not entitled to the possession of their property at the time this action was brought, unless it should appear that the defendant had waived his right to insist on the said lien. The evidence discloses no such waiver; and while it is true that the defendant at the time of the plaintiffs' demand for their said property claimed a larger sum than that to which he was entitled under the provisions of the Estray Act, nevertheless, under the express terms of section 4 of said act, it was the duty of the plaintiffs, if dissatisfied with the amount charged by the taker-up for costs and expenses, to have tendered to him the amount to which he was properly entitled before commencing suit for the recovery of the possession of their said property. The section of the act in question further expressly provides that—

"No return of such animal or animals shall be adjudged until the plaintiff shall pay to defendant or deposit in court payable to him the amount of all such expenses."

These being the terms of the law relating to estrays, it was clearly the duty of the trial court to have sustained the defendant's lien, and to have provided in its judgment for the full payment of the amount to which it had held the defendant entitled. Its judgment was therefore erroneous in awarding to the plaintiffs the possession of their said property, and in mulcting the defendant with the costs of the action; and this error was in no wise cured by the further action of the court in giving the defendant a judgment against the plaintiffs for the amount to which he was lawfully entitled under the Estray Act and for the payment of which he was entitled to the benefit of his lien.

It follows that the judgment must be reversed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 690

LAWRENCE v. WILSON et al. (Civ. 3076.)

(District Court of Appeal, First District, Division 1, California. Dec. 10, 1919.)

1. TRUSTS ⇐206(1) — TRUST DEED HELD TO AUTHORIZE MORTGAGE BY TRUSTEE AFTER DEATH OF ONE OF TWO BENEFICIARIES.

Deed of trust from father and mother to daughter, directing daughter to apply the income to the uses of the father and mother during their lives and the life of the survivor, and, in case the income should be insufficient to pay for maintenance of the father and mother "while they both live," to mortgage, lease, or sell the property, *held* to authorize mortgaging of the property by the daughter after death of one of the parents, where the income was insufficient for support of the other.

2. TRUSTS ⇐206(6)—WIFE AS TRUSTEE HELD EMPOWERED TO MORTGAGE TRUST PROPERTY TO SECURE LOAN FROM COMMUNITY FUNDS.

Where parents executed deed of trust to daughter, directing her to apply income to uses of the parents during their lives and to mortgage or sell the property if income became insufficient, daughter's mortgage to her husband to secure loan made after having made an unsuccessful effort to obtain needed funds from other sources was valid, where the transaction was fair and conducted in good faith, though

the money obtained as loan from husband was community property.

Appeal from Superior Court, Marin County; Edgar T. Zook, Judge.

Action by Joseph Lawrence against George M. Wilson, Mabel Lawrence, Daniel T. Wilson, and Herman Detels, and others. Decree for plaintiff, and defendants other than the first three named, appeal. Affirmed.

J. L. Nagle and P. B. Nagle, both of San Francisco, for appellants.

S. Laz Lansburgh, of San Francisco, for respondent.

RICHARDS, J. This was an action to foreclose a mortgage executed by one Mabel Lawrence to the plaintiff, her husband.

The facts of the case, concerning which there is no material dispute, may be briefly stated as follows: On the 10th day of July, 1914, Elizabeth Wilson, who was the mother of said Mabel Lawrence, executed to her a deed of trust covering the property involved in this action, wherein she was directed, as such trustee, to hold said property in trust during the life of the grantor, Elizabeth Wilson, and her husband, Peter S. Wilson, and the survivor of them, and during said period to receive the rents and profits of said property and apply the same to the use of said Elizabeth Wilson and her said husband during their lives, and upon the death of the survivor of them to convey said property in fee simple to certain children of said Elizabeth Wilson and her husband in equal proportions as tenants in common thereof; it being provided that if any of said children be dead at the time set for said conveyance by the trustee the share of such deceased child should be conveyed in equal shares to his or her children, and if there were no children of such deceased child then such share was to be equally divided among the other surviving children of said Elizabeth Wilson. The deed of trust further contained the following provision:

"In case in the judgment of said trustee under said deed of trust the rents and profits of said real estate should be insufficient to pay for the maintenance of the said Elizabeth M. Wilson and her said husband while they live, the said trustee was thereby empowered to mortgage, lease, or sell the said real property or any part thereof, and to hold or invest or apply the proceeds to the support and maintenance of the said Elizabeth M. Wilson or her said husband while they both lived."

It further appears from the evidence that Elizabeth Wilson died intestate on January 1, 1915, and that her husband, Peter S. Wilson, died testate on September 9, 1916, and that Mary Wilson, one of the children of Elizabeth and Peter S. Wilson named in said deed of trust, died on June 25, 1916, leaving at the time of her death six surviving minor children, who are joined as defendants in this action. On the 11th of March, 1916, after the death of Elizabeth Wilson, the grantor in said deed of trust, but while her husband, Peter S. Wilson, was still living, Mabel Lawrence borrowed from her husband, Joseph Lawrence, the plaintiff herein, the sum of $1,800, for which she gave her promissory note, which was also signed by George M. Wilson and Daniel T. Wilson, the two sons of Elizabeth M. Wilson named in said deed of trust, which said promissory note was secured by a mortgage executed by said Mabel Lawrence, as trustee, upon the trust property. This loan being unpaid, the present action was instituted for the foreclosure of said mortgage; the surviving children and the above-named grandchildren of Elizabeth and Peter S. Wilson being joined with the said mortgagor as parties to the action.

It was alleged in the complaint herein, and proven at the trial, that said Mabel Lawrence, "having determined that in her judgment the rents and profits of the said real property were insufficient to pay for the maintenance of said Peter S. Wilson, borrowed of and from this plaintiff, and this plaintiff then loaned to her, the sum of $1,800." The defendants Mabel Lawrence, Daniel T. Wilson, and George M. Wilson defaulted, but the remaining defendants, consisting chiefly of the above-named grandchildren of Elizabeth and Peter S. Wilson, appeared and presented several defenses to said action, and the cause went to trial upon the issues thus tendered. At the conclusion of the trial findings were waived by the respective parties, and the court thereupon made and entered its decree of foreclosure, by which the issues in the case were determined in favor of the plaintiff, and a decree was entered in accordance with the prayer of his complaint, and it is from such decree that this appeal has been taken.

There are two main contentions urged by the appellants upon this appeal. The first of these is that under the terms of the trust conveyance above quoted the trustee had no power to make the mortgage in question, for the reason that, as claimed by the appellants, her power so to do was limited to a time when Elizabeth Wilson, the grantor in said deed of trust, and her husband, Peter S. Wilson, were both living. This contention is predicated upon that portion of the clause in said deed of trust above quoted wherein said trustee was directed to hold or invest or apply the proceeds derived from any mortgage, lease, or sale of the trust property "to the support and maintenance of said Elizabeth M. Wilson or her said husband while they both live."

[1] If this excerpt from the provision of said deed of trust above set forth stood alone, it

might suffice to justify the construction which the appellants seek to have placed upon said trust conveyance; but when the entire clause in said deed of trust from which said excerpt is taken is considered, it would seem to be entirely plain that the purpose for which the trustee was vested with the title to said property, and was also vested with the power to incumber the same, was to provide means for the support and maintenance of her father and mother so long as either of them should live. This express intent is to be derived from the portion of said clause above quoted and of the clause therein which precedes the same; and this being so, to hold that the trustee was invested with the title to the property in question for the purpose of applying the rents and profits thereof to the uses of her father and mother during their lives and the life of the survivor of them, and in the event such rents and profits were insufficient for such purpose to mortgage, lease, or sell said property in order to effectuate the same, and yet to so construe the terms of said trust deed as to restrict these powers of the trustee to a time during which Elizabeth M. Wilson and her husband were both living, would be to place upon the foregoing clause in said trust deed a construction entirely inconsistent with the apparent purposes of the instrument taken as a whole, and would be to defeat one of its beneficent purposes, namely, that of providing for the care and maintenance of the surviving parent of said trustee. We hold, therefore, that this contention on the part of the appellants is without merit.

[2] The next and final contention of the appellants is that Mabel Lawrence, the trustee named in said deed of trust, had no power to make the note and mortgage in question to her husband for a loan of community funds to her as such trustee, and that her said husband, as the mortgagee named in said mortgage, could not engage in the transaction of loaning community funds to his wife in the capacity of such trustee, since the said trustee, in borrowing said money and in giving said note and mortgage, was practically loaning to herself as trustee moneys in which she had a vested interest arising out of the fact that they were the community funds of her husband and herself, and also, since the husband, in attempting to loan the moneys of himself and wife to the latter as the trustee of certain property to be taken as security for said loan, was in substance and effect engaging in a transaction which the rules of equity governing the administration of trusts would not permit to be sustained.

This contention in either of its phases is without substantial merit, since the record shows that the trustee, before attempting to borrow the money in question from her husband, made an earnest endeavor to secure the needed funds for the support of her surviving parent from other sources, and it was only after it was found to be impossible so to do that she applied to her husband for the loan of said money. The record further shows that, while it seems to be conceded that the money which the plaintiff loaned to said trustee was community property, the transaction was in every respect fair and open. The interest which the wife had in these community funds was not at the time said loan was made a vested interest, but was a mere expectancy under the authority of Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Spreckels v. Spreckels, 172 Cal. 780, 158 Pac. 537; Estate of Moffitt, 153 Cal. 360, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207. Under the law as it existed when said loan was made, the husband had full control of the community property, and could loan the same to any person and even to his wife personally or in the capacity of a trustee, so long as the transaction was fair and conducted in the fullness of good faith. From the record herein there is nothing which appears to indicate that this transaction between husband and wife was not conducted in the fullness of good faith, and there is no reason, therefore, for holding that it should be frowned upon by a court of equity, or that the plaintiff, having loaned his money and having taken a mortgage to secure the payment thereof, was not entitled to all the remedies in the way of foreclosure of such mortgage which were awarded him by the decree of the trial court herein.

No error appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 771

JERAULD v. CHAMBERS et al. (Civ. 3131.)

(District Court of Appeal, First District, Division 2, California. Dec. 12, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⟸20(5) —NOMINEE NEED NOT SIGN PETITION ASKING LETTERS OF ADMINISTRATION.

Where one, who with his sister was entitled, under Code Civ. Proc. § 1365, to first consideration in the selection of an administrator, signed a petition asking that letters of administration be granted to another, and it was also signed by counsel as attorney for petitioner, the requirement of Code Civ. Proc. § 1371, that such petitions must be "signed by the applicant or his counsel" was complied with, and, if the nominee's signature was a jurisdictional requirement, it was supplied by his consent to act, and letters granted are not void.

2. EXECUTORS AND ADMINISTRATORS ⟸29(2) —LETTERS OF ADMINISTRATION NOT SUBJECT TO COLLATERAL ATTACK.

Letters of administration when not revoked or suspended by direct attack upon the order appointing the administrator are sufficient proof of his right to represent the estate in a civil action, unless the record affirmatively shows no jurisdiction to make the appointment.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Blanche Pearl Jerauld against George J. Chambers and others. Judgment for defendants, and plaintiff appeals. Reversed.

N. S. Hammack and W. R. Andrews, both of San Diego, for appellant.

Crouch & Chambers, of San Diego, for respondents.

NOURSE, J. Appellant was plaintiff in an action brought in the superior court to quiet title to certain lands claimed adversely by defendants. In her complaint she alleged that on a certain day she had been duly and regularly appointed administratrix of the estate of Herbert A. Jerauld, deceased, and that immediately thereafter she duly qualified and continued to act as such, that the property which was the subject-matter of the litigation was owned by the estate of said decedent, and that she, as administratrix thereof, was entitled to the possession of the property. Adverse claims were alleged on the part of the defendants, and the usual prayer for the quieting of title was made. The defendant Chambers alone appeared, and denied upon lack of information and belief the due appointment or qualification of the plaintiff as administratrix of said estate. Upon the trial it was shown that plaintiff was appointed administratrix upon the petition of A. A. Jerauld, the son of the deceased, which petition, after stating the jurisdictional facts and the written consent and request of A. A. Jerauld and Mrs. Susie Arnold, the son and daughter of the deceased, for the appointment of Mrs. Blanche Jerauld as administratrix, prayed that such appointment be made. The petition was signed by A. A. Jerauld, and by an attorney of the court, as counsel for petitioner. It was not signed by Mrs. Blanche Jerauld, but she consented to act, letters were issued to her, and she immediately qualified. Upon this showing the court held that the plaintiff had not been legally appointed as such administratrix because she had not signed the petition, and rendered judgment against the plaintiff dismissing the action, each party to pay his own costs. The appeal is from this judgment.

Two points are raised upon the appeal: First, that the petition for the letters of administration was sufficiently signed; and, second, that in any event the order appointing the administratrix was not subject to collateral attack.

The position of respondent is that under section 1371, Code of Civil Procedure, the petition for letters of administration should have been signed by Mrs. Jerauld, who was by the order of the court appointed administratrix. That section provides that such petitions must be "signed by the applicant or his counsel." The petition here in question was signed by A. A. Jerauld, who, under section 1365, Code of Civil Procedure, was, with his sister, Mrs. Arnold, entitled to first consideration in the selection of an administrator. It was also signed by counsel as attorney for petitioner.

[1] If one who is entitled to letters of administration files a petition asking that letters be granted to another, it would seem that the petitioner would be the "applicant" within the meaning of section 1371. If so, the signature of A. A. Jerauld to this petition was sufficient. If, on the other hand, the nominee is the "applicant," then the petition may be treated as having been filed in her behalf, and the signature of the counsel meets the requirements of the statute. If the nominee's signature is a jurisdictional requirement, it is supplied by her consent to act, and the letters are not void. Section 1371, Code Civ. Proc.

[2] But in any event, upon presentation of the petition, the court must hear proofs of the jurisdictional facts (section 1371, Code Civ. Proc.), and must also pass upon the sufficiency of the petition in making the order appointing the administratrix. As the court had jurisdiction of the subject-matter, objections to the mode of procedure were questions which could have been raised on an appeal from the order or by a direct attack for lack of jurisdiction or on the ground of

fraud or mistake. No appeal having been taken from the order, and no direct attack having been made thereon, it became a final adjudication of the jurisdiction of the court to act, as well as the rights of the parties under the letters issued. In the absence of an appeal or other direct attack upon the order, it is free from a collateral attack in a suit brought by the administratrix in behalf of the estate which she represents. Thaxter v. Finn (Sup.) 173 Pac. 163, 165, 168. In other words, letters of administration, when not revoked or suspended by a direct attack upon the order appointing the administratrix, are sufficient proof of her right to represent the estate in a civil action, unless the record affirmatively shows no jurisdiction to make the appointment.

For these reasons the judgment is reversed.

We concur: LANGDON, P. J.; BRITTAIN, J.

44 Cal. App. 774

RECHTSTEINER v. NATIONAL SURETY CO. OF NEW YORK. (Civ. 3165.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1919.)

1. MECHANICS' LIENS ⟸313—PROVISION IN CONTRACTOR'S BOND REQUIRING ACTION AGAINST SURETY WITHIN SIX MONTHS VALID.

A provision in a surety bond given by a contractor, requiring action to be brought within 6 months, is not invalid as unreasonable.

2. MECHANICS' LIENS ⟸317 — FAILURE OF OWNER TO SUE CONTRACTOR'S SURETY WITHIN SIX-MONTH PERIOD NOT EXCUSED.

Where a contractor defaulted and the owner completed the building, *held* that where mechanics' liens were filed against the premises in excess of the amount due the contractor, but the amount of such liens were ascertained by stipulation, to which the surety was a party, and the whole matter could have been disposed of within the 6-month period allowed by the contractor's bond for action thereon, the owner cannot excuse delay in suing the contractor's surety, and maintain an action after 6 months on the ground that the judgment in the action to foreclose the liens was not rendered until more than 6 months after default.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Rose I. Rechtsteiner against the National Surety Company of New York. From a judgment for defendant, plaintiff appeals. Affirmed.

Irwin, Smith & Rosecrans, of Los Angeles, for appellant.

Allen & Weyl, of Los Angeles, for respondent.

WOOD, Judge pro tem. This is an action brought by the owner of a building against the surety on the contractor's bond. The bond was conditioned that the builder would indemnify the owner against loss or damage directly caused by reason of the failure of the builder to perform his contract. The owner completed the work after it was abandoned by the contractor, and filed the proper notice of cessation of labor. Thereafter 16 claims of lien were filed, 2 of which were subsequent to the expiration of 30 days after the notice. Suits for foreclosure were brought upon all these claims, and consolidated into one action. Although the bond in question explicitly provides that no right of action shall accrue upon it for the use or benefit of any person other than the owner of the building, the surety company was made a party to such consolidated action. All parties therein at some time, the date of which does not appear, agreed upon and stipulated in writing to all the facts, and that all the liens were filed for record within the time prescribed by law. Judgment in the consolidated action was entered for $3,155.33 more than 18 months after the time fixed in the building contract for its completion. It was paid upon the filing of the cost bill. The owner had left in her hands after she had completed the contract $775.96 only of the original contract price with which to satisfy the judgment, and her damages were the amount she paid in excess of such sum to effect such satisfaction.

There is an express stipulation in the surety company's bond that no suit or action shall be instituted in any event later than six months after the date or time fixed in the contract for the completion of the work therein. In accordance with this provision the trial court held that this action was brought too late, and rendered judgment against the plaintiff.

The questions involved upon this appeal, as stated by appellant, are:

First. Is the 6-month limitation provided in the bond an unreasonable one in an indemnity bond of this character?

Second. Was the plaintiff's delay in commencing the action unavoidable, and should not the limitation commence to run only from the time of her loss or damage, that is, at the time when the claims were established by judgment of the court or paid?

[1] Appellant does not seem to seriously rely upon the first point. The cases of Tebbets v. Fidelity & Casualty Co., 155 Cal. 138, 99 Pac. 501, and Appel v. Cooper Ins. Co., 76 Ohio St. 52, 80 N. E. 955, 10 L. R. A. (N. S.) 674, 10 Ann. Cas. 821, each of which cites numerous authorities involving similar time limitations, apparently answer the question in the negative. In fact, no case has been referred to where it has been held that a

stipulation, limiting the time for the bringing of an action, was in and of itself unreasonable.

[2] As to the second point the appellant relies upon cases where the rule has been declared "that if with proper diligence it happens in a particular case that the loss cannot be legally ascertained in time to bring the action within the limitation fixed in the policy, then the time will not commence to run until such damage is ascertained." One of these cases is that of Sheard v. United States Fidelity & Guaranty Co., 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276, upon which appellant places principal reliance for a reversal here. The Sheard Case was brought upon a bond that limited the time for commencement of an action to about 3 months after the time fixed in the contract for the completion of the work. The work was not completed until more than 3 months after the time limit in the bond, and the last lien was filed four months and 7 days later. The action on the bond was commenced 2 years and 6 months after such limitation had expired, but within 30 days after judgment on appeal was rendered in the lien suits. The Washington court held that to determine whether the limitation was reasonable and valid it was necessary to consider the bond, the contract, and the facts in the particular case; and that, so considered, the limitation in that case was unreasonable. We cannot see that the Sheard Case is applicable to this one. The only excuse offered in appellant's complaint or at the trial for the delay in the commencement of this action was "that judgment in the consolidated lien action was not entered in the judgment book until May 23, 1916, and that she (plaintiff) was unable until the entry of such judgment and the service of all the cost bills to ascertain the amount of the damages she had sustained." The 6-month limitation in the bond for the commencement of an action expired March 28, 1915. The last lien was filed 3 months and 9 days prior, or 2 months and 5 days after the owner filed notice of cessation of labor for record. With one exception all the other liens were filed before November 14, 1914. For aught that appears to the contrary here these lien suits might have been brought and consolidated, and the written stipulation as to the facts agreed to and signed by all the parties, within a few days after the filing of the last lien, and more than 3 months before the time limited by the bond for the commencement of the action. The record is silent as to the time when any of the lien actions were commenced, or when they were at issue, or when consolidated, or when set for trial; or when the stipulation as to the facts was made or filed. There is no attempt in the record to show that plaintiff used any diligence in pressing the cases to an entry of judgment as she could have done as a party defendant. Indeed, it does not appear why she could not have paid the liens without judgment, inasmuch as the surety company and all the parties had signed a writing stipulating to all the facts in the consolidated case.

The appellant has failed to show that her delay in the commencement of this action was unavoidable, or that any diligence was used in ascertaining her damages. The judgment should be affirmed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

43 Cal. App. 145

GOULD v. VAN HORNE. (Civ. 2992.)

(District Court of Appeal, First District, Division 1, California. Sept. 4, 1919.)

1. GIFTS ⟸49(5)—EVIDENCE SUFFICIENT TO SHOW INTENT TO MAKE ABSOLUTE GIFT.

In an executor's action against alleged debtor of testator, evidence *held* to sustain finding that testator had intended to make an absolute gift of the money in question to the alleged debtor.

2. GIFTS ⟸34—INTENT TO MAKE ABSOLUTE GIFT NOT DEFEATED BY REQUIREMENT THAT DONEE PAY INTEREST ON AMOUNT GIVEN.

That donor, in making gift of money with intent that it should be an absolute gift, required the donee to pay her interest on the sum given during her lifetime, or even give her back some of the principal if desired, did not affect the validity of the gift.

3. GIFTS ⟸48—DONOR'S DECLARATIONS BOTH BEFORE AND AFTER TRANSACTION ADMISSIBLE ON ISSUE OF INTENT.

In determining the intent of a donor, declarations made by donor both before and after the transaction are admissible as tending to show a gift.

4. APPEAL AND ERROR ⟸1054(1)—ERROR IN ADMISSION OF EVIDENCE NOT GROUND FOR REVERSAL WHERE UNNECESSARY TO SUSTAIN FINDINGS.

The admission of evidence by the court trying case without a jury, if error, was not ground for reversal, where there was ample evidence, without such alleged erroneously admitted evidence, to sustain the court's findings.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Will D. Gould, executor of the last will and testament of Mary M. Shaw, deceased, against E. B. Van Horne. Judgment for defendant, and plaintiff appeals. Affirmed.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Will D. Gould, Jas. H. Blanchard, and Bordwell & Mathews, all of Los Angeles, for appellant.

Geo. Beebe and J. Marion Wright, both of Los Angeles, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant in an action brought by the plaintiff as executor of the last will and testament of Mary M. Shaw, deceased, to recover the sum of $17,250.66, alleged to be due from said defendant to the estate of said deceased upon his promissory note. The defendant's amended answer set up that there was no consideration for said note, and further set forth the circumstances under which the note had been signed as the basis for the defendant's claim that it was executed under a mutual mistake of the parties.

The facts of the case as developed at the trial are substantially these: In the month of April, 1911, Mary M. Shaw was, and for some years prior thereto had been, a woman of considerable means, residing in Los Angeles; the defendant had, during such time, been a real estate and general business agent in said city, and as such had been looking after the business interests of said Mary M. Shaw, who had come to have great confidence in him and to display a strong liking for him. For some time prior to the month of April, 1911, said Mary M. Shaw had signified to the defendant and said to other persons that she intended to make a gift to the defendant of the sum of $20,000, which sum was to be derived from the collection of one of her outstanding mortgages when the same should be paid. On a certain day in April, 1911, she came into the defendant's office with a check for the full amount of said mortgage, together with about $700 in interest, and handed the check to the defendant, saying, "Van, here is that check that I have been waiting for some time to give you; everything has been paid off and I want you to take it." She also stated to several other people about the office at the time that she was giving the defendant the money outright as a gift, and also gave as a reason therefor that she thought as much of him as she would of a son, and that he had done as many things for her as a son could do, and that her relations would get everything she had after she died and were just waiting for her to die. At various times thereafter up to the time she did die in the year 1913 she repeated these statements to various persons. The evidence also showed that at the time she handed the check to the defendant she refused to take any writing from him upon the ground that it was his money, but said that she would like him "to pay interest on it during her lifetime, and if she wanted any additional sums at any time she needed it I would take and advance it to her." The record shows that from time to time thereafter the defendant gave the decedent sums of money, and particularly shows that she asked the defendant for some money in the year 1912, and that he then paid her the sum of $1,000, and at the time of doing so had her sign a receipt drawn by himself showing that of the sum then paid $646.25 was the interest up to May 24, 1912, and $353.75 was to be applied upon principal, leaving $16,646.25 yet due on principal. Upon the death of Mary M. Shaw the plaintiff herein, who had been her attorney for a number of years and who was named in her will as her executor, was duly appointed as such upon the probate of her will, and after qualifying as such executor had an interview with the defendant with respect to this money, which he asserted was an asset of the estate and for which he threatened to bring suit unless the defendant would execute a note to the estate for the balance claimed to be due. The defendant protested that the decedent had made a verbal gift to him of the money, but the executor stated that he was legally liable for it "by reason of the fact that the defendant had no writing to show," and also on account of the existence and terms of the receipt above referred to. The defendant, who had known the plaintiff as an attorney and personally for many years and had much confidence in his ability and integrity, and who also did not wish to be sued, finally signed the note which forms the basis of this suit. Upon the trial of the case the defendant and his witnesses testified to the foregoing state of facts. The trial court made its findings in conformity to the foregoing facts, and rendered its judgment accordingly in the defendant's favor.

[1, 2] The plaintiff, upon this appeal, urges three main grounds for a reversal of the case. The first of these is that the facts as shown are insufficient to support the finding of a gift inter vivos to the defendant, but at most are merely evidence of an intent on the part of the deceased to make a gift to take effect upon her death. Much of the appellant's argument upon this point is devoted to a discussion of the weight of the evidence, but as to this we think that there was sufficient evidence, if believed by the court, to sustain its finding to the effect that it was the donor's intent to make an absolute gift of the money in question to the defendant. If such was her intention it would not be defeated by the further fact that she required of the defendant that he pay her interest on the sum given during her lifetime, nor even that he give her back some of the principal, if desired. Robertson v. Robertson, 147 Ala. 311, 40 South. 104, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051; Goodrich v. Rutland, etc., Bank, 81 Vt. 147, 69 Atl. 651, 17 L. R. A. (N. S.) 181; Doty v. Willson, 47 N. Y. 580; Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634; Miller v. Western College, etc., 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242.

[3] The appellant incidentally urges an objection to the testimony of certain witnesses as to subsequent declarations of the decedent as to her intention in giving the defendant the money in question; but this objection has no merit, since it is well settled that in determining the intent of a donor declarations made by her both before and after the transaction are admissible as tending to show a gift. Calkins v. Equitable B. & L. Ass'n, 126 Cal. 531, 59 Pac. 30; Estate of Hall, 154 Cal. 527, 98 Pac. 269; Helm v. Martin, 59 Cal. 57.

[4] The final contention of the appellant is that the trial court erred in permitting the plaintiff, while upon the witness stand, to be asked in cross-examination, over the plaintiff's objection, the following question: "Would you have gotten Mr. Van Horne to sign this note, Plaintiff's Exhibit 1, if you had been in possession of the facts which you now have?" The witness answered "No." While it seems to be conceded that the question was improper, it is to be noted that the case was on trial before the court sitting without a jury, and that the testimony of the defendant and his several witnesses as to the circumstances attending the gift was without contradiction; and hence that the trial court, if he believed this testimony, had abundant evidence before him to sustain his findings, regardless of what the mental attitude of the plaintiff, either before or after the institution of the action, might be. Under such conditions we do not think that the error, if such it be, sufficiently prejudicial to justify a reversal of the case.

Judgment affirmed.

We concur: WASTE, P. J.; BARDIN, Judge pro tem.

45 Cal. App. 53

McDUFF v. McDUFF. (Civ. 3142.)

(District Court of Appeal, First District, Division 2, California. Dec. 16, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

1. APPEAL AND ERROR ⊜1011(1)—FINDING ON CONFLICTING EVIDENCE CONCLUSIVE.

The finding of the trial court on conflicting evidence is conclusive on appeal.

2. HUSBAND AND WIFE ⊜16—WHAT CONSTITUTES EVICTION BY HUSBAND OF WIFE FROM HER PROPERTY.

It is not necessary to support the finding of an eviction by a husband of his wife from her property that there should be a forcible ouster, but it is sufficient if the husband's acts were such as to drive the wife away.

3. JUDGMENT ⊜713(1)—IN ABSENCE OF FINDINGS ONLY THOSE ISSUES WHICH WERE NECESSARY IN THE JUDGMENT WILL BE DEEMED ADJUDICATED.

Under Code Civ. Proc. §§ 1908, 1911, only those issues which were actually and necessarily included in the judgment will, in the absence of findings, be deemed adjudicated.

4. JUDGMENT ⊜743(2)—JUDGMENT FOR HUSBAND IN WIFE'S ACTION FOR SEPARATE MAINTENANCE DOES NOT PREVENT WIFE FROM MAINTAINING EJECTMENT TO RECOVER HER PROPERTY.

A judgment in favor of a husband in a wife's action for separate maintenance is not, where findings were waived, an adjudication conclusive against the right of the wife to maintain ejectment for the premises, standing in her name, used as their home.

5. HUSBAND AND WIFE ⊜262(1)—PRESUMPTION AS TO GIFT BY HUSBAND OF COMMUNITY PROPERTY.

Where title to a residence was taken in the name of a wife, the husband having intended to give her the same, the fact that the initial payment was made with community funds does not raise any presumption, under Civ. Code, § 164, that the property was community property.

6. HUSBAND AND WIFE ⊜205(4)—WIFE MAY MAINTAIN EJECTMENT FOR HER SEPARATE PROPERTY AGAINST HER HUSBAND.

Where property became the separate property of the wife by gift, the wife might, under Code Civ. Proc. § 370, where the spouses were separated, maintain ejectment against her husband.

7. HUSBAND AND WIFE ⊜205(4)—EXTENT OF RECOVERY IN EJECTMENT BY WIFE AGAINST HUSBAND.

Where spouses separated, and the wife was forced to leave her separate property which the spouses had occupied as a residence, she may, under Code Civ. Proc. § 427, subd. 2, recover the separate property in an action of ejectment against the husband, together with damages for the withholding.

8. HUSBAND AND WIFE ⊜205(4)—EXCLUSION OF WIFE BY HUSBAND FROM HER SEPARATE PROPERTY GIVING WIFE RIGHT TO SUE IN EJECTMENT.

Where a husband gave his wife the property which the spouses used as a home, and on disagreement the wife left and the spouses lived apart, *held*, that the wife might recover the premises in ejectment and the husband could not defeat the action on the ground that under Civ. Code, §§ 156 and 157, neither the husband nor wife can be excluded from the family dwelling place; the premises at the time of the action not being used as a family dwelling place, but the husband instead holding an adverse possession of his wife's separate property.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Sarah F. McDuff against William G. McDuff. From a judgment for plaintiff, defendant appeals. Affirmed.

Percy Hight, of Long Beach, for appellant.

Nathan Newby, of Los Angeles (Hugh A. McNary, of Los Angeles, of counsel), for respondent.

BRITTAIN, J. The defendant, the husband of the plaintiff, appeals from a judgment in ejectment.

The parties were married in 1885. Their domestic relations were pleasant until 1907, from which time until 1915 there was at least lack of harmony. In the month of May, 1915, the wife left the family dwelling place and later in the same year sued for separate maintenance. Judgment in that case was in favor of the husband.

[1] The property involved in this action was purchased in 1909; the first installment of the purchase price, amounting to $300, having been made up of $100 delivered by the husband to the wife and $200 borrowed by her from her mother. There was a mortgage for the remainder of the purchase price, $3,450, which was subsequently paid by the husband from the proceeds of a sale of his separate property in the state of Kansas. He also paid taxes. The deed to the property was made to the wife alone. The husband asserted that he did not learn the deed was so made until he paid off the mortgage debt in 1913. The wife testified that he saw the deed on the day the deed and mortgage were made. She signed the mortgage first, and she testified that at that time her husband said, "'Well, that is the first time my name didn't go on the paper first;' he says, 'This time this is yours.'" Another witness testified that during the negotiations for the sale to the husband of other property, in December, 1909, when the wife was not present, the appellant stated that "he had just bought a piece of property and paid $3,600 for it and given it to his wife." The wife further testified that when the mortgage was paid off her husband brought the deed to her, saying: "Now, this is the deed to your place. I have paid every cent of the debt on that for you, and now I am giving it to you for your own. * * * Nobody can ever take your place from you for my debts. If I should make a bad deal you will never lose your home, you will have the deed to your own." The husband denied many of these statements. The judge who tried the case saw the witnesses and heard their testimony. It was clearly conflicting, and in such a case the appellate court is bound by the action of the trial court.

[2] The evidence was similarly conflicting in regard to the question of eviction of the wife by the husband. It is not necessary in such a case to support the finding of eviction that there should have been evidence of a forcible ouster. If the husband's acts were such as to drive the wife away from her home, it would amount to constructive eviction.

[3, 4] It is argued that the judgment in favor of the husband in the maintenance suit rendered the questions involved in this action, and particularly that of eviction, res judicata. Findings were waived in the maintenance suit, and the record in that case fails to show upon what ground the judgment was entered. So far as the record in that suit shows, the trial judge may have determined that the plaintiff owned this property, and that therefore she had ample means of support without a judgment for maintenance. He may have determined that the plaintiff failed to prove the existence of a cause of action for divorce. In the absence of findings, only those issues which were actually and necessarily included in the judgment, or necessary thereto, are deemed adjudicated. Code Civ. Proc. §§ 1908, 1911; Estate of Li Po Tai, 108 Cal. 484, 41 Pac. 486; Beronio v. Ventura, etc., Co., 129 Cal. 232, 61 Pac. 958, 79 Am. St. Rep. 118; Gardella v. County of Amador, 164 Cal. 555–560, 129 Pac. 993; Bank of Visalia v. Smith, 146 Cal. 398–402, 81 Pac. 542.

[5] The appellant argues that the property was community property and not the separate property of the wife, because the initial payment was made from community property. Community property may be given by a husband to his wife with like effect as his separate property. Holmes v. Holmes, 27 Cal. App. 546, 150 Pac. 793. In view of the finding, on conflicting evidence, that there was a gift, it is immaterial whether the gift was from community property or separate property, and the argument addressed to the court on the interpretation and application of section 164 of the Civil Code concerning the presumption arising from the deed having been taken in the name of the wife has no bearing on the case.

[6, 7] The property became the separate estate of the wife by the gift, and she had the right to sue her husband to recover possession. Code Civ. Proc. § 370; Peters v. Peters, 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699. Her seisin was the issuable fact. It was determined adversely to the appellant on conflicting evidence. Payne v. Treadwell, 16 Cal. 220–243; Hihn Co. v. Fleckner, 106 Cal. 95, 39 Pac. 214; Nathan v. Dierssen, 164 Cal. 607, 130 Pac. 12. She had the right to recover the specific property with damages for the withholding. Code Civ. Proc. § 427, subd. 2; Nathan v. Dierssen, 164 Cal. 607–611, 130 Pac. 12.

[8] The appellant contends the plaintiff could not recover in ejectment because neither the husband nor the wife could be excluded from the dwelling of the other; reliance being placed upon the provisions of sections 156 and 157 of the Civil Code. At

the time of the commencement of this action the house was not the family dwelling place. The parties were living separate and apart. The provisions of sections 156 and 157 relate to the marital right of the spouses to occupy the family home. In the first clause of section 157 it is expressly stated: "Neither husband nor wife has any interest in the property of the other." Under the facts in this case the husband was not asserting his personal marital right of living in the family home, but was holding possession of the wife's separate property adversely to her as the owner. This question, upon which no authorities are cited on behalf of the appellant, has been determined adversely to his contentions in a number of cases in other states. Cook v. Cook, 125 Ala. 583, 27 South. 918, 82 Am. St. Rep. 264; Crater v. Crater, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161; Wood v. Wood, 83 N. Y. 576; Minier v. Minier, 4 Lans. (N. Y.) 421.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

44 Cal. App. 592

FAWCETT v. EDMUND PEYCKE CO.

(Civ. 3002.)

(District Court of Appeal, Second District, Division 1, California. Dec. 4, 1919. Hearing Denied by Supreme Court Feb. 2, 1920.)

1. FACTORS ⟸42—COMPLAINT IN ACTION AGAINST COMMISSION MERCHANT FOR ACCOUNTING SUFFICIENT.

In fruit grower's action against commission merchant for accounting for defendant's collection of claims against railroad and transportation companies for damages to plaintiff's shipments, complaint *held* sufficient.

2. TRIAL ⟸394(1) — FINDINGS IN ACTION AGAINST COMMISSION MERCHANT FOR ACCOUNTING SUFFICIENT IN VIEW OF STIPULATION.

In fruit grower's action against commission merchant for accounting for defendant's collection of claims against carriers, where a stipulation entered into between the parties as to all the claims filed against railroads on plaintiff's behalf and all the amounts collected by defendant thereon obviated the necessity for an examination of defendant's accounts and furnished the court with the needed evidence as to the aggregate amount due, general findings, which did not separate the facts and assign them to several alleged causes of action, but determined that the amount for which judgment was awarded was due plaintiff, were sufficiently specific; it being immaterial that plaintiff had set forth in the form of various causes of action the facts relating to the handling of his crops for several different seasons or years.

3. EVIDENCE ⟸443(1)—ORAL TESTIMONY AS TO SEPARATE CONTRACT MATTER, NOT REFERRED TO IN WRITTEN AGENCY AGREEMENT, ADMISSIBLE.

In a suit against an agent for an accounting for money received from railroad companies for mishandling of plaintiff's fruit, defendant claiming a percentage for collection as offset, testimony that defendant's manager orally agreed that there would be no commission charges above commission for shipment and sale as agreed in writing, was competent, if the claim account was separable from the written agreement, and also if such account was incidental to the main agency, but not referred to in the writing, it would be competent to show agreement or custom governing the same.

4. APPEAL AND ERROR ⟸1011(1)—FINDINGS OF TRIAL JUDGE ON CONFLICTING TESTIMONY CONCLUSIVE.

Trial judge's determination on question of fact on conflicting evidence is conclusive.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Suit for accounting by Will S. Fawcett against the Edmund Peycke Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

George H. Woodruff and Clyde C. Shoemaker, both of Los Angeles, for appellant.

Davis & Rush, of Los Angeles, for respondent.

JAMES, J. Appeal from a judgment by which plaintiff was awarded a sum of money in excess of $2,000.

[1] The defendant, during the time material to this controversy, was engaged in business as a commission merchant or broker handling fruits and agricultural products. It contracted with the plaintiff to ship and market crops of canteloupes and grapes produced during the years 1911, 1912, and 1913. The contracts covering the obligations of the parties were evidenced by letters. In brief, it may be stated, with which the uncontradicted testimony agrees, that the defendant, after the fruit was delivered to it, assumed the obligation to transport and market it, with full power in that connection, rendering an account to the plaintiff for the net proceeds therefrom. The compensation of defendant was a commission, that being definitely fixed by the agreement. The crops for the years mentioned were handled by the defendant, and an account and return was made of the proceeds derived from the sale, less commissions, to the plaintiff. However, in addition to the returns of sale of the crops, the defendants collected various amounts of money from railroad and transportation companies on account of claims for damage resulting from the mishandling of plaintiff's fruit. After the third-year crop had been marketed, the plaintiff claimed to have discovered that

there was a large amount of money due him on account of these damage demands, which money the defendant had failed to include in its accounts and failed to pay over. It appeared in testimony that some moneys had been paid over, but that the amount for which the court awarded judgment remained in the defendant's hands at the time the action was brought. Plaintiff by his suit assigned this failure to account as a breach of duty on the part of his agent, alleged that true accounts had not been rendered, and that he was unable to determine precisely what amount of money the defendant held to which the plaintiff was entitled.

The action in form was one for an accounting, which remedy the trial court enforced against the defendant. Plaintiff's complaint contained five counts. These counts referred to the contract and employment of the defendant, first, for the handling of the canteloupe crop for the season 1911; second, for the handling of the grape crop for the season 1911; third, for the handling of the canteloupe crop for the season 1912; fourth, for the handling of the grape crop for the season 1912; the fifth count referred to one contract with reference to the grape and canteloupe crops for the year 1913. Each count of the complaint was similar in form and language. It was set forth that, under the agreement with the defendant, defendant was to account for all money received from the sale of the fruit, "or any claim against any railroad company, or from any other source in connection with the sale, marketing, and disposition of said" crops. The allegations of the complaint were sufficient, we think, to show that the defendant had received and failed to account to the plaintiff for money in excess of the amount of the judgment. We do not think there was any such uncertainty about the allegations in these particulars as to make the complaint vulnerable to the demurrer of the defendant.

[2, 3] The trial judge made general findings, without separating the facts and assigning them to the several alleged causes of action, and determined that the amount for which judgment was awarded was due to the plaintiff. One of the contentions of appellant is that the findings are not specific enough in this particular; but, in view of a stipulation entered into between the parties and filed in the case, we think that the findings were as specific as the court was required to make. In the bill of exceptions it appears that an itemized statement had been, before trial, filed among the papers of the case, and the terms of the stipulation thereto attached and signed showed that the paper contained a full statement of all the claims filed against railroad companies on behalf of the plaintiff by the defendant and all the amounts collected by the defendant thereon. While the record shows that there was an objection to the introduction of the stipulation in evidence, it is not stated what the objecton was; but, even though an objection had been made in appropriate language and upon legal grounds, we think that the evidence was admissible. The court then had before it as a stipulated fact, assuming the same was competent to the issues tendered, a statement of the amount collected by the defendant. This was the ultimate thing that plaintiff sought by his action to have ascertained, and, to our minds, it matters not that he had set forth in the form of various causes of action the facts relating to the handling of the different crops. The collection of this money was all made by the defendant as the agent of the plaintiff, and at the time the action was brought the total amount had accrued. We think that the complaint might well have detailed the facts covering the various engagements of the defendant as the agent of the plaintiff in one cause of action, asserted that a breach of the agency duty had occurred by failure to fully account, and asked the court to make examination and determine what, if anything. was due from the defendant to the plaintiff. The stipulation entered into between the parties obviated the necessity for an examination of the accounts of the defendant, and furnished the court with the needed evidence as to the aggregate amount due.

Defendant, however, did not admit that the full amount stated in the stipulation and unaccounted for was due to the plaintiff, but contended by counterclaim that as offsets thereto a commission of 15 per cent, was due it on the amount of all claims collected and those which had been placed in position to be enforced. The court found against the defendant's claim in this regard, and allowed testimony to the effect that defendant's manager had orally agreed with the plaintiff that there would be no commission charges over and above the charge for the shipment and sale of the fruit as agreed upon in the writings. It is claimed that the admission of this testimony was error as being an attempt to change and vary the terms of a written contract, and further that the claim account constituted a separate contract and not the contract sued upon by the plaintiff. We have already noted that the complaint did set forth an agreement on the part of the defendant to collect the accounts both upon the sale of fruit delivered to it and also for any claims made against transportation companies for damages. We think that in this suit for an accounting it is immaterial whether the claim account should be treated as the subject of a distinct and separate contract from the fruit sales account. Plaintiff alleged the agency relation of the defendant as to both of those matters, and sought an accounting to have it ascertained as to what amount defendant might have in its hands belonging to the

plaintiff. If the claim account was a separate matter of agreement, then the parol testimony was competent to establish it, and if on the other hand, such account was incidental to the main agency, but not referred to in the writings, the oral testimony would also be competent to show agreement or custom governing the same. It nowhere appears that defendant could have been misled as to what the plaintiff was endeavoring to have ascertained and determined by his action. The defendant in its answer controverted the issues tendered, alleged its counterclaims as offsets to the damage claim demands, and furthermore made a stipulation with its adversary agreeing precisely upon the amount of the items in dispute. We can find in this record nothing which will support the claim that prejudicial error has been committed which has prevented the defendant from having its side of the controversy fully considered.

[4] As to the question of counterclaims, that matter was the subject of conflict of testimony; hence the trial judge's determination of the fact that no commissions were owing as offsets, must be taken as final.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 105

HINSHAW et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 3255.)

(District Court of Appeal, Second District, Division 1, California. Dec. 18, 1919.)

1. EMINENT DOMAIN ⊂⊃198(1)—COURT MUST DETERMINE NECESSITY OF PROCEEDING IN ACTION WHERE ONLY ISSUE OF VALUE IS SUBMITTED TO JURY.

Under Code Civ. Proc. § 1241, in an action of eminent domain, where the only disputed issue, that of value, is submitted to a jury, the trial court nevertheless is required to determine the fact that there exists necessity for subjecting the property to the public use sought, and judgment of condemnation alone does not immediately follow on return of verdict by the jury, whereby damages to defendant are assessed.

2. EMINENT DOMAIN ⊂⊃224—VERDICT ON SINGLE ISSUE OF VALUE IN CONDEMNATION CASE NOT "DECISION" TO INITIATE TIME FOR NOTICE OF INTENT TO MOVE FOR NEW TRIAL.

In view of the necessity that the court determine whether the property need be subjected to public use, in a condemnation case, the verdict of the jury on the single issue of the value of the property does not constitute a decision after trial, within Code Civ. Proc. § 659, fixing the time within which notice of intention to move for new trial must be given.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Decision.]

Application for writ of prohibition by W. E. Hinshaw and others against the Superior Court of the State of California in and for the County of Los Angeles and Paul J. McCormick, Judge thereof. Writ denied, and proceeding dismissed.

F. A. Knight, of Long Beach, for petitioners.

A. J. Hill, County Counsel, Vincent Morgan, and Wm. W. Clary, all of Los Angeles, for respondent.

PER CURIAM. Prohibition. Petitioners here were defendants in a certain action brought in the superior court by the Los Angeles County Flood Control District. That action was prosecuted to secure, by condemnation, certain lands for the uses of said district in the carrying out of the purposes described in the statute under which such district was organized. The complaint in the action set forth the different steps and proceedings had and taken by the board of supervisors preliminary to the commencement of the suit, and showed that the public use and necessity demanded that the property described be acquired by the there plaintiff. None of these petitioners made any denial as to the issues tendered by these preliminary allegations of the complaint; they did take issue as to the value of the land sought to be taken, and this issue was submitted to a jury, which returned a verdict thereon. Plaintiff was dissatisfied with the finding made by the jury, and within 10 days after verdict served its notice of intention to move for a new trial, which motion was not brought on for hearing until after 90 days had expired subsequent to the entry of the verdict.

When the motion came on for hearing, petioners here, defendants in that case, objected to any consideration of the motion on the ground that such a motion was required to be disposed of within 90 days after the verdict of the jury, and that no authority resided in the court to act upon the same. This contention was made agreeable to the provisions of section 660 of the Code of Civil Procedure. However, at the time the first notice was given, no findings had been made in the action by the trial judge; but findings were subsequently made, and thereafter a new notice of intention to move for a new trial was served and filed by the plaintiff there, and the motion came on for hearing on the 1st day of December, 1919. The defendants, these petitioners, then objected that the court had not jurisdiction to rule upon the motion, basing the contention upon the same provisions of the section cited. The court, according to the petition here, heard the motion, took the same under advisement, and,

as here alleged, "persists in entertaining said motion, and threatens to, and will unless restrained and prohibited from so doing, consider and grant a new trial in said cause." Under this situation, the objecting defendants petitioned this court for a writ of prohibition. A preliminary writ was issued and hearing has been had.

It is admitted by petitioners that, if it was the duty of the superior court to make further findings of fact, supplementing the verdict of the jury, then the second motion for a new trial, as noticed, was in time, and the court had jurisdiction to consider and determine it. The contention that the verdict of the jury constituted the decision after "trial," within the meaning of section 659, Code of Civil Procedure, rests upon the showing that, as petitioners did not controvert, by answer, any of the allegations of the complaint of respondent, except to raise the issue as to the amount of damages, all facts alleged, and not controverted, would be conclusively presumed to exist without proof, and hence require no finding. After a very careful consideration of the argument, we are not prepared to agree with petitioners that, in the action of eminent domain, the trial court has no function to make findings where the only disputed issue is submitted to a jury.

[1, 2] We think that, under the provisions of section 1241, Code of Civil Procedure, the court was required to determine the fact that there existed the necessity for subjecting the property to the public use sought, and that a judgment of condemnation alone would not immediately follow upon return of a verdict by the jury, by which verdict the damages to the defendants were assessed. If we are correct in this assumption, the case immediately falls within the decision made in San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 30 Cal. App. 405, 158 Pac. 768. That case is quite full in its review of the preceding decisions referring to the commencement of the time within which notice of intention to move for a new trial may be given. It plainly holds that in a condemnation case the verdict of a jury upon a single issue alone does not constitute a decision of the case. It is true that it does not clearly appear that there was in that action no denial as to the necessity for the taking of the property. But, as we have indicated, we are of the opinion that in the proceeding of eminent domain it is the duty of the court to make its decision upon the matter adverted to, regardless of whether an answer contains allegations controverting those issues alleged in the complaint. Having reached that conclusion, we need not give particular attention to those facts affecting some of the petitioners only, where the court made findings regarding certain lien interests which were conceded to exist against the real property.

From the conclusions expressed, peremptory writ should be denied, and this proceeding dismissed. It is so ordered.

182 Cal. 612

EMPLOYERS' LIABILITY ASSUR. CORPORATION, LIMITED, OF LONDON, ENGLAND, et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (L. A. 6277.)

(Supreme Court of California. April 6, 1920.)

MASTER AND SERVANT ⊂⊃405(4) — EVIDENCE HELD INSUFFICIENT TO SHOW THAT INJURED EMPLOYÉ, DEPARTING FROM DIRECT ROUTE, WAS WITHIN DUTY INCIDENT TO EMPLOYMENT.

Evidence *held* insufficient to sustain a finding that injured automobile driver, departing from the usual and direct road to his employer's garage, was at the time of the accident discharging a duty incident to his employment, within the Workmen's Compensation Law.

In Bank.

Proceeding by Mrs. Mattie Boatman under the Employers' Liability Act, opposed by the City Garage, a corporation, employer, and Employers' Liability Assurance Corporation, Limited, of London, England, the insurance carrier. To review an order of the Industrial Accident Commission, awarding compensation, the employer and insurance carrier apply for certiorari. Award annulled.

George H. Moore, of Los Angeles, for petitioners.

A. E. Graupner, of San Francisco, for defendants.

KERRIGAN, Judge pro tem. On February 20, 1919, June Boatman, an employé of one Freeman A. McKenzie, conducting business under the name of City Garage at San Pedro, Cal., was injured by the overturning of an automobile which he was driving, from which injuries he died. On said day he had been directed by his employer to tow a disabled automobile from San Pedro to Los Angeles, and, after delivering it at a given address, to return immediately. He proceeded to carry out his instructions, and, with a companion named Glen Park, whom he had invited to accompany him, he executed his commission and started on the return journey. Instead of following the only direct and regular road of travel, which was by the way of Harbor boulevard, he with his companion departed therefrom, going first out of his proper course about three miles in an easterly direction to the city of Vernon. There he made a stop and purchased a jug of wine. Resuming his trip, he again reached the main road, and then pursued one of three courses: Crossing

this main road, he went west, taking a direction which would add about 12 miles to the length of the return journey; or, after regaining the main road, he proceeded along it a distance of about 6 miles to a point a little north of Gardena, and there turned west, and, passing through Redondo, reached the point where the accident occurred; or (and which seems most likely) he remained on the main road, or Harbor boulevard, until he came to a point about 4 miles from San Pedro, and there made his detour westerly, traveling in the direction of Harbor City, and so arrived at the aforesaid point of accident.

It may be stated preliminarily that the evidence shows that Boatman's companion, Park, had consumed part of the wine purchased at Vernon and was intoxicated at the time of the overturning of the automobile; but there is a conflict in the evidence as to whether or not Boatman had partaken of it, so that we will not review the finding of the commission that the upsetting of the machine cannot be attributed to any lack of skill on the part of its driver, induced by a state of inebriety. We find ourselves, however, unable to agree with the learned commission in its conclusion that any reasonable inference can be drawn from the evidence that Boatman, at the time and place of the accident, was discharging a duty incident to his employment. According to the fundamental rule in compensation cases, the burden of proving that the injury to the employé was received in the course of his employment was on the claimant. Here there was no direct evidence, nor any fair inference based on the evidence, tending to support the conclusion of the commission in that behalf. As before stated, the accident occurred on a road at right angles to the regular and usual route of travel between Los Angeles and San Pedro, at a point approximately two miles westerly thereof, and at a place where it cannot be reasonably assumed from any evidence in the case that the deceased was pursuing the course of his employment. The evidence shows that the deceased disregarded his employer's instructions to return to San Pedro immediately upon the completion of his errand in Los Angeles, and on the whole tends strongly to support the contention of the petitioner that at the time of the accident, as well as much of the time immediately prior thereto, he had temporarily abandoned the business of his employer in favor of some business, or possibly frolic, of his own. If he had taken, as the evidence shows he ought to have done, the usual and direct road in returning to his employer's place of business, following the instructions given to him, he could not have been at the point where he was injured, and would not have been exposed to that particular peril.

While no case has been cited which in the particular facts is directly in point, the authorities in this state support our conclusion. In Casualty Co. v. Ind. Acc. Com., 176 Cal. 530, at page 533, 169 Pac. 76, at page 77, it is said:

"An employer cannot be held liable under our Compensation Act unless the accident arises out of and in the course of the employment, and of course it devolves on a claimant to establish this fact by evidence from which such a conclusion is fairly inferable. * * * But here, in view of the admitted facts, considered in connection with what we deem established by the record as to the situation of deceased at the time of the accident, there appears no warrant for holding that the accident arose out of and in the course of the employment. It happened during the hour when the deceased was obligated to be on duty, and also on the premises of the employer, but the record negatives any inference that decedent, in leaving and going away from the floor where it was his business to be, was engaged on any mission having any connection, direct or indirect, with the service for which he was employed."

In Sherer & Co. v. Ind. Acc. Com., 175 Cal. 615, 618, 166 Pac. 318, 319, we find this language:

"There are two sorts of ways of frequent occurrence in which a workman might go outside the sphere of his employment—the first one when he did work he was not engaged to perform; and, second, when he went into a territory with which he had nothing to do."

And in N. P. R. R. Co. v. Ind. Acc. Com., 174 Cal. 297, 306, 163 Pac. 1000, 1003 (L. R. A. 1918A, 286), our Supreme Court construes the employer's liability under the statute we are considering as follows:

"When a servant of his own accord and without the direction of his master steps outside the scope of his employment, whether on the master's business or his own, the master owes him no duty as to the dangers he encounters, and he is not liable for the injury received."

There is some evidence in the record which tends to support the supposition that the accident occurred when Boatman was turning the car, intending to direct its course towards San Pedro; but it cannot be reasonably contended that, had he successfully executed this maneuver, by which his car would thereafter have been headed in the direction of his ultimate destination, he was at the moment of the accident engaged in the business of his employment. Certainly, until he arrived at the regular road, which he had left for the purpose of making his detour, he must be regarded as returning from a mission of his own, if, as we have held, his side trip in the direction of Harbor City was at least a temporary abandonment of his employer's business.

It follows that the award should be annulled; and it is so ordered.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; OLNEY, J.; SHAW, J.

45 Cal. App. 33

RATH v. VAUGHAN. (Civ. 3121.)

(District Court of Appeal, Second District, Division 1, California. Dec. 16, 1919. Rehearing Denied Jan. 12, 1920; Hearing Denied by Supreme Court Feb. 13, 1920.)

1. APPEAL AND ERROR ⟸622—EXCEPTIONS, BILL OF ⟸36(3)—TIME FOR SERVING AND FILING PROPOSED BILL OF EXCEPTIONS AND FOR FILING TRANSCRIPT AS AFFECTED BY NEW TRIAL, STATED.

Where notice of entry of the judgment was served on defendant March 31st, and notice of intention to move for a new trial was filed April 7th, and notice of appeal from judgment was filed on April 10th, and the motion for new trial was never brought on for hearing, and under Code Civ. Proc. § 660, the power of court to grant a new trial of the case expired on June 30th, the time within which defendant was entitled to serve and file his proposed bill of exceptions expired on July 10th, unless further time was granted and the 40 days' time for filing the transcript then began to run.

2. APPEAL AND ERROR ⟸624—MERE POSSIBILITY OF APPLICATION FOR RELIEF FROM DEFAULT NOT PENDING PROCEEDING WHICH WOULD EXTEND TIME FOR FILING TRANSCRIPT.

An affidavit by defendant, opposing motion for dismissal of appeal for failure to file tran-

script within time that, "should the judge refuse to sign or settle the bill of exceptions because of delay, affiant will move, under section 473 and on his motion and affidavit hereto attached," papers attached being a purported copy of conditional notice of motion and a purported copy of affidavit for relief under Code Civ. Proc. § 473, by means of an order "to set aside any default and to grant leave to serve said proposed bill of exceptions and that the same stand as served," it not appearing that such notice and affidavit had been served or filed, or, even if served and filed, that the contingently intended application for relief had been made, showed merely a possibility that at some time within the limits of time fixed by law an application for such relief might be made and was not sufficient to constitute a pending proceeding for such relief which would extend the time for filing the transcript.

3. EXCEPTIONS, BILL OF ⚖40(4)—COURT WITHOUT AUTHORITY AFTER DEFAULT TO EXTEND TIME FOR FILING PROPOSED BILL OF EXCEPTIONS.

Where the time for filing a proposed bill of exceptions had expired, the court thereafter was without authority to revive that right by an ex parte order extending time.

Appeal from Superior Court, Los Angeles County.

Action by A. C. Rath against Arthur C. Vaughan. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Arthur C. Vaughan, in pro. per.

Charles F. Reiche and B. W. Shipman, both of Los Angeles, for respondent.

CONREY, P. J. On motion to dismiss appeal in an unlawful detainer action, on the ground that the transcript has not been filed within the time allowed by law. Notice of this motion was served and filed on September 10, 1919. Rule 2[1] prescribes, as a general rule, that the printed transcript shall be filed within 40 days after the appeal was perfected. But "if a proceeding for settlement of a bill of exceptions which may be used in support of such appeal is pending or may still be instituted, the time aforesaid shall not begin to run until the settled and authenticated bill of exceptions has been filed, or the time in which a proceeding for such a bill of exceptions may be instituted has expired, or such proceeding if instituted has been dismissed by the trial court."

By the clerk's certificate it appears that notice of entry of judgment was served on defendant on the 31st day of March, 1919. Notice of intention to move for a new trial was filed on April 7th, and notice of appeal from the judgment was filed on April 10th. The motion for new trial was never brought on for hearing. Therefore, under the limitations established by the terms of section 660, Code of Civil Procedure, the power of the court to grant a new trial of the case expired on the 30th day of June.

Under the provisions of section 650, Code of Civil Procedure, the time allowed to a party to prepare and serve upon the adverse party a proposed bill of exceptions is, in a case tried without a jury, "within ten days * * * after receiving notice of the entry of judgment." "Or if proceedings on motion for a new trial be pending, within ten days after notice of decision denying said motion, or other determination thereof, or such further time as the court in which the action is pending, or a judge thereof, may allow."

[1] From and after June 30, 1919, the proceeding on motion for new trial was no longer pending. The time within which defendant was entitled to serve and file his proposed bill of exceptions would therefore, in the ordinary course of procedure, expire on the 10th day of July, unless further time had been granted, and the 40 days' time for filing the transcript would then begin to run. The transcript, then, was overdue when plaintiff gave notice of this motion to dismiss the appeal.

On the 17th day of July, on affidavit filed by the defendant, a judge of the superior court made an order purporting to extend for 20 days the time for filing said proposed bill of exceptions. On August 14th, on motion of plaintiff, after due notice, the same court set aside the order of July 17th. On the 6th day of August defendant served on the plaintiff's attorney, who acknowledged receipt of copy thereof, a proposed bill of exceptions. On the 15th day of August plaintiff served on defendant his "objections and amendments" to the proposed bill, and therein specifically objected to the signing, settlement, and allowance of the bill on the ground that it was not served within the time provided by law. The judge has not yet settled or allowed the said proposed bill of exceptions.

Defendant's affidavit in opposition to the motion herein states that August 23d was the date when he delivered to the clerk, for the judge, the proposed bill and amendments. It appears that the trial judge was absent on vacation from and after August 18th, and on September 17th had not returned therefrom. Defendant in another affidavit further states that on September 30th the matter of settlement of the bill was by the judge set down for October 7th, of which the clerk sent notice to the parties; that on October 7th the matter was continued to October 8th; that on October 8th plaintiff and defendant appeared, and the court proceeded to examine and settle the bill. The minutes of that court of October 8th, set forth in the same affidavit, state that "the court partially examines into said matter, and of its own

⚖For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] 176 Pac. vii.

motion, both plaintiff and defendant consenting, but without thereby waiving or intending to waive any legal right or advantage whatever now existing, continues the further hearing" until November 26th.

[2] In defendant's affidavit filed herein on September 17th he states:

"That should the judge refuse to sign or settle the bill of exceptions because of delay, affiant will move, under section 473 and upon his motion and affidavit hereto attached."

Said attached papers are a purported copy of a conditional notice of motion, and a purported copy of an affidavit, for relief under section 473, Code of Civil Procedure, by means of an order "to set aside any default and to grant leave to serve said proposed bill of exceptions, and that the same stand as served." It does not appear that said notice and affidavit have been served or filed, or, even if served and filed, that the contingently intended application for relief has been made. There is merely a possibility that, at some time within the limits of time fixed by law, an application for such relief may be made. This is not sufficient to constitute a pending proceeding for such relief.

[3] We have, then, a plain case wherein the defendant failed to propose his bill of exceptions within the time limited by law, and likewise failed to file in this court his transcript on appeal. In Cox v. Palos Verdes Co., 172 Cal. 702, 158 Pac. 332, it was contended by appellant that his claim for relief from default in the matter of serving a proposed bill of exceptions or statement would arise only on the refusal of the judge to settle the statement. But the court said:

"Relief from his default in the matter of presenting his proposed statement, from his failure to present it in time, is the relief essential to the settlement, * * * and this failure or default occurred on June 14, 1915," which was the day on which the time expired within which to give notice of intention to move for a new trial.

By parity of reasoning, in the present case, the default which deprived the defendant of his right to a bill of exceptions took effect on the expiration of the 10th day of July, 1919. The court thereafter was without authority to revive that right by an ex parte "order extending time." Such order, having been made, was appropriately set aside.

No sufficient cause appears excusing appellant from the consequences of his failure to file his transcript within the time prescribed by rule II.

Therefore the appeal is dismissed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 719

PEOPLE v. CIULLA. (Cr. 866.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1919.)

1. CRIMINAL LAW ⟸369(8) — EVIDENCE OF KIDNAPPING ADMISSIBLE ON TRIAL FOR RAPE IN CONNECTION THEREWITH.

Where defendant kidnapped the prosecuting witness and then raped her, evidence of the kidnapping was admissible on the trial for rape, under the rule that evidence of other offenses is admissible, where they are so connected that full proof of one cannot be given without showing the others, and also under the rule that such evidence is admissible, where there is such a clear connection that it may be logically inferred that, if guilty of one offense, defendant is guilty of the other.

2. CRIMINAL LAW ⟸1130(5) — CONTENTION THAT EXCLUSION OF EVIDENCE WAS ERROR DOES NOT REQUIRE CONSIDERATION WHEN UNACCOMPANIED BY CITATION OR ARGUMENT.

The contention on appeal, without the citation of authority or any argument, that the court erred "in the exclusion of testimony offered in support of the theory of the defense," does not require the court to make an independent examination and inquire as to the correctness of the ruling.

3. CRIMINAL LAW ⟸1130(2) — OBJECTION THAT COURT ERRED IN EXCLUDING TESTIMONY OF NAMED PERSON AS SHOWN ON CERTAIN PAGES INSUFFICIENT.

An objection on appeal that the court erred in excluding the testimony of a person named, embraced in questions on specified pages of the reporter's transcript, did not, as required, point out clearly and concisely the rulings complained of and the reasons why they were erroneous with reference to authorities, if any.

4. CRIMINAL LAW ⟸824(8)—INSTRUCTION AS TO PURPOSE FOR WHICH EVIDENCE IS ADMISSIBLE NOT REQUIRED IN ABSENCE OF REQUEST.

On a trial for rape of a woman whom defendant had kidnapped, the failure to instruct as to the purpose for which the evidence of the kidnapping was admissible was not error, in the absence of a request for such instruction.

5. CRIMINAL LAW ⟸783(1)—INSTRUCTION FOR JURY NOT TO CONSIDER EVIDENCE OF OTHER OFFENSES PROPERLY REFUSED.

Where, on a trial for rape of a woman whom defendant had kidnapped, evidence of the kidnapping was admitted, an instruction erroneously advising the jury not to consider evidence of other acts at all was properly refused.

6. CRIMINAL LAW ⟸1144(10)—DISTRICT ATTORNEY PRESUMED TO HAVE ACTED IN GOOD FAITH WHERE RECORD DOES NOT SHOW OTHERWISE.

Where the record does not show, in support of the contention of misconduct on the part of the district attorney, that he was acting in bad faith, it must be presumed on appeal that he was conscientiously discharging his duty as he understood it.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

7. CRIMINAL LAW ⟨⟩594(1) — REFUSAL OF CONTINUANCE FOR ABSENCE OF WITNESSES. FUGITIVES FROM JUSTICE, WHO COULD ONLY TESTIFY TO MATTERS KNOWN TO OTHERS, NOT ERROR.

It was not error to refuse a continuance, because of the absence of witnesses who were defendant's confederates in the commission of the offense for which he was on trial and were fugitives from justice, and no assurance was given as to when such witnesses could be produced, and where the facts to which they could testify were known to, and could be testified to by, other parties.

8. CRIMINAL LAW ⟨⟩1144(8)—JURY PRESUMED UNPREJUDICED AND SATISFACTORY IN ABSENCE OF PROCEEDINGS TO IMPANEL FROM THE RECORD.

In reviewing the denial of a continuance asked for to enable defendant to investigate anticipated prejudice, on account of alleged inflammatory newspaper articles, where the proceedings in connection with the impaneling of the jury are not before the court, it must be assumed that defendant was tried by unprejudiced and fair-minded jurors, satisfactory to himself.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Salvatore Ciulla was convicted of rape, and from the judgment and order denying a new trial, he appeals. Affirmed.

C. D. Cavallaro and O. Speciale, both of San Jose, and J. M. Atkinson, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The appellant was convicted of rape, alleged to have been forcibly committed by him upon the person of Mary Schiro, a young Italian woman 22 years of age. From the judgment of his conviction, and from the order denying his motion for a new trial, appellant appeals.

His first contention is that the verdict is not supported by the evidence. There is absolutely no merit in the contention. On the trial appellant admitted the act of sexual intercourse, but denied that it was had or accomplished by him with force or violence, but contended that the prosecutrix consented thereto. This was denied by the girl, and the jury believed her story. The record on appeal presents a case against the defendant and his several confederates of such nature as to merit the characterization of the Attorney General as being "conduct toward this young woman of the most brutal sort, not to say astonishing, in a civilized age and a civilized community. It would put even a 'cave man' to blush." Early in the morning of April 7th of this year, as the prosecutrix was leaving her home in San Jose to go to work at a nearby place of employment, she was roughly seized by the defendant, who, with the help of two others, Sam Corcufa and Sam Mazzurco, overpowered her and threw her into a waiting automobile. She struggled and fought to the utmost of her strength with the assailants, and screamed loudly for help. The abduction was witnessed by two neighbors, Simon Bojorques and Grace Durso, who were witnesses at the trial. The prosecuting witness was taken against her will and over her protest to Mazzurco's house, in the town of Campbell, a number of miles away. Her outcries were stilled, and she was forcibly taken into the house and locked in the bedroom with the defendant. Later the other men returned with the wife of Mazzurco, who assisted in partially disrobing the girl, after which all retired from the room except the defendant, who accomplished the act of sexual intercourse. The prosecutrix testified that she fought her assailant as long as she had strength, that she was scared, and finally had to give up. The defendant was arrested upon two charges. For the forcible seizure and taking the prosecuting witness to the home of Mazzurco he was charged with kidnapping. He was likewise charged with the crime of rape, resulting in the conviction upon which this appeal is based.

[1] The prosecuting witness testified fully to the occurrence of the abduction; no objection being made by the defendant to this testimony. When, however, the prosecution called witnesses Bojorques and Margaret Durso to corroborate her story in that particular, defendant objected upon the ground that the testimony tended to prove a distinct and separate offense, for which the defendant was not then on trial. The court correctly overruled the objection and admitted the testimony. "If several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense which is itself a detail of the whole criminal scheme." Underhill on Criminal Evidence, § 88, p. 157; State v. Taylor, 117 Mo. 181, 22 S. W. 1103; Id., 118 Mo. 153, 24 S. W. 449; Oakley v. State, 135 Ala. 29, 33 South. 23. We are also satisfied that the testimony of the kidnapping was admissible upon another theory. "It is held by all the authorities that, whenever there is a clear connection between two offenses, from which it may be logically inferred that, if guilty of one, the defendant is also guilty of the other, evidence of such other offense is admissible." People v. Burke, 18 Cal. App. 72, 98, 122 Pac. 435, 447, and numerous authorities therein cited. Rarely will a case be presented the facts of which fall more

clearly within the rule of evidence noted than do those of the case at bar.

[2] Another point urged by the appellant for reversal, without the citation of authority or any argument beyond the bare statement of the contention, is that "the court erred in the exclusion of testimony offered in support of the theory of the defense that the prosecutrix was not forced against her consent to the relationship had with defendant." While we are not called upon to make an independent examination and inquiry as to the correctness of the ruling, in order to determine whether or not there is any merit in appellant's contention (People v. Castro, 183 Pac. 828; People v. Ruiz, 179 Pac. 691), we have done so. The testimony sought to be elicited was irrelevant and immaterial, and the lower court was correct in excluding it.

[3] Another objection, similarly stated, is that "the court erred in excluding the testimony of Grace Durso embraced in the questions on pages 320–322 of reporter's transcript." Here again the appellant has not performed his duty "to point out clearly and concisely the rulings complained of as erroneous, and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so we shall deem the matter as of not sufficient importance to merit notice in an opinion." People v. McLean, 135 Cal. 309, 67 Pac. 771. The record plainly shows, however, that the defense was attempting to get before the jury other irrelevant matter having to do with the alleged actions of the parents of the complaining witness and in no way connected with, or bearing on, the crime with which defendant was charged.

Another contention of the appellant is that "the court erred in refusing defendant's instructions, and the whole thereof." An examination of the charge given by the trial court shows the jury to have been fairly and thoroughly instructed in all matters necessarily involved in the offense for which the defendant was then on trial.

[4, 5] As to the contention that the court should have instructed the jury as to the purposes for which the evidence of the kidnapping was admissible in the trial for rape, the record discloses that no such instruction was requested by the defendant. The failure of the trial court to instruct the jury upon any proposition deemed essential by the defendant is not to be regarded as error, unless he made a request for such instruction. People v. Fice, 97 Cal. 460, 32 Pac. 531; People v. Martin, 185 Pac. 1003. Defendant's proposed instruction No. 12, bearing on the subject, was correctly refused by the court, because it erroneously advised the jury that they were not to consider evidence of other acts at all.

[6] Appellant asks consideration by this court of certain assignments of alleged misconduct on the part of the district attorney. It has required a search of the transcript and the assistance of the Attorney General in order to locate that portion of the record wherein these assignments occur. As to the first assignment, the court instructed the jury to disregard the alleged improper remark, which cured the error, if any there was. As to the second specification, there is no showing in the record by which it may be determined that the district attorney was acting in bad faith. It must be presumed, therefore, upon appeal, that he was conscientiously discharging his duty, as he understood it. People v. Burke, 18 Cal. App. 72, at page 102, 122 Pac. 435.

[7] The crime with which the defendant is charged was committed on April 7, 1919. He was arrested on the same evening. His preliminary examination was held on April 24th following. On May 1st defendant was furnished with a copy of the evidence taken at the preliminary examination. On May 5th defendant pleaded to the information and asked that the time of trial be fixed for not earlier than May 19, 1919. The court fixed May 12th as the date of the trial. Before the trial the defendant had subpœnas issued for Mrs. Sam Mazzurco and Sam Corcufa, neither of whom, the sheriff's return showed, could be found in the county. On the day set for trial the defendant moved for a continuance upon two separate grounds: First, that he had not completed his investigation of anticipated prejudice in the community on account of alleged inflammatory articles appearing in the newspapers circulating in the city of San Jose containing purported facts of the crime. The second ground upon which the application for a continuance was based was that material witnesses who were absent could not be found, and upon the further ground that the defendant had not had a reasonable opportunity to prepare his case. Both the witnesses whose testimony was claimed to be material were confederates of the defendant in the commission of the offense for which he was on trial, and were fugitives from justice. The defendant could give the court no assurance as to when said witnesses might be produced. It also appeared that the facts to which the absent witnesses could testify were known to, and could be testified to by, other parties. As to this phase of the request for a continuance, it was proper for the court to proceed with the trial. People v. Loomis, 170 Cal. 347, 349, 149 Pac. 581.

[8] In view of the very serious offense with which the defendant was charged, and the remarkably short time allowed him in which to prepare his defense, we have felt it our duty to examine the entire record before disposing of the situation presented by the other ground for a continuance. The

alleged prejudicial publications were carefully considered by the trial court. While tending to arouse a decided interest in the case throughout the community, there is nothing in the record to indicate that the defendant was in any manner thereby prevented from having an absolutely fair and impartial trial. The proceedings in connection with the impanelment of the jury which was selected to try defendant are not before us, and we must therefore assume that the accused was tried by unprejudiced and fair-minded jurors satisfactory to himself. He was represented at all times by able counsel, and his defense was carefully presented. We are unable to find that the defendant suffered any prejudice by the ruling of the lower court in directing the defendant to proceed to trial on the day fixed.

The order denying appellant's motion for a new trial and the judgment of conviction are, and each is, affirmed.

We concur: KERRIGAN, J.; WOOD, Judge pro tem.

44 Cal. App. 725

PEOPLE v. CIULLA. (Cr. 871.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1919.)

CRIMINAL LAW ⊂=200(7)—PROSECUTION FOR RAPE NO BAR TO PROSECUTION FOR KIDNAPPING.

Where the act of rape upon prosecutrix was committed on the same day that she was kidnapped, and after she had been carried away, *held*, that prosecution for rape was not a bar to a prosecution for kidnapping under Pen. Code, § 207.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Salvatore Ciulla was convicted of abduction and he appeals. Affirmed.

C. D. Cavallaro and O. Speciale, both of San Jose, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The defendant was convicted of a violation of section 207 of the Penal Code, having been charged with the kidnapping of Mary Schiro, an unmarried Italian woman 22 years of age, and the taking and carrying her from the city of San Jose to another portion of the county of Santa Clara, some miles away. The defendant made no defense to the charge upon its merits, but contented himself with standing upon a special plea of once in jeopardy and a former conviction. He appeals from the judgment of conviction, and from the order denying his motion for new trial. The facts of the case are reviewed in People v. Salvatore Ciulla (Cr. 866) 187 Pac. 46, this day decided. The same witnesses were called as in the other case, and repeated the story as there narrated. The defendant then offered in evidence in support of his special pleas the information in the rape case, the minutes of the court's proceedings in that matter, and the transcript of the evidence of the witnesses, to which evidence the prosecution objected, and was sustained by the court.

The appellant relies upon the rule of law that, where one offense is a necessary element of another, and both were in fact one transaction, a judgment on one is a bar to a judgment upon the other. The prosecution concedes that to be the law. People v. Defoor, 100 Cal. 150, 34 Pac. 642; People v. McDaniels, 137 Cal. 192, 69 Pac. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81. But the appellant fails to point out wherein the offenses of rape and kidnapping are identical. He advances no argument nor citation of authority to the effect that one is a necessary element of the other.

On the other hand, the authorities sustain a view contrary to that advanced by the appellant. In People v. Bentley, 77 Cal. 7, 8, 18 Pac. 799, 11 Am. St. Rep. 225, the defendant was on trial for an attempt to commit robbery. He contended that he had been formerly convicted of the same offense, which he alleged to be a bar to the prosecution. He offered evidence tending to show that he had been convicted of an assault with a deadly weapon under an information charging an assault with intent to commit murder. It appeared that the first thing done by the defendant and his confederate in that case was an attempt to intimidate and rob; the next was to attack with a deadly weapon. The lower court refused to admit the evidence. The defendant was convicted, and appealed. The Supreme Court sustained the ruling excluding the evidence, saying:

"If the offenses do not possess the same elements, although both relate to the same transaction, it would seem that both may be punished."

In People v. Majors, 65 Cal. 138, at page 143, 3 Pac. 597, at page 601 (52 Am. Rep. 295), our Supreme Court quoted approvingly from State v. Elder, 65 Ind. 282, 32 Am. Rep. 69, and State v. Hattabough, 66 Ind. 223, as follows:

"In the first case (reported in 65 Ind.) the rule on the subject we are now treating is stated as follows: 'When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily included in the greater, and when the facts necessary to convict in the second prosecution would not necessarily have convicted in the first, then the first prosecution will not be a bar to the second, although the

offenses were both committed at the same time and by the same act.' And in the other case (66 Ind.) it is said: 'The usual test by which to determine whether the former conviction or acquittal was for the same offense as that charged in the second prosecution, and therefore whether the former is a bar to the latter, is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case.' "

Applying the rule last stated, we do not see how it can be consistently argued that the evidence necessary to support the charge of kidnapping would be sufficient to sustain a conviction on the charge of rape, which was involved in the former case. Facts establishing the crime of kidnapping beyond any and all reasonable doubt might in the instant case fall far short of sustaining the other offense. To the same effect are People v. Devlin, 143 Cal. 128, 76 Pac. 900, and People v. Kerrick, 144 Cal. 46, 77 Pac. 711. The kidnapping of the complaining witness was completed on the morning of April 7, 1919, when the defendant and his confederates forcibly seized and carried her away from San Jose to the home of one of them a number of miles distant in the same county. The act of rape upon the prosecutrix was committed later in the same day, when the defendant and his confederates overcame her resistance by force and violence, in order that he might commit the act of sexual intercourse upon her.

The judgment and the order appealed from are affirmed.

We concur: KERRIGAN, J.; WOOD, Judge pro tem.

45 Cal. App. 145

RINEY v. PACIFIC ELECTRIC RY. CO.

(Civ. 3029.)

(District Court of Appeal, Second District, Division 2, California. Dec. 19, 1919.)

1. STREET RAILROADS ⟸117(23)—PEDESTRIAN CROSSING STREET WITHOUT LOOKING OR LISTENING FOR CAR NONSUITED FOR CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a pedestrian, who, in crossing street with double-track railway of an interurban line, was struck by a car running at a dangerous speed without signal on the second track, on which he entered without looking or listening after leaving curb over 40 feet away, though he had an open view for 500 feet, *held*, that defendant was entitled to a judgment of nonsuit on the ground of plaintiff's contributory negligence.

2. STREET RAILROADS ⟸81(1) — RULES OF CAUTION APPLICABLE TO STEAM RAILROADS APPLICABLE TO INTERURBAN RAILWAY USING STREET WITH UNBALLASTED TRACKS.

Where a city street largely given over to railway traffic is unpaved except at the crossing, and has double tracks which are open and unballasted, with exposed ties and "T" rails projecting their full height above the street level, and are utilized by an interurban car line, the rules of caution applicable are those applicable to the steam railway rather than those applicable to street car traffic.

3. STREET RAILROADS ⟸103(1)—LAST CLEAR CHANCE DOCTRINE INAPPLICABLE.

Where there was no evidence that the motorman operating an interurban railway car discovered, in time to avoid the accident, that the pedestrian crossing the tracks at a street intersection was in danger from which he could not escape, the doctrine of the last clear chance was not applicable, though motorman ought to have known of pedestrian's position of imminent danger.

4. NEGLIGENCE ⟸83 — LAST CLEAR CHANCE DOCTRINE STATED.

The last clear chance doctrine has no application where both parties are guilty of concurrent acts of negligence, each of which at the very time of the accident contributes to it, but only to conditions where the defendant, knowing of plaintiff's danger and that he cannot extricate himself from it, fails to do something which is in his power to do to avoid the danger.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Michael Riney against the Pacific Electric Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

William Ellis Lady, of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for respondent.

SLOANE, J. This is an appeal by plaintiff from a judgment of nonsuit in defendant's favor. The action is for damages resulting to plaintiff from being run over by one of defendant's electric cars. On the trial, at the conclusion of plaintiff's case, the court gave judgment for defendant on the ground that plaintiff's evidence affirmatively established contributory negligence.

The injury occurred on defendant's electric railway in the city of Venice. Trolley way, the street occupied by the railway, is at the place of the accident, intersected by Horizon avenue. At this intersection plaintiff, who was walking in a northerly direction upon a sidewalk along the east side of Trolley way, left the walk to cross Trolley way, with its double-track railway. The width of the street at this point, from curb to curb of the sidewalk, seems to be 60 feet. The first rail of the first car track is 14.3 feet from the curb. The track itself is 4.71 feet wide, and the space between the two tracks is 21 feet. It was upon the second track that plaintiff was injured. According to his own testimony, the only time he looked or listened for

an approaching car was when he left the sidewalk to cross the street. Although there was an open view for 500 feet, and his hearing was good, he says he neither saw nor heard any indication of an approaching car. From that point until he was struck by a west-bound car on the second track, the evidence discloses that he paid absolutely no further heed to his surroundings, but proceeded leisurely across the street, apparently engrossed in introspective reflections. The distance he traveled was over 40 feet, and he then entered upon the second track without looking up or even listening. At this time there was a car speeding down toward him at what the witnesses estimate at a rate of 30 or 40 miles per hour, upon an open, unpaved track, with a noise which one of plaintiff's witnesses heard half a block away, and which, as a matter of common knowledge, must have been sufficient, at such a speed and on such a track, to give warning of its approach at a considerable distance. The testimony is to the effect that no gong or whistle was sounded until the car was within from 15 to 30 feet of plaintiff.

[1] There is no question that the evidence shows negligence on the part of defendant; but it is equally evident that plaintiff was guilty of contributory negligence. Considering the distance plaintiff had to travel from the curb, where he took his only observation of the street, to the second track, where he was struck, the most obvious dictates of common prudence required him to look and listen again before entering on this second track, which was separated from the first, not by the usual distance of 5 or 6 feet, but by a space of 21 feet. It is evident that plaintiff could have avoided this injury by the most casual use of his sense of sight or hearing at almost any point between the two tracks, notwithstanding the excessive rate of speed of the car and failure of the motorman to sound a reasonable warning.

[2] The diagrams and photographs introduced in evidence show that this street was largely given over to railway traffic. The street is unpaved, except at the crossing, and the double tracks are open and unballasted, with exposed ties and "T" rails projecting their full height above the street level. The tracks are utilized by an interurban car line. The rules of caution applicable, therefore, are rather those of the steam railway than of street car traffic. Simoneau v. P. E. Ry. Co., 159 Cal. 504, 115 Pac. 320; Heitman v. P. E. Ry. Co., 10 Cal. App. 398, 102 Pac. 15; Brown v. P. E. Ry. Co., 167 Cal. 199, 138 Pac. 1005; Martz v. P. E. Ry. Co., 31 Cal. App. 592, 161 Pac. 16; Starck v. P. E. Ry. Co., 172 Cal. 280, 156 Pac. 51, L. R. A. 1916E, 58; Griffin v. S. P. R. R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842; Holmes v. S. P. R. R. Co., 97 Cal. 167, 31 Pac. 834; Green v. L. A. Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68.

[3, 4] The doctrine of the last clear chance is not applicable to this case. The decision in Wing v. S. P. R. R. Co. (Sup.) 184 Pac. 949, cited by appellant, did not raise a question of the last clear chance, but of ordinary negligence. The rule has no application to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time of the accident, contributes to it, but only to conditions where the defendant, knowing of plaintiff's danger and that he cannot extricate himself from it, fails to do something which is in his power to do to avoid the injury. Green v. L. A. Ry. Co., 143 Cal. 41, 76 Pac. 719, 101 Am. St. Rep. 68. There is no evidence here that the motorman discovered, in time to avoid the accident, that plaintiff was in danger from which he could not escape. It is not enough that defendant ought to have known, but it must appear that he actually did know, of plaintiff's position of imminent danger. Lobbett v. Oakland, etc., Ry. Co., 36 Cal. App. 641, 172 Pac. 1123; Collins v. Marsh, 176 Cal. 639, 169 Pac. 389; Thompson v. L. A., etc., Ry. Co., 165 Cal. 748, 134 Pac. 709; Starck v. P. E. Ry. Co., 172 Cal. 277, 156 Pac. 51, L. R. A. 1916E, 58.

We think it is clear that plaintiff in this case was the unfortunate victim of his own abstraction of mind, from the consequences of which the negligence of defendant cannot relieve him, and that the judgment of nonsuit was justified. Ross v. P. E. Ry. Co., 179 Pac. 538.

The other grounds of alleged error are not well taken.

Judgment affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

44 Cal. App. 626

SANDERS v. DUTCHER. (Civ. 3113.)

(District Court of Appeal, First District, Division 1, California. Dec. 5, 1919. Hearing Denied by Supreme Court Feb. 2, 1920.)

1. PUBLIC LANDS ⊂=106(1) — DECISION OF UNITED STATES LAND DEPARTMENT CONCLUSIVE.

A decision of the Land Department of the United States upon any question of fact in determining the right of any person in respect to the public lands under the laws of the United States is conclusive upon all other tribunals, in the absence of fraud, mistake, or imposition.

2. PUBLIC LANDS ⊂=103(1)—AFFIDAVIT SUPPORTING CONTEST OF DESERT LAND ENTRY SUFFICIENT.

Affidavit in support of contest of entry under the Desert Land Law of 1891, alleging the land had not been reclaimed, irrigated, or improved as required, was not insufficient.

3. PUBLIC LANDS ⟸103(1)—DEFECTIVE AFFIDAVIT NOT FATAL TO CONTEST OF DESERT LAND ENTRY.

Affidavit in support of contest of entry under the Desert Land Law of 1891 was merely a preliminary process, required as an evidence of good faith by the rules of practice, so that any defect in it was not necessarily fatal to the contest.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by Louis N. Sanders against Gordon L. Dutcher. From judgment for plaintiff, defendant appeals. Affirmed.

Conkling & Brown, of El Centro, for appellant.

Dan V. Noland and E. K. Brown, both of Los Angeles, Frank E. Dunlap, of Stockton, and Cedric E. Johnson, of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal from a judgment. The issue framed by the pleadings, and a full discussion thereof, may be found in the opinion filed on a former appeal taken in this case. 168 Cal. 353, 143 Pac. 599. The complaint was in ejectment, to which the defendant filed an answer and cross-complaint. In the latter he alleged that one Orpha C. Johnson had made an entry on the lands in question for the purpose of acquiring title to the same under the Desert Land Law of 1891 (26 Stat. 1095), that thereafter she complied with the terms of said act and made final proof and payment, subsequent to which she sold, assigned, and transferred all her right, title, and interest in the land to the defendant, Gordon L. Dutcher, who entered into possession thereof under the conveyance, and has since expended large sums of money upon the land in the further reclamation and improvement thereof; that thereafter Louis N. Sanders, the plaintiff, instituted a contest against the Johnson entry, alleging that the land had not been reclaimed, irrigated, or improved as required by law; that said contest was the result of a conspiracy between the plaintiff and one Jordan to deprive the defendant of the land; that said contest came on for hearing at the land office, and although the plaintiff introduced no competent evidence to sustain the allegations of his affidavit, nevertheless the officers of the Land Department held in favor of said contestant on the theory that the entry made by Orpha C. Johnson was invalid, for the reason that she had not personally done the reclamation work required by law, and also that her final proof was made under and after a contract of sale, said contract being contrary to the policy of the law. Under these allegations it was claimed that Sanders stood as trustee for the defendant of the land, and that a court of equity would compel him to convey the land to the defendant. The Supreme Court, upon the former appeal above alluded to, held that when the officers of the Land Department err in a matter of law in such a way as to deprive a person, who has a valid claim under the laws of the United States, of rights vested in him, their decisions may be reviewed in a proper proceeding, and that a court of equity in such a proceeding will grant appropriate relief to the injured party against the one obtaining title as a result of such erroneous decision. That court also held that under the provisions of the Desert Land Law an entry could be assigned, and that it was not necessary for the entryman to personally do the work required by the terms of the act; that therefore it appeared from the allegations of the cross-complaint (deemed admitted to be true upon a motion for judgment on the pleadings) that the officers of the Land Department had decided against the defendant under a misapprehension of the law; and, it further appearing from the allegations of the answer and cross-complaint that the cancellation of the Johnson entry was accomplished by the fraudulent contrivance of the plaintiff and one Jordan, the court reversed the judgment so given upon the pleadings.

At the trial of the case on its merits a transcript of the proceedings and all the evidence adduced before the Land Department was introduced. From this evidence it appears that the Land Department did not decide that a desert land entryman must personally do the work required by law, nor that a desert land entry could not be assigned. Moreover, the defendant introduced no evidence to sustain the allegation of his cross-complaint that the plaintiff and said Jordan had conspired to deprive him of the land; and the trial court found that there was sufficient evidence introduced at the hearing before the Land Department to prove the allegations of the contestant's affidavit, and accordingly, that defendant had done none of the work on the land required by law, and that the final proof introduced by defendant was fraudulent.

[1] A decision of the Land Department of the United States upon any question of fact, in determining the right of any person in respect to the public lands under the laws of the United States, is conclusive upon all other tribunals in the absence of fraud, mistake, or imposition. Sanders v. Dutcher, 168 Cal. 353, 143 Pac. 599; Hosmer v. Wallace, 47 Cal. 461; Gage v. Gunther, 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141; Jameson v. James, 155 Cal. 275, 100 Pac. 700.

[2, 3] In the former appeal the Supreme Court did not decide that the facts stated in the affidavit of contest were not sufficient, or that the entry of defendant's assignor could not have been canceled on grounds not

alleged in such affidavit. There is no law of the case, therefore, requiring this court to so hold. Nor, in fact, was the affidavit insufficient; but, even if it were, the affidavit is regarded as only a preliminary process, and the rules of practice require it as an evidence of good faith, and contests have been allowed where the affidavit was admittedly defective, or where no affidavit at all was filed. Gage v. Gunther, supra; Seitz v. Wallace, 6 Land Dec. 300; Saunders v. Baldwin, 9 Land Dec. 391.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 115

RAPHAEL v. PEOPLE'S BANK OF BENICIA. (Civ. 3050.)

(District Court of Appeal, First District, Division 1, California. Dec. 18, 1919.)

1. CORPORATIONS ⟸503(2)—ACTION ON CONTRACT AGAINST CORPORATION MAY BE COMMENCED IN COUNTY WHERE THE CONTRACT IS TO BE PERFORMED, THOUGH NOT CORPORATION'S PLACE OF BUSINESS.

Under Const. art. 12, § 16, an action against domestic corporation may be begun and prosecuted to final judgment in a county other than that in which the corporation has its principal place of business, where the contract is to be performed in the county of suit, and this is so notwithstanding Code Civ. Proc. § 395, providing that personal actions shall be tried in the county in which the defendants or some of them reside.

2. CONSTITUTIONAL LAW ⟸249—PERMITTING PERSONAL ACTIONS IN COUNTY OTHER THAN CORPORATION'S PRINCIPAL PLACE OF BUSINESS DOES NOT VIOLATE FOURTEENTH AMENDMENT.

The provision of Const. art. 12, § 16, allowing a personal action against a domestic corporation to be tried in a county court other than that in which the corporation has its principal place of business, where the county in which suit is begun is that in which the contract is to be performed, does not violate the Fourteenth Amendment of the federal Constitution by denying to private corporations the right conferred by Code Civ. Proc. § 395, to residents of the state to have personal actions tried in the county of their residence.

3. BILLS AND NOTES ⟸23 — LIABILITY OF DRAWER OF CHECK STATED.

The drawer of a check undertakes that the drawee will be found at the place that he is described to be, and that the sum specified will there be paid to the holder when the check is presented, and he is bound to pay at the place named.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Samuel Raphael against the People's Bank of Benicia, a corporation. From an order granting defendant's motion for change of venue, plaintiff appeals. Reversed.

A. S. Newburgh, of San Francisco, for appellant.

J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

KERRIGAN, J. This is an appeal from an order granting defendant's motion for a change of venue.

The action was commenced in the city and county of San Francisco to recover the amount of a check executed by the defendant, directing the American National Bank of San Francisco to pay to the order of the Pleasant Spring Distillery Company the sum of $300. The complaint alleges indorsement to plaintiff, presentment to the drawee for payment, its refusal to pay based upon the request of defendant, and that the check was protested and payment thereof demanded of defendant and refused. Defendant demurred thereto, and at the same time filed its notice of motion for change of venue. The petition for a change of venue was predicated upon the sole ground that defendant corporation was a resident of and had its principal place of business in the city of Benicia, county of Solano, state of California. The lower court granted defendant's motion, and plaintiff takes this appeal, contending that he is entitled to have the case tried in the city and county of San Francisco: (1) For the reason that the alleged breach occurred there; and (2) that it is the place where the contract was to be performed.

The case involves a construction of our constitutional and code provision relative to the place of trial of civil actions when a corporation is defendant.

Section 395 of the Code of Civil Procedure insures to a defendant the right of trial of actions of the character here involved in the county where the defendants, or some of them, reside. If the rights of the parties herein were dependent upon the statute, we would be required to sustain the order.

By section 16 of article 12 of our state Constitution, however, it is provided that—

"A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases."

It is the contention of respondent in support of the order that this constitutional provision refers merely to the place where the suit must be brought and not to the place of trial.

[1, 2] The question thus presented is not

one of first impression in this state. The construction claimed by the respondent is opposed to the doctrine as announced in Cook v. Ray Manufacturing Co., 159 Cal. 697, 115 Pac. 318. Some of the earlier cases are there distinguished and the conclusion reached that the constitutional provision here involved means not merely that a personal action against a domestic corporation may, at the option of the plaintiff, be commenced in one of the designated counties other than the one in which the defendant has its principal place of business, but that it may be prosecuted to final judgment when so commenced, unless the defendant can allege and show some sufficient ground for a change of the place of trial distinct from the fact that the residence of the corporation is in another county. The intimation of respondent that such a construction is violative of the Fourteenth Amendment of the federal Constitution, for the reason that it denies to domestic corporations the benefit of the right conferred by section 395 of the Code of Civil Procedure to all persons resident of the state having personal actions against them tried in the county where the defendants or some of them reside, is also there disposed of adversely to the defendant's contention.

[3] The complaint here shows that the contract was to be performed in the city and county of San Francisco, that the obligation or liability of the defendant arose at said place, and that likewise the breach occurred there. The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will be paid there to the holder when the check is presented, and he is bound to pay at the place named. Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, 12 Ann. Cas. 450. Plaintiff was therefore entitled under the constitutional provision invoked to have his case tried in the city and county of San Francisco.

The order of the lower court, transferring the cause, should therefore be, and the same is hereby reversed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 108

PEOPLE v. EVANOFF. (Cr. 850.)

(District Court of Appeal, First District, Division 2, California. Dec. 18, 1919.)

1. INDICTMENT AND INFORMATION ⟸65, 119 —SUPERFLUITY OR LACK OF EVIDENTIAL DETAILS WILL NOT VITIATE INDICTMENT.

It is fundamental that superfluity does not vitiate, and that it is not necessary in an indictment for larceny to set forth in detail the evidence by which the larceny is to be proved.

2. INDICTMENT AND INFORMATION ⟸99—REFERENCE IN ONE COUNT TO ANOTHER COUNT DOES NOT INCORPORATE ALLEGATIONS.

A reference in the second count of an indictment, "that the allegations in both the first and second counts of this indictment constitute different statements of the same offense and relate to the same actions, transactions, and offenses," did not incorporate the allegations of the first count in the second.

3. INDICTMENT AND INFORMATION ⟸98—MATERIAL ALLEGATIONS SHOULD BE MADE IN EVERY COUNT.

Material allegations must be made in every count in an indictment, so that the defendant shall be charged with the distinct offense to which that count relates.

4. INDICTMENT AND INFORMATION ⟸59—TEST OF SUFFICIENCY STATED.

The test of the sufficiency of an indictment is that it alleges acts and facts which constitute the offense, and is direct and certain as to the party and the particular offense charged.

5. INDICTMENT AND INFORMATION ⟸119—NOT IMPAIRED BY STATEMENT OF FACTS AND CIRCUMSTANCES.

Where an indictment sufficiently charges the defendant with the crime, it is not impaired by the subsequent statement therein of the facts or circumstances under which it was committed, unless such statement of itself constitutes a negation of the crime.

6. INDICTMENT AND INFORMATION ⟸171—RULE AS TO MATERIAL AND IMMATERIAL VARIANCE STATED.

Where the acquittal of the defendant under the indictment would be no bar to the further prosecution of the offense, a variance would be material; but where the discrepancy does not affect the validity of the indictment, or prejudice the substantial rights of the defendant in his defense, the variance is immaterial.

7. INDICTMENT AND INFORMATION ⟸129(1)—DIFFERENT OFFENSES RELATING TO SAME TRANSACTION MAY BE CHARGED IN DIFFERENT COUNTS.

Pen. Code, § 954, permits the charging of different offenses in different counts of the same indictment, where the different offenses all relate to the same act, transaction, or event.

8. FALSE PRETENSES ⟸4—INDICTMENT AND INFORMATION ⟸129(2) — LARCENY ⟸1—ELEMENTS OF OFFENSES STATED; OFFENSES RELATING TO SAME TRANSACTION CHARGEABLE IN DIFFERENT COUNTS.

The offense of obtaining money by false pretenses, charged in one count of an indictment, is the act, transaction, and event of obtaining the money, and not the particular false pretenses by which it is obtained, the offense not being the lie, but the taking of the money by fraud; while the act, transaction, and event constituting larceny, charged in another count, is the taking of property of complaining witness without his consent, and not any particular one of a series, nor the whole series, of

events which culminates in the offense charged; hence the act, under each count, was the taking of money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, False Pretenses; Larceny.]

9. Larceny ⊂=14(1)—One obtaining money by trick or device guilty.

Where the possession of money has been obtained through a trick or device, with the intent at the time the party receives it to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny.

10. Larceny ⊂=26—False representations creating trust, other than ones used to obtain money, no defense.

In a prosecution for larceny, defendant having obtained money of the complaining witness through fraud, by means of mechanical device which apparently turned paper into dollar bills and representations concerning the contrivance, it was no defense that defendant may have made other false representations to the complaining witness, by which he may have established a confidential relationship with him; it being enough that in some way the defendant became well enough acquainted with the prosecuting witness to play upon his ignorance and to take his money.

11. Criminal law ⊂=1167(1) — Failure to allege manner of committing offense harmless.

In a prosecution for grand larceny, accused was not deceived in the necessity for his preparation for defense by failure to state the manner and means in which offense was committed, the taking of money of the prosecuting witness being the ultimate issuable fact to be charged, in view of the finding in defendant's possession of the machine which apparently turned paper into dollar bills, used by defendant to defraud, together with 25 new $1 bills and parts for the manufacture of a similar machine.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Chris Evanoff was convicted of grand larceny, and appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant's conviction of grand larceny rests on evidence that by the execution of a complicated mechanical contrivance, so constructed that, when blank paper was inserted in one portion, the machine first gave forth sounds of electric sparking and whirling of wheels, and then ground out genuine dollar bills, the blank paper being coiled inside the machine, he induced the complaining witness to deliver to him $1,500, which the complaining witness drew from the bank. The money was given to the defendant on the representation that he was going to Chicago, and possibly to New York, to buy the required paper to print more money. The defendant left the machine with the complaining witness, and warned him against using it, saying, "don't touch the machine until I come back, because it is liable to explode." After his arrest, the defendant, being asked whether he took the money from the complaining witness, replied to the arresting officer, "I will give him back all his money, and more, too, if he helps me out, and you help me, too."

The indictment under section 954 of the Penal Code was in two counts, the first for obtaining money under false pretenses, and the second for grand larceny. The false pretenses alleged to support the first count were that the defendant had represented to the complaining witness that he was an artist employed at a salary of $75 per week, and that he had entered into negotiations with a French company for artistic work for which he was to receive $400,000, and that these representations were false, but the complaining witness, believing them to be true, did then and there, to wit, on the 5th of December, 1917, in the city of San Francisco, deliver to the defendant the sum of $1,500 in lawful money of the United States. The second count was in the ordinary form of an indictment for grand larceny of $1,500 belonging to the complaining witness on the 5th day of December, 1917, at the city and county of San Francisco. Following the suggestion contained in People v. Miles, 19 Cal. App. 223, 125 Pac. 250, there was added to the second count the following statement:

"That the allegations in both the first and second counts of this indictment constitute different statements of the same offense and relate to the same acts, transactions, and offenses."

The evidence did not support the allegations contained in the first count on the charge of obtaining money under false pretenses, and the defendant was acquitted on that count. Objection was made to the introduction of the mechanical device in evidence, and to statements made by the defendant to the complaining witness in regard thereto. It is argued that there is a fatal variance between the allegations in the indictment and the evidence upon which the conviction was based. If the first count only had been contained in the indictment, and no evidence had been introduced upon the subject of the particular false representations alleged to have been made, and the defendant had been convicted of obtaining money by false pretenses, upon the evidence in

this case the conviction could not stand. On the other hand, if the second count alone had been in the indictment, except for the quoted addition, both the indictment and the evidence would have supported the conviction on the charge of grand larceny. The record leaves no doubt as to the guilt of the defendant of the crime for which he was convicted. There is one question presented by the appeal—whether the addition of the quoted clause limited the state in introducing evidence upon the charge of grand larceny to the particular allegations contained in the first count.

[1-3] It is fundamental that superfluity does not vitiate, and that it is not necessary in an indictment for larceny to set forth in detail the evidence by which the larceny is to be proved. The charge of larceny in the indictment was sufficient without the addition of the quoted clause. People v. Brown, 27 Cal. 500; People v. Goggins, 80 Cal. 229, 22 Pac. 206; People v. Savercool, 81 Cal. 650, 22 Pac. 856. Not only was it not necessary to allege the evidentiary facts to support the charge of larceny, but they were not alleged in the second count by virtue of the quoted clause. Such a reference from one count to the other does not incorporate the allegations of the first count in the second. Material allegations must be made in every count, so that the defendant shall be charged with the distinct offense to which that count relates. People v. Ellenwood, 119 Cal. 166, 51 Pac. 553.

[4-6] The test of the sufficiency of the indictment is that it alleges acts and facts which constitute the offense, and is direct and certain as to the party and the particular offense charged. People v. Beatty, 14 Cal. 566; People v. Fowler, 88 Cal. 136, 25 Pac. 1110; People v. O'Brien, 96 Cal. 171, 31 Pac. 45. Where the indictment sufficiently charges the defendant with the crime, it is not impaired by the subsequent statement therein of the facts or circumstances under which it was committed, unless such statement of itself constitutes a negation of the crime. People v. Ross, 134 Cal. 256, 66 Pac. 229; People v. Handley, 100 Cal. 370, 34 Pac. 853; People v. Newton, 11 Cal. App. 762, 106 Pac. 247. Where the acquittal of the defendant under the indictment would be no bar to the further prosecution of the offense, a variance would be material; but where the discrepancy does not affect the validity of the indictment, or prejudice the substantial rights of the defendant in his defense, the variance is immaterial. People v. Arras, 89 Cal. 223, 26 Pac. 766.

[7-9] Section 954 of the Penal Code permits the charging of different offenses in different counts of the same indictment, where the different offenses all relate to the same act, transaction, or event. People v. Miles, 19 Cal. App. 228, 125 Pac. 250. The offense charged in the first count in this case was that of obtaining money under false pretenses. The act, transaction, and event was that of obtaining the money, not the particular false pretenses by which it was obtained. The offense was not the lie, but the taking of the money of the complaining witness by fraud. Under the second count, the offense charged was grand larceny. The act, transaction, and event was the taking of the money of the complaining witness without his consent, and not any particular one of a series, nor the whole series, of events which culminated in the offense charged. The act under each count was the taking of the money. If the allegations contained in the first count had been proved, the offense would have been that of getting the money of the complaining witness by false pretenses. The defendant was acquitted under that charge, and was convicted under the charge of larceny. "Where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use and the owner of the property parts merely with the possession, and not with the title, the offense is larceny." People v. Shaughnessy, 110 Cal. 602, 43 Pac. 2; People v. Tomlinson, 102 Cal. 23, 36 Pac. 506; People v. Raschke, 73 Cal. 378, 15 Pac. 13; People v. Johnson, 91 Cal. 265, 27 Pac. 663.

The theory of the prosecution is amply sustained by the evidence, which shows a bald and cruel scheme to mulct the complaining witness out of his savings. In a case in which a conviction was upheld as against a claim of variance, where the allegation was that money had been stolen, and the evidence showed that the defendant had been possessed of a check of the complaining witness, which he thereafter cashed, the court swept aside a contention closely akin to that made in the present case. The theory of the state was that the defendant had obtained possession of the check by representing to the complaining witness that certain voices she had heard at a serious of séances were the voices of spirits from the other world. These voices urged and advised her to invest in the Fountain Tooth Brush Company. While the defendant was on the witness stand on his own behalf, an objection of the prosecuting attorney was sustained to a question concerning the marketability and probable value of the fountain tooth brush. On appeal it was claimed that this evidence would have tended to show the good faith of the defendant in urging and advising the prosecutrix to turn over her money for investment in the company, which it was claimed was to be formed for the purpose of manufacturing and marketing the brush. The court said:

"The trick and device by which the money was obtained was in representations by words

and acts that departed spirits were talking to the prosecutrix and advising her to invest in the enterprise. If these representations were false, and made to deceive the prosecutrix—and the evidence beyond question so proves—and defendant and his fellow conspirators by such means obtained possession of the money of the prosecutrix, with the intent to convert it to their own use, it would be no defense to say that they believed the investment that they were advising would be a good one." People v. Arnold, 20 Cal. App. 35–38, 127 Pac. 1060, 1062.

[10] In this case under the second count the defendant obtained the money of the complaining witness by means of the mechanical device, which he exhibited, and by representations in regard thereto. It is no defense that he may have made other false representations to the complaining witness by which he may have established a more or less confidential relationship with him. In some way the defendant became well enough acquainted with the prosecuting witness to play upon his ignorance and to take his money from him.

[11] As was said by the Supreme Court more than 50 years ago in a case of homicide:

"The only reason assigned by the common law, why the manner and means by which the homicide was committed should be stated in the indictment, was that the defendant might be fully informed as to the case against him, and thereby enabled to prepare for his defense. As we had occasion to remark in the case of People v. King, 27 Cal. 510 [87 Am. Dec. 95], this reason of the common law was but a flimsy pretext, for, if the defendant was guilty, he stood in no need of information as to the means by which he committed the crime; and, if not guilty, the information that he did the act in a particular way, or by the use of particular means, could not assist him in the preparation of his defense." People v. Cronin, 34 Cal. 191.

In that case it was held that the killing was the ultimate and issuable fact; so in this case the taking of the money of the prosecuting witness was the ultimate and issuable fact, and if the defendant was guilty he was not deceived in the necessity for his preparation for defense, in view of the use of the machine which was found, together with 25 new $1 bills and parts for the manufacture of a similar machine, in his possession at the time of his arrest.

The other alleged errors urged by the appellant we consider it unnecessary to discuss. If any errors were committed, they were not such as to call for a reversal of the judgment upon an examination of the entire record.

The judgment is affirmed.

All concur.

45 Cal. App. 10

NORTON v. NEWERF et al. (Civ. 3136.)

(District Court of Appeal, First District, Division 2, California. Dec. 15, 1919.)

1. APPEAL AND ERROR ⊂=672—MATTERS REVIEWABLE ON APPEAL ON A JUDGMENT ROLL STATED.

On an appeal on the judgment roll the only questions for consideration are whether the complaint stated a cause of action, whether the findings are within the issues and support the judgment, and whether reversible error concerning a matter of law appears on the face of the record.

2. PLEADING ⊂=8(11)—ALLEGATION OF TITLE OR OWNERSHIP MAY BE ONE OF FACT OR LAW.

An allegation of title or ownership of land may be either one of fact or of law.

3. MORTGAGES ⊂=585—SECOND ACTION MAY BE MAINTAINED TO FORECLOSE EQUITY OF PERSON NOT MADE PARTY TO FORMER ACTION.

Where the owner of the equity is through mistake not made a party to a foreclosure suit, the mortgagee who has purchased at the sale may maintain a second action to foreclose the equity of such owner and for a new sale.

4. APPEAL AND ERROR ⊂=931(7)—FINDINGS OUTSIDE THE ISSUES WILL BE PRESUMED SUPPORTED BY EVIDENCE INTRODUCED BY STIPULATION OR WITHOUT OBJECTION.

In support of findings claimed to be outside the issues and of the judgment, it will be presumed that facts found which might have been presented by formal pleadings were supported by evidence introduced under stipulation, or at least without objection.

5. APPEAL AND ERROR ⊂=907(2)—IN ABSENCE OF EVIDENCE FINDINGS PRESUMED SUPPORTED BY EVIDENCE.

In a mortgagee's suit to set aside a former decree of foreclosure to which all interested parties were not made parties and to foreclose the mortgage, it would be presumed in support of the judgment in the absence of evidence that the court's finding that plaintiff was the owner of a crop raised while in possession under the earlier sale was supported by evidence amounting to an accounting for the rents and profits, especially where the crop cost more to produce than the amount for which it was sold.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Suit by Lucy R. Norton against Nicholas C. Newerf, also known as N. C. Newerf, Mrs. A. J. Bolster, and others. From a judgment for plaintiff, the defendants named appeal. Affirmed.

Edward Winterer, of Los Angeles, for appellants.

Walter C. Davison and Purington & Adair, all of Riverside, for respondent.

BRITTAIN, J. In a suit to set aside a former decree of foreclosure of a mortgage of real property, claimed by the plaintiff to

have been ineffectual for want of a necessary party, at the opening of the trial the suit was dismissed as to all fictitious defendants and the defaults of all named defendants, other than N. C. Newerf and Mrs. A. J. Bolster, were entered. They appeal on the judgment roll alone from the decree in favor of the plaintiff. The appellants joined in a formal answer, and subsequently N. C. Newerf filed an amended answer, by which he joined issue on most of the allegations of the complaint, and in which he set up affirmatively five separate and distinct defenses. The findings of fact are very lengthy, and need not be set forth nor summarized at length. In the briefs the essential facts are conceded.

In 1910 the plaintiff, who owned the mortgaged property, agreed with L. L. Newerf to sell it to him for $12,500, of which $5,000 was payable in two equal installments and the remaining $7,500 was to be evidenced by a note. The property was to be conveyed to the buyer on the payment of the second installment of $2,500, at which time the note and mortgage were to be made. About the time for the conveyance of the property, N. C. Newerf, one of the appellants, paid for the account of L. L. Newerf to the plaintiff $2,850. N. C. Newerf procured the conveyance of the property to himself and executed the note and mortgage in suit, the mortgage being recorded. The court found that at that time N. C. Newerf was not acting for L. L. Newerf, but for himself, and that the plaintiff had no knowledge of any agreement between the Newerfs in regard to the conveyance being as security for the money paid by N. C. Newerf. In August, 1911, N. C. Newerf conveyed the property to Edith D. Newerf, the wife of L. L. Newerf. Edith D. Newerf and L. L. Newerf then conveyed the property to Riverside Abstract Company, as trustee for N. C. Newerf, to secure existing indebtedness and future advances. N. C. Newerf made further advances, to secure which, and in consideration of the reconveyance to Edith D. Newerf by the Riverside Abstract Company, she, with her husband, again conveyed the property in January, 1913, to Riverside Abstract Company, in trust, for N. C. Newerf. The Riverside Abstract Company subsequently conveyed upon the same trusts to People's Loan & Trust Company, which thereafter became the People's Trust & Savings Bank. In June, 1913, Edith D. Newerf and L. L. Newerf conveyed the property subject to the same incumbrances to Mrs. A. J. Bolster, the other appellant.

On August 28, 1914, the plaintiff commenced a suit, numbered 6414, against N. C. Newerf, Edith D. Newerf, and L. L. Newerf, for the purpose of foreclosing the mortgage. All the defendants defaulted. The court made its decree of foreclosure in that suit, and on December 7, 1914, the mortgaged property was sold, by the commissioner under the decree, to the plaintiff for $8,531.30, which represented the total amount then due the plaintiff under the judgment. As a result of the sale the claim and the judgment on the mortgage were satisfied in full upon the records. In January, 1915, after the foreclosure sale and before the time had expired for the issuing of the commissioner's deed, the plaintiff openly took possession of the premises and remained in possession until April 1, 1915. During that time she cultivated and took care of the premises, but took no crops therefrom. She surrendered possession on the last-mentioned day, and did not again go into possession until after procuring the commissioner's deed, which was issued December 14, 1915. She then entered under the deed, and is still in possession of the property. In January, 1915, the sheriff of Riverside county levied execution upon the crop of oranges then on the property to satisfy a judgment against the Newerfs, or some of them, held by the Citizens' National Bank. Under the execution the sheriff sold the crop. Third party claims were presented by the plaintiff and Mrs. Bolster, and it was through no fault or act of the plaintiff that the sheriff levied upon and sold the orange crop. Neither the plaintiff nor her agents were given any notice of the right or title of the People's Loan & Trust Company or People's Trust & Savings Bank. The only reason the plaintiff bought at the foreclosure sale was because she believed all persons having or claiming any interest had been made parties to the forclosure proceedings, and that she was getting clear title to the property. To protect the plaintiff in the foreclosure suit her attorney made an examination of the records of Riverside county, and through inadvertence failed to find the record of the conveyance to the Riverside Abstract Company and of its conveyance to the People's Loan & Trust Company.

Edith D. Newerf defaulted in the payment of the indebtedness secured by the trust deed to N. C. Newerf, and in April, 1916, under the terms of the trust deed, but without actual notice to the plaintiff, the trustee sold the premises to N. C. Newerf, who purchased with full knowledge of the rights of the plaintiff and "without his having been misled, but knowing fully that the prior foreclosure action was ineffectual, and that the sale to the plaintiff conveyed no title, and that the mortgage debt had not been paid." There was an express finding that the plaintiff had done nothing to estop her from effectually foreclosing the mortgage, and that the claims of N. C. Newerf are without equity. By the judgment the former decree was set aside with all proceedings taken pursuant to it, foreclosure of the mortgage was decreed and sale ordered by the commissioner appointed in the decree for the purpose.

[1-3] The appeal being on the judgment roll, the only questions to be considered are:

(1) Did the complaint state facts sufficient to constitute a cause of action; (2) are the findings within the issues; (3) is the judgment supported by the findings; and (4) does reversible error concerning a matter of law appear on the face of the record? The contentions on the part of the appellants are so interwoven that it would be idle to attempt to follow counsel through the maze of the argument. Upon the first proposition it is contended that the allegation that the legal title to the mortgaged property was vested in and held by the People's Loan & Trust Company is a conclusion of law. The statement of title or ownership may be either one of fact or of law. It is contended there is no allegation regarding any conveyance to the trustee, nor averment as to the nature or extent of any trust created. These facts appear from the answer of the defendant Newerf. There were a number of other minor contentions in regard to the complaint, which might possibly have been reached by special demurrer, but which have either been waived in the answers, or which go to the form rather than the sufficiency of the complaint. It is also argued that the complaint does not show sufficient facts in regard to the inadvertence of the plaintiff's attorney, nor that the plaintiff was not herself guilty of negligence in the matter. Sufficient facts were stated in the complaint to constitute a cause of action. "If the owner of the equity has, through mistake, not been made a party, the mortgagee, who has purchased at a sale may maintain a second action to foreclose the equity of such owner, and for a new sale, but he cannot recover the costs of the previous sale. Although a new action is the proper remedy for a foreclosure improper through failure to make all persons interested in the equity of redemption parties to the suit, the courts have allowed the original suit to be reinstated upon an amended petition, even after an interval of several years." Jones on Mortgages, § 1679; Brackett v. Banegas, 116 Cal. 278, 48 Pac. 90, 58 Am. St. Rep. 164; Ludwig v. Murphy, 143 Cal. 473, 77 Pac. 150; Gerig v. Loveland, 130 Cal. 512, 62 Pac. 830.

[4] The appellants contend that certain findings are outside the issues tendered by the complaint. The findings in question are responsive to the matters affirmatively set up in the answer of N. C. Newerf. It is also contended that the finding concerning the transfers between the Newerfs and to the Riverside Abstract Company and to the People's Loan & Trust Company, and concerning the failure of plaintiff to discover that the trust deed had been executed until some time in March, 1915, are not supported by the complaint. These matters also are responsive to the allegations of N. C. Newerf's answer. In regard to all appellants' contentions upon the subject of the findings not being within the issues, in the absence of any evidence the case is clearly within the rule that in support of the findings and of the judgment it will be presumed that facts found which might have been presented in the particular case by formal pleadings were supported by evidence introduced by the parties under stipulation, or at least without objection. Hoover v. Lester, 16 Cal. App. 154, 116 Pac. 382; McLellan v. E. San Mateo, 166 Cal. 736, 137 Pac. 1145.

The judgment closely follows the findings, and the attacks upon it are upon the same grounds on which the appellants attack the findings themselves. These attacks need not, therefore, again be considered.

[5] It is contended that the court erred in finding that a crop of oranges produced by the plaintiff on the mortgaged premises is the property of the plaintiff as mortgagee in possession of said premises. Numerous cases are cited in support of the rule that a mortgagee in possession is bound to account to the mortgagor for rents and profits. In the absence of evidence and in support of the judgment, under the rules to which reference has been made, and considering all the findings, it must be presumed that the court properly considered the appellants' claims in this regard, and received sufficient evidence to amount to an accounting and to support the findings. This presumption applies with peculiar force to the particular case, because it was found by the court that the crop produced cost the plaintiff more than the amount for which the crop was sold.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 42

TRIMLETT et al. v. LYNCH et al. (DE COURSEY, Intervener). (Civ. 3010.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1919.)

1. APPEAL AND ERROR ⊂=843(2)—PROPRIETY OF INTERVENTION ORDER NEED NOT BE CONSIDERED WHERE INTERVENER HAD NO RIGHTS.

Where the intervener was in no event entitled to the fund which she claimed, the appellate court need not determine the propriety of the order permitting the intervention.

2. PRINCIPAL AND SURETY ⊂=118—DISCHARGE OF SURETY BY RELEASE OF JUDGMENT AGAINST PRINCIPAL.

Under Civ. Code, §§ 2819, 2840, relating to discharge of sureties and guarantors, a surety company, which signed an appeal bond given by a landowner, who appealed from a judgment foreclosing mechanic's liens, is not discharged because the lienors consented to discharge of the judgment pending determination of the appeal, to enable the landowner to dispose of the property; the satisfaction of the judgment not work-

ing any injury to the surety, which was protected by deposit of a sum of money sufficient to satisfy the judgment.

3. PRINCIPAL AND SURETY ⟸175—THIRD PERSON, WHO LENT MONEY TO PRINCIPAL TO DEPOSIT WITH SURETY AS INDEMNITY, NOT ENTITLED TO RETAKE IT.

Where a landowner's daughter lent her money to deposit with the surety as an indemnity bond, and the landowner himself made the deposit, *held*, that the daughter could not, where the lienors consented to satisfaction of their judgment to enable the landowner to sell the property, recover the amount deposited.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by William E. Trimlett and another against John C. Lynch, as receiver, substituted for the Pacific Coast Casualty Company, and Sarah H. De Coursey, in which Grace De Coursey intervened. From a judgment for the first-named defendant and the intervener, plaintiffs appeal. Reversed.

G. Roy Pendell, of Los Angeles, for appellants.

V. J. Cobb, of Los Angeles, for respondents.

KERRIGAN, J. This action was brought to set aside a satisfaction of judgment claimed to have been obtained through fraud of defendant Sarah H. De Coursey. It is recited in the complaint that, prior to the commencement of the action, plaintiffs had obtained a judgment on a mechanic's lien upon certain property owned by defendant Sarah H. De Coursey, which judgment had been appealed; that pending the appeal said defendant had represented to plaintiffs that she desired to sell said property, but could not do so unless the mechanics' liens and the lien of judgment were first released, and that, if plaintiffs would accept a bond of the Pacific Coast Casualty Company, for the sum of $600, in lieu of the regular statutory bond on appeal, that such bond would ipso facto cause a release of said liens; that accordingly plaintiffs and said defendant entered into a stipulation, accepting said surety company's bond; that, said bond not having the desired effect, defendant requested plaintiffs to satisfy such judgment of record for the purpose of assisting defendant to sell the property; that at the time of such request defendant presented a second stipulation, which defendant stated and represented would be signed by all the parties to the action, including the surety company, which company defendant further represented had given its consent to satisfy of record the said judgment, and further consented that its liability should remain the same as though the judgment had remained unsatisfied; that plaintiffs, believing and relying upon said representations, had caused to be entered the requested satisfaction without any consideration.

The complaint further alleges that the judgment which plaintiffs had satisfied of record was affirmed on appeal, and that plaintiffs made demand for payment, which was refused on the ground that the judgment had been satisfied of record; that plaintiffs believed at all times that said second stipulation had been signed by the surety company, but that the same had not been so signed, and that the company had refused to pay the judgment. In addition to the execution of the appeal bond by the surety company, the complaint also recited that defendant Sarah H. De Coursey had secured that company from loss by depositing with it the sum of $600, such sum being the amount of liability assumed by the company on its bond, and that the company still had possession of said deposit.

At the time the action was set for trial, the intervener, Grace De Coursey, made a motion to be allowed to intervene on the ground that she owned the $600 deposited with the bonding company, and over the objection of plaintiffs her motion was granted. The court, by its judgment, set aside the satisfaction of judgment, as prayed for by plaintiffs, but at the same time made its further order and decree that the bonding company had been released from all liability to plaintiffs on its bond, and further decreed that the $600 deposited with the company was owned by the intervener, Grace De Coursey, and gave judgment in her favor against the company for that amount and decreed that plaintiffs had no right, title, or interest in or to the same.

[1] From the order permitting the intervention, and from the judgment, plaintiffs appeal. In support of the contention that the court erred in allowing the complaint in intervention, it is the claim of plaintiffs, first, that intervener did not have such "an interest" as would entitle her to become an intervener; second, that even though she had such an interest, and was so entitled, yet in fact she never became such, for the reason that she never complied with the methods which would make her an intervener in fact. We do not consider a discussion of this question necessary, for, regardless of any question of the pleadings, we are of the opinion, for reasons hereinafter stated, that intervener was not entitled to the fund, and that the trial court erred in decreeing that the surety company was released from the bond.

[2] The Code provides when a surety is released from its bond. Section 2840, Civil Code, provides:

"A surety is exonerated:

"1. In like manner with a guarantor;

"2. To the extent to which he is prejudiced by any act of the creditor which would naturally

prove injurious to the remedies of the surety or inconsistent with his rights, or which lessen his security; or,

"3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do."

Section 2819, Civil Code, provides that:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

There is no evidence in the record to show that the bonding company was prejudiced in the slightest degree by the act of plaintiffs; on the contrary, it affirmatively appears that it suffered no prejudice, for the $600 which it had in its possession was an ample sum to secure it from any loss which it might have suffered by reason of its bond. It was therefore not prejudiced, and was not relieved from liability, under the provisions of either of the sections above set forth. Nor does the record present any evidence which shows that any act of the plaintiffs was such as would prove injurious to it.

[3] It is the claim of the company, however, that the $600 was not the property of defendant Sarah H. De Coursey, but that the same belonged to her daughter, Grace, the intervener herein, and that this sum was merely deposited with the company by her "as security for loss and liability on the bond," rather than "for the performance of the obligation" from which it is argued the company is exonerated, regardless of what prejudice, if any, it may have suffered.

In support of the position we are cited to the case of Goff v. Ladd, 161 Cal. 257, 118 Pac. 792, as upholding this contention. The question involved in that case was whether or not the creditor had the right to receive the benefit of the security there deposited with the surety by a third person, and the case held that the bond therein was deposited "for the purpose of the obligation," and that it was therefore security which the surety might hold. In discussing the case the court pointed out the distinction between that case and the cases where the bond promised to pay the surety only so much of the judgment as the surety actually was compelled to pay. Here, however, the money was not deposited by a third person, but by defendant Sarah De Coursey herself. It is true there is evidence that the money had belonged to her daughter, intervener herein; but such evidence shows that she lent it to her daughter, by whom it was deposited with the company, and the record does not show that the deposit was made for the limited purpose claimed. Whatever the purpose may have been, the money belonged to the mother when the deposit was made, and was therefore not deposited by a third person. Though no part of the decision, we do not think that the original obligation of the principal was changed. Here, by this very judgment, the court set aside the release on account of the fraud of defendant Sarah De Coursey, and the effect of the judgment, no intervening rights having attached, is to leave the original obligation as between the parties in just as full force and effect as it ever was. Other points do not require consideration.

For the reasons given, the judgment is hereby reversed as to defendant Pacific Coast Casualty Company, and as to the intervener.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 7

FAITH v. MEISETSCHLAGER. (Civ. 3044.)

(District Court of Appeal, First District, Division 1, California. Dec. 15, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

1. BROKERS ⟹46 — CONTRACT GIVING ONLY EXCLUSIVE AGENCY TO SELL.

Contract authorizing a realty company, plaintiff's assignor, to sell defendant's property for a price and under conditions described, etc., *held* to amount only to an exclusive agency to sell, not denying defendant owner's right himself to sell.

2. BROKERS ⟹46—OWNER WHO HAS GIVEN EXCLUSIVE AGENCY CONTRACT HAS RIGHT HIMSELF TO SELL.

A contract authorizing real estate brokers to sell property, which merely makes them exclusive agents, does not entitle the brokers to commission on a sale made by the owner unaided by them; the owner's right to sell being an implied condition of the agency, subject to which it is accepted by the brokers, whose commission is payable only in the event of success in finding a purchaser before the owner.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Harry Faith against Frank Meisetschlager. From judgment for defendant plaintiff appeals. Affirmed.

George G. Graham, of Fresno, for appellant.

F. C. Huebner, of Fresno, for respondent.

KERRIGAN, J. This appeal is from a judgment in favor of the defendant in an action brought by plaintiff for the recovery of the sum of $1,500, claimed as commissions for the sale of real property.

The contract was entered into by plaintiff's assignor and defendant, and that portion necessary for a discussion of the case reads as follows:

"Fresno, Cal., April 15, 1918.

"I hereby appoint the Action Realty Company of Fresno my agent, with the exclusive right to sell the property described on the reverse side of this card for the price and under the conditions hereon described, or for any less amount authorized by me, and receive deposit on same.

"I agree to furnish deed and abstract showing clear title in me to date, and should Action Realty Company sell such property, or be instrumental in selling the same, I agree to pay them 5 per cent. commission on the selling price. This authorization is to remain in force and effect for 60 days and thereafter until revoked by me in writing.

"Action Realty Co., etc.
"Fr. Meisetschlager."

The complaint recites that the company had expended money in advertising and showing the property to prospective purchasers, and that it had used all means to effect a sale thereof; that the plaintiff and his assignor had fulfilled their part of the contract so far as it was possible, but that defendant had breached the agreement by making a sale of the premises himself without first canceling the plaintiff's rights thereunder; and that defendant had refused to pay the commission agreed upon. The case therefore presents the single question of the proper construction to be given to the contract.

The trial court found that neither the plaintiff nor his assignor, the Action Realty Company, had performed the stipulations in the contract which entitled them to the commission upon the sale of the property.

[1] As ground for reversal it is claimed by appellant that as the agreement provided that plaintiff's assignor should have the exclusive right to sell the property, the action of the owner himself in making a sale within the period limited could not operate to defeat the right of plaintiff's assignor to the amount of the commission provided for, notwithstanding the fact that it had failed to make a sale or produce a purchaser. Standing alone, this argument might have force. The contract, however, contains a specific provision that the Action Realty Company should be entitled to the payment of the specified commission if it were instrumental in selling the property, and no provision is contained therein denying the right of the owner to make a sale. Construed as a whole, we are of the opinion that the instrument amounts to nothing more than an exclusive agency.

[2] A contract authorizing real estate brokers to sell property, which merely makes them exclusive agents thereof, does not entitle such brokers to their commission on a sale made by the owner unaided by them. Under such circumstances the owner has the right to sell by his own individual efforts without becoming liable to the agents for a commission. This right is an implied condition of the agency, subject to which the agent accepts it; and in such a case his commission is payable only in the event of his success in finding a purchaser before the owner himself makes a sale. Snook v. Page, 29 Cal. App. 246, 155 Pac. 107.

It being admitted that the agent here in no manner contributed to the making of the sale, neither it nor plaintiff is entitled to a commission.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 57

SAN PEDRO, L. A. & S. L. R. CO. v. SIMONS BRICK CO. et al. (Civ. 2452.)

(District Court of Appeals, Second District, Division 1, California. Dec. 16, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

1. WATERS AND WATER COURSES ⊂⊃38—"NONNAVIGABLE" STREAM DOES NOT INCLUDE WIDE EXPANSE OF ESCAPING FLOOD WATERS.

A nonnavigable stream in California, which ordinarily is of small width, cannot be deemed to include storm waters which escape from the the bed of the stream and may spread over surrounding territory to the extent of a mile or more, so the banks of such a stream must be deemed located approximately at the edges of the stream as it flows in time of normal water.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Nonnavigable.]

2. WATERS AND WATER COURSES ⊂⊃38—NONNAVIGABLE "STREAM" DEFINED AS REGULAR FLOW.

By the term stream, as applied to a nonnavigable stream in California, is meant water which has a regular flow, and not that deposited during time of storm which immediately runs away leaving a mere stretch of sand and rock.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Stream.]

3. WATERS AND WATER COURSES ⊂⊃89—CONVEYANCE HELD NOT TO INCLUDE LAND TO CENTER OF NONNAVIGABLE STREAM.

Where land was conveyed commencing at a point near the Los Angeles river, a nonnavigable stream, and it appeared that the land was some 300 feet away from the bank of the stream in ordinary water, the conveyance cannot be construed as including the land to the center of the stream, by virtue of Civ. Code, § 830, and Code Civ. Proc. § 2077, for the river bank was not fixed as a monument controlling, and the expression near the river cannot be deemed equivalent to a description reading at the river bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the San Pedro, Los Angeles & Salt Lake Railroad Company, a corporation, against the Simons Brick Company, a corporation, and the City of Los Angeles, a municipal corporation. From a judgment in favor of the municipality and against the Brick Company the latter appeals. Affirmed.

Kenton A. Miller and Fred W. Smith, both of Los Angeles, for appellant.

Charles S. Burnell, City Atty., and J. H. O'Connor, Deputy City Atty., both of Los Angeles, for respondent.

JAMES, J. This action was brought by the plaintiff corporation to condemn certain lands for railroad purposes. As between the defendants, Simons Brick Company and the city of Los Angeles, there was a dispute as to the ownership of a certain parcel of land, which controversy the trial judge determined in favor of the municipality. On this appeal from the judgment taken by the Simons Brick Company, the determination of that issue only as between the defendants named is sought to be reviewed.

That the city of Los Angeles was the original owner of the property is conceded. In the year 1876 the city made conveyance to one Hollenbeck of certain property; the conveyance being expressed in a grant deed describing the parcel conveyed. The Simons Brick Company received title to the same land by conveyance from the successor in title of the said Hollenbeck. The parcel of land in dispute lies within what may be generally termed the bed of the Los Angeles river, but outside of the lines apparently established by the deed of the city to Hollenbeck; it lies between, however, the westerly boundary of said land, as so apparently described by the deed, and the center of the river bed, or the place where the water (when there is any) ordinarily runs. Appellant's contention is that by the deed of the city to Hollenbeck the westerly line of the property as described in said deed was intended to refer to the bank of the river, and, such being the case, the grantee took to the center or thread of the nonnavigable stream, by reason of the provisions of section 830, Civil Code, and section 2077, Code of Civil Procedure. The whole controversy is to be determined with reference to whether, by the description in the deed referred to, the western boundary of appellant's property was described as being substantially along the eastern bank of the Los Angeles river. The particular terms of description as embodied in the deed are as follows:

"Lying and being situate on the east side of the Los Angeles river and bounded east by lot 6, block 58, Hancock's survey, Los Angeles city, commencing at a point near said river in the southwest corner of said lot; thence south 62 deg. east along the northerly line of Hollenbeck avenue 363 feet; thence north 28 deg. east 331.32 feet; thence west 508 feet; thence south 14½ deg. east 126 feet to the place of beginning, containing 2.09 acres."

Preliminarily it may be stated that it appears from the testimony that surveyors have had no difficulty in locating the exact points and lines described in the deed upon the ground. In fact, the corner stakes of the western boundary were testified to as having been located by a surveyor introduced by the appellant. This westerly line ran a straight course. The Los Angeles river at the time of the making of the deed of the city to Hollenbeck, during times of high water spread itself over a wash which was perhaps a quarter of a mile in width. At its easterly side was a bluff of considerable height, along which ran a zanja, used for the purpose of taking out irrigating water. Traces of the zanja still remain, showing that during all of the time succeeding the year mentioned the bluff has not been worn away to any considerable extent by the action of the water. The westerly line of appellant's property, following the literal description of the deed, lies below the base of this bluff and in the sandy wash which was at the time of the making of the Hollenbeck deed overflowed by the storm water which was carried in it during the winter months. In the early days little effort was made to confine the water to a fixed bed, although subsequent to the making of the Hollenbeck deed the city by map described what it called the "official bed" of the Los Angeles river. Along the easterly line of this "official bed" was built a levee and upon this levee the railroad company which is plaintiff here maintained tracks. Subsequent to the building of this levee it would appear that, even in winter time, the storm water did not find its way to any extent easterly of the levee nor upon the property of appellant. Moreover, the "center" of the stream, or the place where the water of the river flowed between the rainy seasons, has been at all times at and since the making of the Hollenbeck deed at about the center of what has been termed the official bed of the river as described by the city map. According to the testimony of a surveyor introduced by appellant, the westerly line heretofore referred to of appellant's property was about "430 feet from the easterly side of the official bed of the Los Angeles river." This witness further testified:

"Taking the deed in evidence from the city to Hollenbeck conveying that tract I placed the westerly boundary about 300 odd feet from the bed of the Los Angeles river as it exists at present. * * * It has always been in the same place ever since I can remember, which is about 33 or 34 years, so that the bed of the river during that time has been about where it

is today, namely, about 300 feet approximately west of the brown line on the map."

William H. Workman, a pioneer resident of the city, testified as follows:

"In 1876, the banks of the river with reference to the foot of the bank at the Simons Brick Company's plant ran practically where they are now, but the banks were only 18 inches or 2 feet high. The river used to overflow the whole country there. * * * When the water was up, the eastern boundary of the river was very near the bluff. In 1862 and 1867 the water ran over to the bluff. There was a ditch called zanja No. 7 running at the foot of the bluff on the Simons' property, at least along the side of the hill, possibly 4 or 6 feet higher than the river bed, and in 1862 and 1867 the river washed that out."

This witness further testified that until the building of the levee upon which the railroad tracks are situated the stream shifted, and he said:

"It shifted some. Still the river bed was practically where it is now. Q. That is practically what is now the official river bed? A. Yes, sir; practically."

Another witness called on behalf of the appellant testified as follows:

"Q. And not one of those streams had a fixed or permanent bed or course there which it always followed, did it? A. Well, I would consider that the main channel, what we called the main channel at that time, was located about where it is confined at the present time. Q. That is about the center of the wash? A. That is about where the river is confined at the present time. I would consider that about the main channel of the river in those days. That point, I should judge, is probably 600 feet from the foot of the bluff; maybe a little less than that; but it is several feet, anyhow, west of the bluff. It is also west of these stakes."

We may at this point inquire as to where the bank of the river was at the time of the making of the Hollenbeck deed, for the determination of that question is important to the contention of appellant that the westerly line of its property was intended to be located upon that bank. We have shown by the testimony which appellant offered that the Los Angeles river, during times of normal water flow, is at best a trickling stream; sometimes it carries no water whatsoever. That this stream so flowing under normal conditions traverses about the center of the "official" river bed and describes a line between 300 and 450 feet westerly from the westerly boundary of appellant's property as described in the Hollenbeck deed.

[1, 2] Can it be that in the case of a nonnavigable stream which carries a large volume of storm water during rainy seasons and which spreads over a wide area of sandy wash, its "banks" are to be considered as the lines bounding the extreme limits of the storm flow? It seems both unreasonable and illogical to so define the boundaries thereof. It is well known that the storm waters in California, when traveling through a flat or level country, spread out and meander, washing away the top soil and leaving exposed sand and boulders for widths of many hundreds of feet, or even covering a width of a mile or more. Such was precisely the course and action of the waters which have traversed the so-called Los Angeles river bed, according to the undisputed testimony, and especially that produced by appellant itself. In most of the cases where such sandy wastes or washes carry only storm floods in winter, it would be improper to bring them within the definition of a "nonnavigable stream." By the term "stream" we understand is meant water which has a regular flow, and not that deposited during times of storm which immediately runs away and leaves in its course a mere stretch of sand and rock. By the same course of reasoning it must be said, we think, that where a nonnavigable stream in fact exists within the legal definition of the term, its banks must be located approximately at the edges of the stream as the latter flows during the times of normal water. The evidence in this case is sufficient to show that during such ordinary times some water habitually ran in the Los Angeles river bed. The evidence also very conclusively shows that, considering the ordinary flow of the stream, its banks would be located wholly within the easterly and westerly lines established by the city as defining the "official bed." We have already learned that the westerly line of appellant's property (referring to the description in the Hollenbeck deed) is located easterly from the easterly boundary of the official bed at least 300 feet.

[3] With this intervening distance, clearly it may not be said that that westerly line was coincident with the easterly bank of the nonnavigable stream. Counsel argues at much length and cites many authorities to the point that where a line described in a deed is substantially coincident with the bank of a stream it will be assumed as a matter of interpretation that the grantor intended to make such bank the boundary line, in which event the grantee by force of the law would take to the center of the stream or thread thereof. From what has been said it has appeared that we are wholly out of agreement with appellant in the premises assumed. A line 300 feet away from the bank is not "substantially" located upon the bank. Neither does the rule that monuments control courses have any application here, because the deed did not fix the river bank as a monument to commence with. The phrase "near said river," as used in the instrument of conveyance, was not equivalent to a description reading "at the river bank." Like reason can be found for distinguishing all of the cases cited by appellant from the one

which the facts here illustrate. That the city did not divest itself by the Hollenbeck deed of its title to the strip of land intervening between the westerly boundary line described in said deed and the easterly bank of the Los Angeles river we think is entirely clear, taking into consideration the precise description embodied in the instrument of conveyance together with the undisputed facts referring to the natural conditions existing at the time the deed was made. So convinced are we of the correctness of the judgment that we think it unnecessary to investigate the matter of certain rulings of the trial judge which appellant complains of, in refusing and admitting certain ordinances and maps in evidence. Upon the case as we have illustrated it, any error, assuming such to exist, could not have resulted in a miscarriage of justice. The findings of the court sufficiently covered the issues made by the pleadings.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 81

GRISWOLD v. PACIFIC ELECTRIC RY. CO.

(Civ. 3121.)

(District Court of Appeal, First District, Division 2, California. Dec. 17, 1919.)

1. RAILROADS ⊂=338 — LAST CLEAR CHANCE RULE INAPPLICABLE TO CROSSING ACCIDENT UNLESS OBSTRUCTION WAS DISCOVERED IN TIME.

The last clear chance rule never applies to cases of injury at a railroad crossing unless there is some evidence that the engineer or motorman actually saw the obstruction in time to have avoided the injury by stopping the train or car.

2. RAILROADS ⊂=328(1)—DUTY OF ONE DRIVING AUTOMOBILE AT CROSSING DEFINED.

The rule that one about to cross a street in front of an approaching car cannot omit any of the precautions demanded by law applies with greater force to one crossing railroad tracks in disregard of a warning gong, where the view is obstructed, driving an automobile carrying others than himself, in addition to imperiling trainmen and passengers.

3. RAILROADS ⊂=328(6)—ONE CROSSING BEHIND PASSING TRAIN MUST USE POWERS OF OBSERVATION.

The general rule is that one who attempts to cross a railroad track must reasonably use his own powers of observation to assure him there is no danger from approaching trains; a rule applying to one from whom a train approaching on a second track is hidden by a train which has just passed.

4. TRIAL ⊂=163 — MOTION FOR NONSUIT GROUNDED ON CONTRIBUTORY NEGLIGENCE CONSTRUED AS SUFFICIENT.

A motion for nonsuit on the ground that the uncontradicted evidence shows negligence of plaintiff automobile driver injured at a crossing which contributed proximately to the injury is sufficient to inform both court and counsel, and fulfilled all requirements of Code Civ. Proc § 581, subd. 5, if the motion was permissible under the pleadings.

5. PLEADING ⊂=434—DEMURRABLE PLEA OF CONTRIBUTORY NEGLIGENCE SUFFICIENT TO SUSTAIN MOTION FOR NONSUIT AND JUDGMENT.

In an action against a railroad for injuries to plaintiff automobile driver and death of his wife in a crossing collision, the railroad's method of pleading contributory negligence, after the usual denials of the allegations of the complaint in the answer, immediately preceding the prayer, and by affirmative plea on which plaintiff went to trial, though subject to special demurrer, *held* sufficient to sustain motion for nonsuit and judgment for defendant thereon.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by J. J. Griswold against the Pacific Electric Railway Company. From judgment of nonsuit plaintiff appeals. Affirmed.

Duke Stone and H. E. Wassell, both of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for respondent.

BRITTAIN, J. The plaintiff appeals from a nonsuit judgment in an action for the death of his wife, personal injuries to himself, and injuries to the automobile he was driving when it was struck by an electric train at a grade crossing in Los Angeles county. The nonsuit was granted solely on the ground of the plaintiff's contributory negligence. Three questions of law only are presented. The first is as to the technical sufficiency of the motion for nonsuit. Its determination is in no sense involved with the facts of the case. The second is as to the technical propriety of the defendant's pleading. Its determination in no way depends on any facts in the case. The third is whether the evidence of what occurred immediately preceding and up to the very instant of the accident, stated most strongly for the plaintiff, was such that in view of the law applicable to such cases reasonable men could reach but one conclusion concerning the caution or lack of caution of the plaintiff in approaching the railroad track. The determination of this question in no way depends on the deplorable and most distressing results of the accident, and their consideration or statement could serve only to create a bias above which the judge of the superior court, with high regard for the judicial function, rose.

There are certain fundamental rules of law controlling upon the court. The element of sympathy for the suffering, mental or physical, of the plaintiff can be given no

weight if he took chances which the law declares can only be taken upon the responsibility of those who take them and so bring themselves and others into peril. The fact that others take or have taken similar chances and have escaped injury cannot be given any greater weight than would the plea of one accused of wrongdoing that others had done the same thing without suffering the consequences of a disregard of those rules of law which exist for the safety and protection of all men, and which should be applied, regardless of apparent or real hardship, in the particular cases to which they properly relate. The aphorism that justice should be tempered with mercy gives no warrant to courts to be unlawfully generous with the property of one litigant for the benefit of another. If the law is too hard, it should be changed; but it is not the function of courts to evade it either by disregarding the facts or misapplying established rules of law. In the particular case, if either the facts or the law were different, this court, and no doubt the judge of the superior court, would be glad if the judgment appealed from could be reversed; but this court is bound, as he was, by the facts and the law as declared by the Legislature and the Supreme Court of this state.

Stated most strongly for the appellant, and assuming for the present purpose only that the defendant was in some degree negligent, the facts essential for the determination of this appeal in accordance with the general principles of law which control the actions of this court are as follows:

The defendant operates a railroad running from the city Los Angeles to various places in its vicinity. Its cars and trains are operated by electric power, and, at the place where the accident occurred, over tracks laid upon a private right of way owned by the defendant. Near the scene of the accident, which was some miles outside of the municipal limits of Los Angeles, a more or less closely built-up, but apparently scattering, settlement had sprung up along both sides of the right of way and near to it. To accommodate traffic from one side of the right of way to the other, crossings were maintained at the streets or roads through this semirural settlement, about the length of an ordinary city block apart—250 to 300 feet. Between these cross streets and fronting on the right of way were a few shops, a sidewalk running in front of them, with the distance of 7 feet or thereabouts between the outer edge of the sidewalks and the nearest rail of the defendant's tracks. On the right of way there were four parallel tracks running north and south; the two outer tracks being used for local trains, and the two middle tracks for through trains, which were normally operated at a higher rate of speed than the local trains and which made infrequent stops. Starting from the west side, from which the appellant was driving, the four tracks are designated in order as "southbound local," "main line south," "main line north," and "north-bound local." The space between the rails of each track was 5 feet; the distance between the two main tracks 9½ feet; between the main line and the local tracks 8½ feet. At the right-hand side of the street on the nearest side of the right of way as the plaintiff aprpoached was what is designated as a wigwag or automatic flagman. It is an electrically controlled device which when in operation swings to and fro a warning signal to the continuous clangor of a gong. It is put in operation when an approaching train from the north on either of the first two tracks reaches a point 1,000 feet north of the crossing, and it continues ringing until the train has passed the crossing. It is similarly operated by trains from the south. If a train stops within the 1,000 feet, the signal continues in operation while the train remains. Trains on one or another of the four tracks were passing every few minutes during the day and the crossing was a stopping place for local trains. The wigwag was therefore in operation a great part of each day; as one witness said, "three-fourths of the time."

The plaintiff had lived in the vicinity since 1913 and had ridden on the defendant's trains. He was 50 years of age and had driven an automobile for about 2 years. He had crossed the tracks at this place once before. In the Ford machine with him were his wife, another lady, and a little girl. As he approached the crossing from the west there were two other automobiles in front of him. The view to the north was obstructed by a building at the corner of the street and the west line of the railroad right of way. The view to the south was similarly obstructed by a lumber yard, in which there were buildings. The appellant's machine was on the south side of the street, nearest the wigwag, which he testified he saw in operation. He saw a train going south on the main line and a Watts local come north and stop on the south side of the crossing. In that position it would have operated the wigwag, and the plaintiff testified he thought it was the cause of the alarm.

The first two machines came up to the track and stopped there. The plaintiff stopped as the front wheels of his car reached the first track. He stopped just an instant and looked up and down the track both ways. His view to the south was obstructed by the train which had passed in that direction. The other two machines had passed on. He started his machine in the low gear at about the rate of 10 or 12 miles an hour. He could have stopped his machine, he testified, in 5 or 6 or 8 or 10 feet. From where he stopped to the first rail of the main track north, where

the accident occurred, was 28 feet. It was about 6 or 6:30 o'clock in the evening in August and was not dark. A whistle was sounded by some train, but he did not hear it. He was asked: "Now, after you got up on the first track when you say you looked south and north, after you started again, did you ever look any more to the south?" His reply was: "No; I do not think I did."

No clearer comment on these facts could be made than that of the judge of the superior court in passing on the motion for nonsuit. He said:

"Mr. Griswold knew about this crossing. At any rate, whether he had known of it before or not, the wigwag was going. He approached the crossing and stopped when the front wheels were on the first rail. That is the Watts local going south. That was 27½ feet from the track at which the accident occurred. Starting from the end of the car, he had about 25 feet after he stopped and looked before he got to that track. He says himself that he looked to the south and saw nothing—there was another train about 100 yards away—he looked to the north and saw nothing. Counsel did not just comment on it, but he looked and saw a Watts local there and thought that the Watts local was what was ringing the bell. That, however, was no excuse whatever. Now, then, he himself said that he did not look again. He also said he could have stopped his machine at the speed he was going. First he said in 8 or 10 feet, and afterwards he said he could have stopped it in 6 or 7 feet; but leaving it at 8 or 10 feet, according to his own testimony when he was on the stand, he only looked when his front wheels were on that Watts track, and said he looked there to the north because that was the first track that he was going to cross. He saw nothing to the north and no obstruction. He was in absolute safety until he got down onto the main line south track. There he should have looked again before he passed the center of the right of way. The law required him to look then. In fact, the law requires a person to keep looking where they are crossing a railroad track. This was a street car. It is just the same as steam car; they are running on a private right of way. It does not make any difference whether it is in the city or in the country. The court is compelled to grant the motion for nonsuit."

[1-3] Upon this phase of the case the appellant argues that the question of contributory negligence should have been submitted to the jury generally, and particularly under the legal doctrine of "last clear chance," and he cites cases in which nonsuits have properly been denied, but which do not apply to the facts of this case. The "last clear chance" rule never applies in railroad cases unless there is some evidence that the engineer or motorman actually saw the obstruction in time to have avoided the injury by stopping the car or train, and there was no such evidence in this case. Bennichsen v. Market St. Ry. Co., 149 Cal. 18, 84 Pac. 420; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 Pac. 709; Tucker v. United Railroads, 171 Cal. 702–705, 154 Pac. 835; Starck v. Pacific Electric Ry., 172 Cal. 277–282, 156 Pac. 51, L. R. A. 1916E, 58. In the case last cited it was said:

"A pedestrian about to cross a street in front of an approaching car has no right to omit any of the precautions which the law demands, nor to rely upon the strict compliance by the servants of the railway company with the speed laws." Starck v. Pac. Elec. Ry. Co., 172 Cal. 282, 156 Pac. 53, L. R. A. 1916E, 58, citing: Brown v. Pac. Elec. Ry. Co., 167 Cal. 204, 138 Pac. 1005; Griffin v. San Pedro, etc., R. Co., 170 Cal. 772, 151 Pac. 282, L. R. A. 1916A, 842; Hutson v. Southern California R. Co., 150 Cal. 701, 89 Pac. 1093.

In this case there is no question, on the nonsuit at least, regarding the speed of the electric train. This rule of law affecting pedestrians applies with infinitely greater force to one crossing railroad tracks in disregard of a warning gong, where the view is obstructed, driving an automobile in which he carries into peril others than himself, in addition to imperiling the lives of trainmen and passengers on a train which may be wrecked by a collision.

"The general rule that one who attempts to cross a railroad track must reasonably use his own powers of observation to assure himself that there is no danger from approaching trains is clear. * * * And the rule applies to one from whom a train approaching on a second track is hidden by a train which has just passed." Koch v. Southern Cal. Ry. Co., 148 Cal. 681, 84 Pac. 178, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795; Herbert v. S. P. Co., 121 Cal. 230, 53 Pac. 651; Green v. L. A., etc., Ry. Co., 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; Murray v. S. P. Co., 177 Cal. 1, 169 Pac. 675.

Under these rules of law the nonsuit was properly granted, if the motion was technically sufficient in form and technically proper under the pleadings.

[4] Concerning the motion for nonsuit, argument is not presented on either side, nor was it necessary. The second ground stated was that "the uncontradicted evidence shows contributory negligence on the part of the plaintiff that contributed proximately to the injury." This was sufficient to inform both the court and the counsel, and fulfilled all the requirements of subdivision 5 of section 581 of the Code of Civil Procedure, if the motion on that ground was permissible under the pleadings.

[5] The defendant's method of pleading contributory negligence is open to criticism, but in view of the entire record it was sufficient to sustain the motion for nonsuit and the judgment. After the usual denials of the allegations of the complaint, the following appears in the answer immediately preceding the prayer:

"For a further separate and distinct answer and defense, defendant alleges: That the plaintiff himself did not exercise ordinary care, caution, or prudence in the premises to avoid said accident and the resulting injuries, if any, by him sustained, and that said accident and the resulting injuries, if any, complained of were directly and proximately contributed to and caused by the fault, carelessness, and negligence of plaintiff in the premises."

This was an affirmative plea. It was subject to special demurrer, but the appellant went to trial upon it. It is substantially in the form upheld by the Supreme Court in the Starck Case, where the same contention was made and upon the same argument. Starck v. Pacific Elec. Ry. Co., supra, 172 Cal. 277, 156 Pac. 51, L. R. A. 1916E, 58, Supreme Court Record, L. A. No. 3658, decided March 9, 1916.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

44 Cal. App. 786

FOX v. FLOOD et al. (Civ. 3140.)

(District Court of Appeal, First District, Division 2, California. Dec. 13, 1919.)

1. APPEAL AND ERROR ⟸955—RECEIVERS ⟸ 29(1)—APPOINTMENT IS DISCRETIONARY AND NOT REVIEWABLE EXCEPT FOR ABUSE OF DISCRETION.

The power to appoint a receiver is very largely within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion, except in cases of palpable abuse.

2. APPEAL AND ERROR ⟸920(5)—FACTS STATED IN CONFLICTING AFFIDAVITS FAVORABLE TO PREVAILING PARTY MUST BE CONSIDERED AS ESTABLISHED.

On appeal from an order appointing a receiver, made on conflicting affidavits, the facts stated in the affidavits, favorable to the prevailing party, must be considered as established.

3. APPEAL AND ERROR ⟸1024(2) — APPOINTMENT OF RECEIVER ON CONFLICTING AFFIDAVITS WILL NOT BE DISTURBED.

Under Code Civ. Proc. § 564, subd. 2, authorizing the appointment of a receiver in a suit to foreclose a mortgage, where it appears that the property is probably insufficient to discharge the debt, where the affidavits, as to the sufficiency of the property to discharge the debt, are conflicting, the order appointing a receiver will not be disturbed.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by George W. Fox against Coleman R. Flood and others. From an order appointing a receiver, the defendant named appeals. Affirmed.

Earl Curtis Peck, of Los Angeles, for appellant.

John B. Haas, of Los Angeles, for respondent.

NOURSE, J. This is an appeal from an order appointing a receiver in an action for the foreclosure of a second mortgage. Coleman R. Flood, the owner of the property at the time of the institution of the action, is the sole appellant. The order was made upon the complaint as amended and affidavits introduced at the hearing.

The second mortgage was given to secure the payment of $15,000, and covers three lots in Venice, Cal., improved by a hotel building, together with the rents, issues, and profits thereof. The first mortgage is in the sum of $20,000. The complaint, as amended, alleges the failure of the defendant mortgagors to perform the conditions of the mortgage, in that they have failed to pay interest due on the first mortgage amounting to $909.78, interest due on the second mortgage amounting to $262.50, $5,000 due on the principal under the terms of the mortgage, and delinquent taxes amounting to $233.62, together with a penalty thereon in the sum of $33.46. It also alleges the insolvency of the persons personally liable for the payment of the mortgage debt, and that the mortgaged property is insufficient to discharge the debt secured thereby, its cash value being only $30,000.

Under the provisions of subdivision 2, section 564, Code of Civil Procedure, a receiver may be appointed in an action for the foreclosure of a mortgage where it appears that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt. Appellant apparently concedes the nonperformance of the conditions of the mortgage and the insolvency of those personally liable thereunder. His answer denies the above allegations on information and belief. The only point urged on appeal is that the court abused its discretion in determining the value of the property to be insufficient to discharge the mortgage debt.

[1, 2] The power to appoint a receiver is very largely within the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion except in cases of palpable abuse. Whitley v. Bradley, 13 Cal. App. 720, 724, 725, 110 Pac. 596. In reviewing an appeal from an order made upon affidavits, in which the determination of a question of fact is involved, the court is governed by the same rules applicable to oral testimony. If the affidavits are conflicting, the facts stated in the affidavits favorable to the prevailing party must be considered as established. Doak v. Bruson, 152 Cal. 17, 19, 91 Pac. 1001; Davies v. Ramsdell, 183 Pac. 702; Boland v. All Persons,

etc., 160 Cal. 486, 489, 117 Pac. 547. High on Receivers (4th Ed.) § 667, states the following rule regarding the appointment of receivers:

"But when the income, rents, and profits of the premises are pledged by the mortgage, less stringency of proof is required to warrant the court in granting a receiver. And where the debt is past due and the taxes and insurance are unpaid and the mortgagor refuses to surrender the property, the court will not strictly scrutinize, for the mortgagor's benefit, conflicting affidavits upon the question of the value of the property. And when the court has appointed a receiver in a foreclosure suit because of the inadequacy of the security, an appellate court will be reluctant to disturb the finding of the court below as to the fact of such inadequacy."

In Pouder v. Tate, 96 Ind. 330, an action to foreclose a mortgage, plaintiff petitioned the court for the appointment of a receiver on the ground that the value of the mortgaged property was insufficient to discharge the mortgage debt. The statements as to the value of the property were conflicting in the respective affidavits sustaining and opposing the appointment. The appellate court affirmed the appointment, saying: "Upon a question of fact thus presented, we cannot disturb the conclusion reached by the trial court."

[3] In the present case the entire evidence upon the motion for the appointment of the receiver was presented by affidavits which were conflicting upon the issue of the insufficiency of the property to discharge the debt. This being so, this court cannot substitute its judgment and discretion for that of the trial court, and cannot say there has been an abuse of discretion on the part of the trial court, where there is evidence which, if believed, will support the order.

The order is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

45 Cal. App. 214

JAXON et ux. v. CLAPP et al. (Civ. 3172.)

(District Court of Appeal, First District, Division 1, California. Dec. 22, 1919. Hearing Denied by Supreme Court Feb. 19, 1920.)

1. WATERS AND WATER COURSES ⟸126(2)—EVIDENCE SHOWING DAMAGE TO LOT AND HOUSE THROUGH CONSTRUCTION OF BRICK WALL DISCHARGING WATER.

In an action for injuries to plaintiffs' lot and house from waters collected on defendants' land by their brick wall and discharged through drainage holes, evidence that the damage was caused by the wall and not by heavy rainfall *held* sufficient to sustain findings for plaintiffs.

2. WATERS AND WATER COURSES ⟸117—LOWER TRACT MUST BEAR BURDEN OF RECEIVING STORM WATERS FROM HIGHER.

Where two adjacent parcels of land belong to different owners, one being lower than the other, and surface waters from the higher have been accustomed by natural flow to pass over the lower, the owner of the higher land has an easement for the escape of storm waters to the lower tract, charged with a corresponding servitude.

3. WATERS AND WATER COURSES ⟸118—ALTERATION OF SURFACE OF CITY LOT WITHOUT LIABILITY THOUGH FLOW OF WATER IS DISTURBED.

The doctrine that of two adjoining lots the lower must receive the burden of storm waters discharged from the upper has no application to city lots, and the owner of such a lot may alter its surface in any manner essential to its enjoyment, though interfering with the flow of water from or onto an adjoining lot, without rendering himself liable in damages.

4. WATERS AND WATER COURSES ⟸119(2)—OWNER WITHOUT RIGHT TO ACCUMULATE WATER AND DISCHARGE IT ON LOWER ADJOINING LAND.

The owner of one of two adjoining tracts, whether in the city or in the country, has no right to erect a brick wall causing a large accumulation of storm waters discharged through vents upon the adjoining land, though such land is naturally lower, and before construction of the wall carried off the natural surface water of the other.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by J. C. C. Jaxon and Clara J. Jaxon, husband and wife, against Eben P. Clapp and Mary B. M. Clapp. From judgment for plaintiffs, defendants appeal. Affirmed.

F. G. Cruikshank and Lloyd W. Brooke, both of Pasadena, for appellants.

Willis O. Tyler, of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal by defendants from a judgment in favor of the plaintiffs by which they recovered damages for injuries to their land through the acts of the defendants.

The defendants are owners of a certain lot No. 9 in the city of Pasadena, 50 feet wide, fronting on Elevado drive, and extending back 170 feet deep, which formed a part of their residence premises. The plaintiffs are the owners of a lot of equal size, No. 10, immediately adjoining to the east, upon which was located their bungalow home. The defendants erected a brick wall 8 feet 6 inches high and approximately 8 to 12 inches in thickness along the eastern boundary of their lot. In building this wall the defendants had left 3 to 5 inch openings or weep holes every 3 feet extending along the whole

length of the wall, and several 2-inch pipe openings in the foundation of the wall through which the rain water draining naturally from lot 9 would flow onto lot 10. The plaintiffs alleged and sought to prove in their first cause of action that the defendants had so changed the grade and character of the surface of their lot as to cause the rain waters to flow upon plaintiffs' lot, but the court found that these allegations were untrue, and that the flow of rain water from defendants' lot was natural and not by reason of any change of grade or of the character of the surface soil.

The plaintiffs alleged in their second cause of action that the brick wall erected by the defendants as described above caused the water to concentrate and flow upon the plaintiffs' property with resulting damage to their bungalow. The finding of the court was:

"That said water was poured upon said lot 10 in an unusual quantity and only by and through the medium of the said openings and the said drainage tubes constructed in said wall by the said defendants, and that as a result thereof the plaintiffs were damaged, in that the waters did run through said draining tubes and openings against the western wall of the house of said plaintiffs situate on lot 10, and did run under the said house, and did damage the said house in the sum of and to the extent of $600."

Defendants contend that the evidence is insufficient to sustain the findings that any damage to the plaintiffs' house was the result of water flowing from defendants' lot in unusual quantities caused by the construction of the brick wall, or that the damage amounted to $600. A map was introduced in evidence and constantly referred to during the trial of the case, but it has not been incorporated in the transcript, and it is therefore difficult to obtain a clear idea of the evidence, but we are satisfied that the finding of the court is sustained as to the damages allowed. The testimony is not very definite, but it may be said that one of the plaintiffs and another witness testified to an amount of damage in excess of that for which recovery was given, and their testimony was not contradicted.

[1] With reference to the sufficiency of the evidence as to the cause of the damage, that, also, is not as satisfactory as might be wished for. Mrs. Jaxon testified that the storm waters flowing from defendants' lot onto their lot had caused damage each year since they had owned the property, and her husband in his testimony admitted that his property had suffered damage from flood waters at least on one occasion prior to the erection of the wall. The record also contains evidence that the rainfall which preceded the damage to plaintiffs' home for which the action was brought was unusually heavy and of an extraordinary character—the inference being that the very heavy rainfall caused the damages, and that they would have occurred even if the wall had not been erected. On the other hand, there is evidence in the record which tends to show that by reason of the wall the course of the flow of storm waters was changed so that the water, instead of flowing off the land generally and naturally, was gathered in a large pool on defendants' lot against the brick wall from which it escaped through the holes in the wall and poured onto plaintiffs' lot and against their house with great velocity, flooding the cellar and causing substantial damage. We are constrained, therefore, to hold that there is sufficient evidence to sustain the findings of the court in favor of the plaintiffs.

[2-4] We think, too, that the authorities support the conclusion reached by the court. The general rule is that where two adjacent parcels of land belong to different owners, one being lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass over the lower tract, the owner of the higher land has an easement by virtue of which storm waters from such land may be permitted to flow onto the lower tract, which latter is charged with a corresponding servitude. Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213. Conceding, however, as seems to be the case, according to the very generally adopted rule in this country, that this doctrine has no application to city lots, and that the owner of such a lot, in the exercise of proper dominion over his property, may make changes and alterations in the surface thereof essential to its enjoyment, and which might interfere with the flow of water from or onto the adjoining lot, without thereby rendering himself liable in damages to the owner thereof (Ogburn v. Connor, supra), still in the case at bar the court found that the damage complained of was not caused by any change in the grade of defendants' lot or by any alteration of its surface, but by the erection of the aforesaid wall, which caused an accumulation of storm waters in large and artificial quantities at a particular spot, and which were discharged with force and in a different form from that prevailing under natural conditions. This, we think, the dominant tenant has no right to do, whether the adjoining land be a city lot or a larger open tract. Ogburn v. Connor, supra; Wood v. Moulton, 146 Cal. 319, 80 Pac. 92.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; WOOD, Judge pro tem.

45 Cal. App. 1

AMERICAN MARINE PAINT CO. v. NYNO LINE, Inc. (Civ. 3132.)

(District Court of Appeal, First District, Division 2, California. Dec. 13, 1919. Hearing Denied by Supreme Court Feb. 9, 1920.)

1. APPEAL AND ERROR ⟸933(4) — ORDER GRANTING NEW TRIAL NOT AUTHORIZING PRESUMPTION THAT IT WAS NOT GRANTED FOR INSUFFICIENCY OF EVIDENCE.

It cannot be presumed, for the purpose of reversing an order granting a new trial, that it was not granted for insufficiency of the evidence, merely because it contains a statement that a written opinion will be filed if the case is not settled within 30 days.

2. NEW TRIAL ⟸39—GRANT ON GROUND THAT INSTRUCTIONS WERE MISLEADING AND CONFUSING NOT AN ABUSE OF DISCRETION.

It was not an abuse of discretion to grant a new trial on the ground that the instructions were misleading and confusing, where it appeared from the questions of several jurors, after they had deliberated for some time and were unable to reach a verdict, that they were confused, and had no clear idea of the law applicable to the facts.

3. APPEAL AND ERROR ⟸856(5) — ORDER GRANTING NEW TRIAL IN GENERAL TERMS WILL BE AFFIRMED, IF JUSTIFIED ON ANY GROUND.

Where an order granting a new trial is in general terms, it will be affirmed, if any ground justifying it can be found in the entire record on which it was based.

4. NEW TRIAL ⟸71—VERDICT ON CONFLICTING EVIDENCE NOT CONCLUSIVE.

On motion for a new trial, the trial court is not bound by the decision of a jury because of a conflict in the evidence.

5. APPEAL AND ERROR ⟸977(3) — ORDER GRANTING NEW TRIAL WILL NOT BE DISTURBED, EXCEPT FOR ABUSE OF DISCRETION.

The granting of a new trial rests so largely in the discretion of the trial court that it will not be disturbed, except on an unmistakable abuse.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the American Marine Paint Company against the Nyno Line, Incorporated. From an order granting a new trial, plaintiff appeals. Affirmed.

Ira S. Lillick, of San Francisco (J. Arthur Olson, of San Francisco, of counsel), for appellant.

W. G. Van Pelt and Bertin A. Weyl, both of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal from an order granting a new trial after judgment for the plaintiff in the sum of $16,250 and interest, the full amount prayed for in its complaint. The action was brought to recover commissions for the sale of a steamer owned by the defendant company. The record contains a stipulation of counsel as to certain basic facts, from which it appears that the transaction out of which the action grew was negotiated on the part of the defendant by one Will E. Keller, and upon the part of the plaintiff company by one W. C. Lacombe. The steamer was sold to and paid for by the Kerr Steamship Line of New York. It was, at the time of the sale, in a dry dock at New York. The purchase price was $325,000. The defendant agreed to pay to Mr. Lacombe, as agent for the plaintiff, 5 per cent. commission upon the sale, which would amount to $16,250.

It is claimed by the defendant that the agreement to pay 5 per cent. commission was procured by a fraudulent misrepresentation to the effect that it would be necessary for Lacombe to pay 3 per cent. to the purchasers of the vessel in order to effect the sale. We do not consider it either necessary or proper for us to discuss the evidence upon the question of misrepresentation, since it is our opinion that the order granting a new trial must be affirmed and the case must be retried. The motion for a new trial was made upon three grounds: First, insufficiency of the evidence to justify the verdict; second, that the verdict was against law; third, errors in law occurring at the trial and excepted to by the defendant. The motion was submitted to the trial court upon briefs.

[1, 2] The appellant argues that the trial court erred in granting this motion, because it appears from the order that the trial court was satisfied as to the sufficiency of the evidence to sustain the verdict. And this the appellant deduces from the inclusion in the order granting a new trial of the statement by the court:

"If within 30 days from this date the parties have not settled the case, the court will then file a written opinion herein."

We will not indulge in any speculations as to what was in the mind of the court in making this statement in the order, and most assuredly we will not presume something which would contradict the action taken by the court in granting the motion. The trial court may have concluded that the evidence was insufficient to justify the verdict, or that the instructions to the jury were misleading and confusing. The former conclusion would not be so unwarranted as to amount to an abuse of discretion under the record in this case, and the latter, also, would be justified, for it appears from the questions of several of the jurors, after they had been deliberating for a time and were unable to reach a verdict, that they were confused, and had no clear idea of the law applicable to the facts.

[3-5] The order granting a new trial was

general in its terms, and all presumptions are in its favor. The entire record upon which the order is based will be examined upon appeal, and if there be found any ground that would have justified the order, it will be affirmed. Central Trust Co. v. Stoddard, 4 Cal. App. 647, 88 Pac. 806; Morgan v. Robinson Co., 157 Cal. 348, 107 Pac. 695. The trial court is not bound by the decision of a jury because of a conflict in the evidence. In this respect its functions are different from those of an appellate court. Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911. The granting of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed, except upon an unmistakable abuse. Groppengiesser v. Lake, 103 Cal. 38, 36 Pac. 1036; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 Pac. 1019.

The order appealed from is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

45 Cal. App. 4

FARRAHER v. SUPERIOR COURT OF KERN COUNTY, DEPARTMENT 3, et al. (Civ. 3140.)

(District Court of Appeal, Second District, Division 1, California. Dec. 13, 1919.)

1. STATUTES ⟹211—TITLE MUST BE DEEMED PART OF ACT.

The title or headnote of Pen. Code, § 403, relative to the disturbance of public meetings other than religious or political, must be deemed a part of the substance of the act, and accorded the same effect as though written into the body of the law.

2. DISTURBANCE OF PUBLIC ASSEMBLAGE ⟹6—COMPLAINT INSUFFICIENT.

A complaint charging that defendant without authority of law willfully and unlawfully disturbed a certain assembly and meeting of the irrigation committee of the farm bureau of the county, which meeting was not unlawful in character, and was an assembly and meeting other than such as is mentioned in Pen. Code, §§ 58, 59, 302, not charging disturbance of a public meeting, did not state facts constituting an offense under section 403.

3. PROHIBITION ⟹3(4) — DOES NOT LIE AGAINST JUSTICE COURT PROCEEDING TO TRY ON INSUFFICIENT COMPLAINT.

Prohibition would not lie against a justice court proceeding with trial of defendant on an insufficient complaint, because, if convicted, he would have a plain, speedy, and adequate remedy by appeal to the superior court.

4. PROHIBITION ⟹5(4) — WRIT WILL LIE TO PREVENT SUPERIOR COURT TRYING CASE ON APPEAL FROM CONVICTION ON INSUFFICIENT COMPLAINT.

Prohibition lies against the superior court to prohibit trial of defendant on his appeal from conviction in a justice court of a violation of Pen. Code, § 403, relative to disturbances of public meetings, on a complaint insufficient and not sustaining conviction, because not alleging the meeting disturbed was public.

Petition for writ of prohibition by James F. Farraher against the Superior Court of Kern County, Department 3, and George H. Cabaniss, Judge thereof. Writ granted.

Edson Abel, of Taft, for petitioner.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., J. R. Dorsey, Dist. Atty., and R. B. Lambert, Deputy Dist. Atty., both of Bakersfield, for respondents.

SHAW, J. Prohibition to restrain respondent, after a ruling denying petitioner's motion to dismiss the case, from proceeding with the threatened trial of petitioner on an appeal by him to the superior court from a judgment of conviction by the justice's court, based upon a complaint which purported to charge him with the violation of section 403, Penal Code. The contention of petitioner is that the complaint fails to charge him with the commission of any acts constituting a criminal offense under said section, or under any other provision of the law.

[1] The section in question was originally adopted by the Legislature in 1872. The headline or title of the section is "Disturbance of Public Meetings, Other Than Religious or Political," and the body thereof provides:

"Every person who, without authority of law, willfully disturbs or breaks up any assembly or meeting, not unlawful in its character, other than such as is mentioned in sections 59 and 302, is guilty of a misdemeanor."

Petitioner properly insists that the title or headnote of the section must be deemed a part of the substance of the enactment, and accorded the same effect as though written into the body of the law. Bettencourt v. Sheehy, 157 Cal. 698, 109 Pac. 89; Alden v. Mayfield, 33 Cal. App. 724, 166 Pac. 382; Sharon v. Sharon, 75 Cal. 1, 16 Pac. 345; Wall Estate Co. v. Standard Box Co., 20 Cal. App. 311, 128 Pac. 1020. Hence the section of the Code must be construed as not applicable to one who disturbs an assembly or meeting, unless it further appears that such meeting or assembly was of a public character. The question, therefore, is whether or not the complaint charges defendant with such an offense.

[2] The complaint charges:

"That said James F. Farraher * * * did, without authority of law, willfully and unlawfully disturb a certain assembly and meeting, to wit, the irrigation committee of the farm bureau of the county of Kern, * * * and which said meeting was not unlawful in its character, and was an assembly and meeting other than such as is mentioned in sections 58, 59, and 302 of the Penal Code."

Our attention is directed to no provision of law defining the character of such committee meetings, and there is absolutely nothing in the complaint indicating in the remotest degree that the meeting held was a public one. Indeed, we understand the contrary is conceded. Hence, since the subject of the inhibition is the disturbance of a public meeting only, the complaint states no facts constituting an offense.

[3, 4] Notwithstanding the insufficiency of the complaint, prohibition would not lie against the justice court proceeding with the trial of the defendant thereon, for the reason that, if convicted, he would have a plain, speedy, and adequate remedy by appeal to the superior court. Code Civ. Proc. § 1103; Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765; Keith v. Recorder's Court, 9 Cal. App. 380, 99 Pac. 416. Conceding he might have gone to jail, and sought release from custody by a writ of habeas corpus, nevertheless, as was his right, he availed himself of the remedy by appeal, and, on perfecting the same, made his motion to dismiss the action for want of a sufficient complaint. Since, as we have seen, no facts constituting a criminal offense were stated therein, there was nothing upon which to try the defendant, and hence the court should have granted the motion, instead of which, however, it made an order denying it, and, as shown, threatens to and will, unless restrained by an order of this court, proceed with the trial for the purpose only of determining whether or not the judgment should be modified. It therefore appears that the judgment which the court proposes to render would be a futile act. No appeal would lie therefrom, and conceding that petitioner might, upon such conviction in the superior court, avail himself of an application for a writ of review to have the judgment annulled, or seek release from custody by habeas corpus, nevertheless no purpose could be served in subjecting petitioner to a trial, the result of which, concededly, would be a nullity. Clearly, upon the facts presented, the court should be prohibited from taking any action in the case, other than to make an order dismissing the same. Hogan v. Superior Court, 16 Cal. App. 783, 117 Pac. 947.

The demurrer interposed to the petition is overruled, and the respondent commanded to desist and refrain from further proceeding with the trial of that certain case pending in the superior court of Kern county, numbered Crim. 1841, wherein the people of the state is plaintiff and petitioner is defendant, or from taking any action therein other than to make an order granting defendant's motion for the dismissal of the same.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 120

GALLWEY v. GALBREATH. (Civ. 2917.)

(District Court of Appeal, First District, Division 1, California. Dec. 18, 1919. Rehearing Denied Jan. 16, 1920. Hearing Denied by Supreme Court Feb. 16, 1920.)

1. BROKERS ⟸63(1)—EVIDENCE WARRANTED RECOVERY FOR SERVICES.

Evidence that defendant made a written proposal to real estate brokers for an exchange of property with a third party, that the brokers procured the third party to accept the offer, and the parties ordered the titles examined and deposited their deeds in escrow and a check for the difference in values, and that defendant withdrew his deed and check, and refused to go on with the arrangement, though the third party was ready, able, and willing to make the exchange on his own terms, supported a recovery by the broker's assignee.

2. BROKERS ⟸67(2)—AGREEMENT FOR DOUBLE COMMISSIONS DOES NOT PREVENT RECOVERY WHEN KNOWN TO DEFENDANT.

That real estate brokers were to receive a commission from each party to an exchange of land did not prevent recovery from one of the parties, who refused to go on with the exchange, where it did not appear that he did not know that they were to receive double commissions.

3. APPEAL AND ERROR ⟸173(2)—OBJECTIONS TO RECOVERY NOT URGED BELOW NOT AVAILABLE.

Objections that real estate brokers suing for commissions were to receive a commission from each party, and that one of the terms of defendant's offer to exchange land was not accepted by the other party, were not available on appeal, where they were not urged below, and the case was not tried on such theories.

4. BROKERS ⟸57(2)—DEFENDANT WAIVED REQUIREMENT OF OFFER WHICH OTHER PARTY DID NOT ACCEPT AS MADE.

A requirement of defendant's offer to exchange lands, made to brokers, that the other party should assume a mortgage, was waived, where the other party only agreed to take the property subject to the mortgage, but defendant made no objection to the form of acceptance, and in depositing his deed in escrow did not condition delivery on compliance with such requirement.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by K. Gallwey against A. J. Galbreath. From a judgment for plaintiff, defendant appeals. Affirmed.

A. Caminetti, Jr., and H. F. Shaw, both of San Francisco, for appellant.

Gerald C. Halsey, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from a judgment in favor of plaintiff for services rendered by his assignor as a broker upon the exchange of certain real property. Plain-

tiff had judgment below, and defendant appeals.

[1] It is first claimed that the evidence is insufficient to support the findings and judgment. We see no merit in this contention. It appears from the evidence that defendant delivered to J. W. Wright & Co., a corporation engaged in the real estate business, a written proposal for the exchange of certain real property controlled by him for certain other property owned by one Dawson Company. The properties were of different values, and were both subject to incumbrances. By the terms of defendant's proposal he agreed to pay as an additional consideration for said exchange the sum of $10,000. This sum was to be partly made up from amounts due defendant upon certain warrants for fire insurance by reason of a fire loss on the property he sought to exchange. The evidence further shows that the Dawson Company was procured by Wright & Co., and that it accepted defendant's offer, and that the respective parties thereafter ordered the titles examined, and caused to be prepared by Wright & Co. a statement prorating the interest, taxes, and water rates, with a view of consummating the exchange within the time limited by agreement. It is also in evidence that the Dawson Company placed in escrow its deed with the title company, and that defendant did likewise, and in addition thereto deposited his check for the amount found to be due from him to the Dawson Company, as represented by the prepared statement. Thereafter defendant withdrew his deed and check and refused to go on with the arrangement. It also appears that the Dawson Company was always ready, able, and willing to make the exchange upon defendant's own terms. The evidence, therefore, in this respect supports the judgment.

[2, 3] Further grounds are urged by appellant for a reversal. It is claimed first, that defendant's proposal of exchange required the Dawson Company to assume the mortgage on the Galbreath property, and that the evidence failed to show that it had consented to this requirement, but that, on the contrary, it had only agreed to take the property subject to the mortgage. It is also claimed that, as it appears from the evidence that Wright & Co. were to receive a commission from both parties, this fact prevents a recovery on the part of plaintiff. There is no evidence in the record to show that defendant did not know that Wright & Co. were to receive double commissions. Besides this, neither one of these objections was urged in the court below, and the case was not tried on either of these theories.

[4] With reference to the first objection, it further appears that defendant made no objection at any time to the form of acceptance by the Dawson Company, and his instructions to the title company concerning the delivery of his deed and check contained no such conditions. Defendant's acts show a waiver of this requirement.

The evidence, as a whole, shows that defendant was desirous of avoiding his contract, and arbitrarily did so. Plaintiff's assignor, having produced a customer ready, able, and willing to consummate the exchange, was entitled to his commission.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 229

MORGAN et al. v. SOUTHERN PAC. CO.

(Civ. 3106.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1919. Hearing Denied by Supreme Court Feb. 19, 1920.)

1. CARRIERS ⊂=316(5) — PRIMA FACIE PRESUMPTION OF NEGLIGENCE FROM INJURY TO PASSENGER BY DERAILMENT.

When a passenger is injured by derailment of a train, the fact of such an accident raises a prima facie presumption of negligence, which the railroad has the burden to overcome by clear proof that the accident could not have been avoided by the utmost practical care and diligence, and that it proceeded from something against which no human foresight could have provided.

2. CARRIERS ⊂=291—PURCHASE OF RAIL FROM COMPETENT MANUFACTURER DOES NOT RELIEVE CARRIER FROM LIABILITY FOR DEFECT.

A railroad was not excused from exercising the utmost care and diligence for the safety of passengers to discover defects in a rail by the fact that the rail was constructed by a competent and skilled manufacturer, from whom it was purchased; the manufacturer having been the road's agent or servant in rolling the rail, for whose want of care it was responsible.

3. CARRIERS ⊂=291—RESPONSIBILITY OF CARRIER OF PASSENGERS FOR DEFECTS IN RAIL.

A common carrier is responsible for defects in a rail causing derailment injuring a passenger which, even though not discoverable after the rail came into its possession, could have been discovered by the most careful and thorough examination during manufacture.

4. CARRIERS ⊂=320(12)—MATTERS OPEN TO JURY'S CONSIDERATION IN DETERMINING NEGLIGENCE IN USE OF RAIL WHICH BROKE.

In an action for injuries to a railroad passenger through breaking of a rail causing derailment, the fact that the train was late and running very fast, that the accident happened at a curve, the great length of time the broken rail had been in use, etc., were matters open for the consideration of the jury on the issue of the railroad's negligence in using a rail with a latent defect.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. CARRIERS ⊂=316(5)—PROOF OF INJURY TO PASSENGER BY DERAILMENT WARRANTS INFERENCE OF NEGLIGENCE UNDER RES IPSA LOQUITUR RULE.

Under the doctrine of res ipsa loquitur, proof that injury to a railroad's passenger was caused by derailment of the train, under the control and management of the railroad, warranted the inference of negligence on its part without further showing by plaintiff passenger and her husband; the burden then devolving on the road to show it was not guilty of negligence for which it could be charged.

6. TRIAL ⊂=343 — VERDICT FOR PLAINTIFFS IMPLIES FINDING AGAINST RAILROAD ON ISSUE OF NEGLIGENCE.

In an action against a railroad for injuries to plaintiff wife in a derailment accident, verdict of the jury for plaintiff wife and husband implied finding against defendant railroad on the issue of its negligence under the res ipsa loquitur rule.

7. DAMAGES ⊂=130(1) — $3,100 VERDICT FOR PERSONAL INJURY NOT EXCESSIVE.

$3,100 verdict in favor of plaintiff wife and husband for injuries to the wife in a derailment accident *held* not excessive; there being evidence to support plaintiffs' claim as to the nature and extent of the wife's injuries, nothing to indicate the verdict was the result of passion or prejudice of the jury, and it not being grossly disproportionate to any reasonable limit of compensation.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Margaret Horton Morgan and others against the Southern Pacific Company. From judgment for plaintiffs defendant appeals. Affirmed.

Henry T. Gage, of Los Angeles, for appellant.

Valentine & Newby, of Los Angeles, for respondents.

WASTE, P. J. Plaintiffs, wife and husband, brought this action for the recovery of damages for injuries received by the wife through derailment of a car being operated by defendant on its main line in Arizona, while she was a passenger thereon. All the allegations of plaintiffs with relation to the negligence of the defendant and the injuries to Mrs. Morgan were denied by the defendant. For a further answer and defense, it alleged that the derailment of the train was caused by a break in the track, through no carelessness or negligence of itself or any of its servants, but resulted from latent defects in the rail not discoverable by usual and ordinary inspection and examination. Defendant asked for a directed verdict, which was refused. The jury found in favor of the plaintiffs for $3,100. A motion for a new trial made by defendant was denied, and this appeal is from the judgment entered on the verdict in plaintiffs' favor.

The train on which the injured plaintiff was riding was running westerly from Yuma to Los Angeles. At the time of the accident it was late, and, according to one witness, "running very fast." The derailment took place on a "two degree," or what is commonly called in railroad parlance a very easy, curve. The engine and some of the cars remained on the track, while the diner, two Pullmans, and the observation car were derailed and turned over on the outer side of the curve. Having shown these facts and established a prima facie case by showing that the injury to Mrs. Morgan occurred while she was being carried as a passenger by defendant, through the use by it of an instrumentality under its control, plaintiffs rested their case.

Defendant thereupon introduced evidence showing that an inspection of the scene of the accident by the division engineer of the defendant and others disclosed a broken rail at that point, which, in the opinion of these witnesses, caused the derailment of the train. The division engineer testified that the rail broke because of an initial weakness, or latent defect, in its manufacture, caused by permitting slag to be rolled into the steel, producing what is technically called a "piped rail," or one having a concealed hole or hollow space in its interior. A break of that kind, the same witness testified, is not discoverable by the usual and ordinary means of track inspection and examination conducted by the defendant, for the reason that the defect is entirely within the metal, with no visible indication on the surface to show it and nothing by which the impending failure of the rail may be foreseen before an accident occurs. Such defects usually develop in the ball, or top portion, of the rail, which falls, or sags, at that point. This sagging causes no sound as the wheels pass over it and can only be detected by sight and observation. The crest of the rail, not being touched and correspondingly worn with the rest of the bearing surface by the passage of car wheels, develops an elliptical discoloration, which, to the trained observer, gives notice of the presence of the defect.

In support of its contention that the ordinary means of examination and inspection of the roadbed were used, defendant showed that Casey, the section foreman, made an inspection of the track where the accident occurred on Thursday, two days before the wreck. He made his inspection while riding on the front of a motorcar and seated about 4½ feet above the rail. Kelleher, foreman of an adjoining section, testified that the broken rail caused the derailment because of the curve. He passed over the track ten or twelve hours before the accident on a velocipede car, and later walked back over that part where the wreck occurred, pushing his velocipede before him, and looking for and repairing some broken bondwires of the sig-

nal system. He testified that he examined the track and did not see anything wrong with it. About six months before the accident he had replaced the ties on that section of the road, relined and gaged the track, and had not discovered any defect in the rail at that time. Brown, roadmaster of the defendant, passed over the track about three days before the wreck occurred, giving it the "usual method of track inspection," which, he testified, was to go over the line on a motorcar, seated about a foot and a half above the rails. Mathews, division engineer of the company, also testified that he inspected the track about ten days before the wreck, making the examination, he thought, from the rear end of a train which was going in the neighborhood of 30 miles an hour. The discoloration of the rail caused by the sagging, so he testified, could be observed in thus passing over the track.

The fractured rail was a Carnegie rail, weighing 75 pounds per yard, purchased in 1899 from the Edgar Thompson mills, which was stipulated to be a reputable house engaged in the manufacture of steel rails. At the time of the accident it had been laid and in use for 17 years on the main line of defendant as the outside rail on 2 per cent. curve. Parts of the broken rail were brought into court and exhibited to the jurors.

On cross-examination of defendant's witnesses, plaintiffs developed the fact that the tendency in railroad practice, in recent years, had been to increase the size of rails used in main line construction to as high as 120 pounds to the yard; that, having gone to a point where the best results were not obtained, during the last 15 years it has been considered the best practice to have 90-pound rails; that the gross weight of the engines in use by defendant has increased, but the wheel loads have not materially grown. The division engineer of defendant also testified that "several broken rails a month" occurred on his division, and that "piped rails" were a very frequent occurrence; that as soon as detected they were taken up and replaced.

[1] When a passenger is injured by the derailment of a train, the fact of such an accident raises a prima facie presumption of negligence, which the railway company has the burden of overcoming by clear and explicit proof that the accident could not have been avoided by the utmost practical care and diligence, and that it proceeded from something against which no human prudence or foresight, on the part of the company, could provide. 3 Thompson on Negligence (2d Ed.) pars. 2909, 2910; Fairchild v. California Stage Co., 13 Cal. 599, 604; McCurrie v. Southern Pacific Co., 122 Cal. 558, 561, 55 Pac. 324. That such is the law is admitted by the appellant. Upon the state of the evidence, however, it claims exoneration in the instant case. It relies first upon the stipulated fact that it purchased the rail forming part of its track from a manufacturer of reputation, and, second, that after employing all reasonable care and skill for the purpose of detecting any weakness in the rail, the defect which was the cause of the accident remained undisclosed, and, in fact, could not be discovered by means of the examination which the defendant made.

[2] The precise question we are here confronted with was elaborately considered by the Supreme Court of this state in Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. So completely is the matter there discussed, and so thoroughly are the authorities examined and quoted from, that the decision may be said to be the leading case in California upon the subject. It was there said (80 Cal. 588, 22 Pac. 270, 5 L. R. A. 498, 13 Am. St. Rep. 175):

"The doctrine of the American courts is still more strict and explicit, and the general current of the authorities is that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest, neglect; holding their undertaking to be to carry their passengers with safety as far as human care and foresight can go."

It is settled by that decision, and seems to be well-established by the cases therein examined and cited, that appellant was not excused from the degree of care and diligence pointed out, by the fact that the rail in use was constructed by a competent and skilled manufacturer, from whom it purchased it. The manufacturer was its agent or servant in the rolling of the rail, and it is responsible for any want of care of the maker. The obligations of care and foresight rested upon the defendant using the rail, and it cannot shift it from itself to another person. Whether the rail was manufactured in the workshop of defendant by agents employed for the purpose, or by a manufacturer engaged in the business of supplying such articles for sale, defendant was bound to see that in its making no care or skill was omitted.

"When such care and skill has been exercised, the defendants' duty, in this respect, has been discharged. If, on the other hand, a defect exist in the construction which might have been detected and remedied, they are answerable for the consequences." Hegeman v. Western R. R. Corp., 16 Barb. (N. Y.) 353, 356, cited approvingly in Treadwell v. Whittier, supra, 80 Cal. 597, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175.

[3] Following the Treadwell Case, the Supreme Court has steadfastly adhered to the doctrine there laid down that in this state a common carrier is responsible for defects which, even though not discoverable after the instrumentality came into its possession, could have been discovered by the most careful and thorough examination during the process of manufacture. Siemsen v. Oakland S.

L. & H. Ry., 134 Cal. 494, 499, 66 Pac. 672; Jacobi v. Builders' Realty Co., 174 Cal. 708, 710, 164 Pac. 394, L. R. A. 1917E, 696; Treadwell v. Whittier, supra, 80 Cal. p. 594 et seq., 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. In view of the above rule, so strongly drawn in this state, we feel that the lower court could not say, as matter of law, that the defendant had successfully met the burden imposed upon it by plaintiffs' prima facie case. Defendant's only witness as to the latent defect and its cause never had any practical experience in the manufacture of or science of making rails. So far as the record discloses he was never in any way connected with such work. There was no evidence as to the processes or care employed in the rolling mills to eliminate slag from rails, or as to tests, or of examination in their manufacture. The effect of the evidence, as we view it, is that, after the rail was made and purchased by defendant, such defects in its inner fabric are not discoverable, cannot be, and, as matter of fact, in the instant case, were not, disclosed by "the usual and ordinary" methods of inspection pursued by defendant.

[4, 5] As before stated, the broken portions of the rail were submitted to jurors. They may not have been satisfied with the theory of the expert, as against the result of their own inspection and examination. As was pointed out in Siemsen v. Oakland S. L. & H. Ry. supra, and its companion case, Johnsen v. Oakland, etc., Ry., 127 Cal. 608, 60 Pac. 170, the jury may have considered other circumstances attending the accident which, in their judgment, entered into a consideration of the case. The fact that the train was late and running very fast, the happening of the accident at a curve, the great length of time the broken rail had been in use, its weight, its texture and physical qualities appearing from the inspection, the credibility of the witnesses, and the probability of the correctness of the theories advanced by defendant as to the cause of the accident, were all proper matters for the consideration of the jury in arriving at a verdict. Under the doctrine of res ipsa loquitur, proof that the injury to Mrs. Morgan was caused by the derailment of the train, which was under the control and management of defendant, warranted the inference of negligence on the part of defendant without further showing on the part of the plaintiffs. Shearman & Redfield on Negligence (6th Ed.) § 516. The burden then devolved upon the defendant to show that it was not guilty of negligence for which it could be charged. Treadwell v. Whittier, supra, 80 Cal. 582, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. In the case of Sweeney v. Erving, 228 U. S. 233, 240, 33 Sup. Ct. 416, 418 (57 L. Ed. 815, Ann. Cas. 1914D, 905), the United States Supreme Court said:

"In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."

[6] The verdict of the jury in the instant case implies a finding against defendant. Worden v. Central Fireproof Building Co., 172 Cal. 94, 96, 155 Pac. 839.

[7] Appellant assails the verdict upon the ground that it is excessive. There is ample evidence, if believed, to support the claim of plaintiffs as to the nature and extent of Mrs. Morgan's injuries. There is nothing in the record to indicate that the verdict was the result of passion or prejudice on the part of the jury. It is not grossly disproportionate to any reasonable limit of compensation warranted by the facts in the case, and the trial court was correct in refusing to set it aside. Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 Pac. 513; Bond v. United Railroads, 159 Cal. 270, 286, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 164, 47 Pac. 1019.

The rulings of the lower court here assailed were correct. The motion for a new trial was properly denied.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

45 Cal. App. 233

CALIFORNIA PACKING CORPORATION v. EMIRZIAN. (Civ. 3046.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1919.)

1. VENDOR AND PURCHASER ⊂=219—EVIDENCE SHOWING NO ASSUMPTION BY PURCHASER OF SELLERS' CONTRACT TO DELIVER FRUIT.

Evidence *held* to sustain finding that defendant purchaser of land did not assume to carry out the sellers' contract to deliver fruit growing thereon to plaintiff's assignor.

2. REFORMATION OF INSTRUMENTS ⊂=11—REMEDY IN CASE OF ACCIDENTAL OMISSION FROM CONTRACT.

If a contract for the sale of land accidentally had omitted to bind the buyer to the fulfillment of the sellers' contract to deliver growing fruit to plaintiff's assignor, plaintiff's proper remedy would have been to seek reformation in equity.

3. FRAUDS, STATUTE OF ⊂=44(4)—CONTRACT TO DELIVER FRUIT NOT TO BE PERFORMED WITHIN A YEAR.

A contract for sale and delivery of fruit, not to be performed within a year, must be in writing, as within the statute of frauds.

4. NOVATION ⊂=7—BURDEN ON PLAINTIFF TO SHOW NECESSARY MEETING OF MINDS.

To establish a novation, plaintiff must show a meeting of the minds, effecting a substitution of the new party for the original party to the contract.

5. ASSIGNMENTS ⊂=48—EQUITABLE ASSIGNMENT OF CONTRACT THROUGH ACCEPTANCE OF BENEFITS NOT EFFECTED BY ACTION UNDER ANOTHER CONTRACT.

Where the buyer of land did not deliver fruit under his sellers' contract with plaintiff's assignor, but under his own contract with a third person, he did not voluntarily accept the benefits of the contract between his sellers and plaintiff's assignor, so as to effect an equitable assignment of the contract, binding upon him under Civ. Code, § 1589.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the California Packing Corporation against Charles Emirzian. From judgment for defendant for costs, and from an order granting plaintiff new trial, plaintiff and defendant appeal. Order granting new trial reversed, and original judgment affirmed.

Short & Sutherand, of Fresno, for appellant.

L. L. Cory, of Fresno, for respondent.

BEASLY, Presiding Judge pro tem. On April 9, 1913, Pettit & Wilson, a copartnership, contracted in writing to sell and deliver to Griffin & Skelley Company the crops of peaches to be grown during the seasons of 1913 to 1917, inclusive, upon certain lands owned by the partnership. In 1916, Pettit & Wilson entered into an executory agreement for the sale of the land to the defendant, pursuant to which defendant has ever since been in possession of and farming the land.

This action grows out of that transaction, and it is alleged in the complaint that the Griffin & Skelley Company assigned the above-mentioned contract to the plaintiff. The defendant delivered the fruit from the land to the plaintiff for the season of 1916, but failed and refused to deliver it during 1917. The action is for damages for this failure to deliver the crop in that year. The defendant had judgment for his costs.

[1] The plaintiff was granted a new trial upon the sole ground that the court had failed to find upon the issue of the assignment of the fruit contract above mentioned, from Griffin & Skelley Company to the plaintiff. Both parties appeal from the judgment. Defendant desires the order granting a new trial reviewed upon the ground that the issue as to the assignment of the contract was, in view of certain other findings of the court, immaterial. The plaintiff was not satisfied with the order granting the new trial, because it was granted upon the single ground above set forth. The questions raised by the parties are entangled; and, while the appeals might, we think, be disposed of on technical grounds, we are inclined to decide all questions raised; and we are the more disposed to this course because of the manner in which the views of counsel are presented. First, then, we will consider the contentions of plaintiff. The trial court found that defendant did not, at any time or at all, assume or agree to perform the contract of Pettit & Wilson with the Griffin & Skelley Company to deliver the fruit, and that the delivery of the 1916 crop was not made pursuant to the terms of that contract. The plaintiff insists that this finding is against the evidence, and conflicts with another finding which its counsel contends is inferentially at least upon the same point of fact. The other finding, with which it is asserted the foregoing finding conflicts, is briefly this: That prior to the execution of the contract for the sale by Pettit & Wilson to the defendant of the land upon which the fruit was to be produced Wilson "at defendant's request asked the manager of Griffin & Skelley Company by telephone if the company would accept the peaches grown upon said land from defendant," and that the manager stated to Wilson that he would do so. We do not think these findings necessarily conflict with each other. They may both very well be true. The conversation above set forth between Wilson and Griffin & Skelley Company's manager, although had at Emirzian's request, may have had no other purpose than to seek information. It would take something more definite than this conversation to make a binding agreement on Emirzian's part to assume and perform the contract between Pettit & Wilson and Griffin & Skelley Company, and the court's finding that Emirzian did not assume the performance of the contract to deliver the fruit was illuminated further by the testimony of Wilson and that of Emirzian himself. Wilson testified that Emirzian requested of him to call upon Rowan, Griffin & Skelley's agent, and ask him if Emirzian could deliver the peaches under the contract. Rowan, on being called and asked if he wanted the peaches, said he did. Wilson told Rowan that Pettit & Wilson were selling out, and asked if he needed a new contract and Rowan said, "No; let him deliver under our

contract." When this was repeated to Emirzian, Wilson did not remember what he said, or if he made any reply at all. Emirzian testified that he knew Pettit & Wilson had a contract with Griffin & Skelley Company; that he did not know the price for the peaches provided in this contract; and that Wilson telephoned to Rowan, but he, Emirzian, did not know what Rowan said. On being afterwards advised by Pettit & Wilson to sell to Griffin & Skelley Company, Emirzian testified that he said he would see Rowan, but, instead, he saw Goree, another agent of Griffin & Skelley Company, or whom Emirzian assumed so to be, and the latter, so Emirzian testified, agreed to give him $22.50 and $27.50 for his peaches, of which there were two varieties. Emirzian, as has been said, delivered the 1916 crop of peaches to Griffin & Skelley Company, as he supposed, under the assumption that he would be so paid, pursuant to the conversation with Goree, and when he came to settle Griffin & Skelley Company told him he was delivering under the Pettit & Wilson contract, and paid him at the rate therein provided. This was $120 short of Goree's price for the crop, and Emirzian pocketed his loss, and did not sue for the difference because he thought it was too small to be fought over. He claimed that this settlement was his first information that any one claimed he was bound to deliver under the Pettit & Wilson contract. In 1917 he sold his peaches elsewhere. The statement of the evidence is sufficient answer to plaintiff's contention on the point of the assumption by Emirzian of the obligation of Pettit & Wilson to deliver the peaches under the contract. The court found that Emirzian did not so assume to carry out Pettit & Wilson's contract to deliver the fruit as above set forth to Griffin & Skelley Company, and the finding is sustained by this evidence.

[2] But there is more to be said on this point. Pettit & Wilson and Emirzian were making a deal, in connection with this land and the crops thereon, which involved the sum of about $50,000. The executory contract of sale was drawn, as it shows, with great care and circumspection and evidently by a thoughtful and prudent lawyer. Two other fruit contracts outstanding, by which Pettit & Wilson agreed to deliver certain other fruits than the peaches, were carefully mentioned in this contract. Emirzian assumed to carry out the provisions of these two other fruit contracts by which Pettit & Wilson were bound. On the other hand, this contract with Griffin & Skelley, while Emirzian knew of its existence, was not mentioned at all in the executory contract for the sale of the land. It seems obvious from this that the parties carefully avoided binding Emirzian to the fulfillment of the Griffin & Skelley Company contract. That such an omission should be accidental is hardly to be assumed at this stage of the case, and, if it was accidental, the proper remedy for the plaintiff was to have sought a reformation of the contract.

[3] Of course, the finding that Emirzian did not assume to carry out the fruit contract, between Pettit & Wilson and Griffin & Skelley is decisive of this case on the point of any contract at all on his part to deliver the fruit, for if the plaintiff must rest on an independent contract, that is, a contract independent of that existing between Pettit & Wilson and Griffin & Skelley Company, such an independent contract must be in writing, for by its terms it was not to be performed within one year, and so is obnoxious to the statute of frauds. There is no such contract here.

[4] Nor can we from the findings and the evidence deduce a novation. The findings are sufficiently broad to negative the idea of a novation. To establish a novation the plaintiff must show a meeting of the minds, effecting a substitution of the new party for the original party to the contract, and no meeting of minds to this effect is apparent from the evidence in this case.

[5] And we are equally unable to agree with plaintiff that there was an equitable assignment of the contract binding upon the defendant. It is contended in this behalf that Pettit & Wilson in effect turned over the contract verbally to Emirzian, and that he accepted its benefits during the year 1916, and cannot be heard to say that he was not bound to assume what are called its burdens, namely, the delivery of the 1917 crop. But the evidence must be construed as the trial court evidently understood it, namely, that Emirzian did not accept the benefits in 1916. According to his testimony, which the trial court evidently credited, he did not deliver in 1916 under the contract at all, but under his contract with Goree. This was not a voluntary acceptance of the benefits of the contract between Pettit & Wilson and Griffin & Skelley Company, such as is necessary to support an equitable assignment. Civ. Code, § 1589.

From the foregoing considerations it is evident that the finding upon the allegation of the assignment of the contract by Griffin & Skelley to the plaintiff is in no sense material to the decision of this case. This assignment must not be confused with the equitable assignment above mentioned. There being no contract or agreement binding Emirzian to deliver the fruit in controversy, any finding that Griffin & Skelley Company had assigned their contract with Pettit & Wilson to the plaintiff could not avail to change the result of this case.

The order granting a new trial on account of failure to find upon the allegation of the assignment of the contract by Griffin & Skel-

ley Company to the plaintiff was therefore improper, and is reversed; the original judgment must be affirmed. It is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

45 Cal. App. 91

McPHERSON v. GREAT WESTERN MILLING CO. (Civ. 3144.)

(District Court of Appeal, Second District, Division 1, California. Dec. 17, 1919.)

1. PARTNERSHIP ⟸9(1) — NOT CREATED BY AGREEMENT TO SHARE PROFITS.

Where plaintiff, an employé of defendant, contracted to render services and furnish teams and trucks for percentage of profits, but the contract provided that he should not be a partner, nor have any interest in assets of the business, there was no partnership; and, where defendant wrongfully appropriated plaintiff's trucks and animals, plaintiff may sue in claim and delivery, and need not proceed for an accounting, as in the case of partnership; it appearing that plaintiff executed bill of sale of the trucks, etc., in favor of defendant by way of pledge to secure performance of his contract.

2. PLEDGES ⟸36—DEFENDANT IN CLAIM AND DELIVERY, DESIRING AN ACCOUNTING, MUST PLEAD NECESSITY.

Where plaintiff sued in claim and delivery for property pledged as security, alleging payment and that nothing was due, and defendant contented itself with a general denial, defendant cannot assert the necessity of an accounting, and, if desiring an accounting, must set up the facts rendering the same necessary.

3. ABATEMENT AND REVIVAL ⟸8(2) — PENDENCY OF ASSUMPSIT TO RECOVER MONEY NOT BAR TO ACTION IN CLAIM AND DELIVERY.

Where plaintiff agreed to render services and furnish defendant with trucks and animals, all hauling, etc., for a percentage of the profits, and executed a bill of sale of the trucks, etc., to secure performance, *held* that, where defendant wrongfully appropriated the trucks, etc., the pendency of an action of assumpsit to recover the amount which plaintiff claimed was due him will not bar an action of claim and delivery to recover the trucks, etc.

Appeal from Superior Court, Orange County; W. H. Thomas, Judge.

Action by S. E. McPherson against the Great Western Milling Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Albert M. Norton and Chas. Greenberg, both of Los Angeles, and H. G. Ames, of Anaheim, for appellant.

F. C. Drumm, of Orange, and H. C. Head, of Santa Ana, for respondent.

SHAW, J. In this action for claim and delivery for certain personal property, a judgment was entered in favor of plaintiff, from which defendant appeals.

It appears that defendant was the owner of a mercantile business under the name of the Orange County Supply Company, and on June 21, 1915, it entered into a written agreement with plaintiff, by the terms of which it was provided that plaintiff should, in addition to his services as manager of the enterprise, furnish the live stock, wagons, trucks, and equipment with feed and oil, the use of which was required in conducting the business, and as full compensation therefor, including his services, he should receive one-half of the net proceeds derived from the business, subject to the termination of the contract at any time by defendant; it being further expressly provided that he was not a copartner and had no interest whatever in the assets of the business of which defendant was declared to be the sole proprietor. The contract also provided that plaintiff should execute a bond to defendant in the penal sum of $2,500.

The subject of the action was five head of horses, two wagons, two sets of harness, and one set of wagon scales, all of which, except the last-mentioned chattel, were, as alleged in the complaint, made the subject of a bill of sale executed by plaintiff to defendant on July 1, 1915, in lieu of and instead of the bond, provision for which was made in the contract.

In accordance with the allegations of the complaint, the court found that the transfer of title to the property was in pledge to secure any indebtedness of plaintiff to defendant, and rising out of the former's conduct of the business; that on December 31, 1915, the relation existing between the parties under said contract was terminated; that plaintiff at all times was in possession of the property until about January 14, 1916, when defendant wrongfully took possession of the same; that at said time plaintiff was not indebted to defendant in any sum whatsoever. No attack is made upon these and other findings, which clearly support the judgment.

[1, 2] Conceding, if nothing was due from plaintiff to defendant, the latter's act in taking the chattels was wrongful, appellant's sole contention is that the business relations of the parties was in the nature of a copartnership, in that it was a joint adventure, and hence the action should have been one for an accounting, instead of in claim and delivery, citing Dukes v. Kellogg, 127 Cal. 563, 60 Pac. 44. The relationship of the parties was not that of a partnership. Not only is such theory excluded by the express language of the contract, but under the terms thereof plaintiff had no interest in the business nor its assets; nor could he be held liable by the creditors of the corporation for anything whatsoever. He was merely defendant's em-

ployé, whose compensation was one-half of the net proceeds derived from the business. In 1 Cyc. p. 407, it is said:

"Under a contract whereby a person is to have a share in the profits of a transaction, whether his remedy may be assumpsit or must be account depends upon whether he had any property in the chattels, and so in the specific money for which they are sold, or whether the form of contract is only a mode of determining compensation for labor. In the latter case the remedy is by an action of assumpsit."

Nevertheless the nature of a transaction, as shown by the pleadings, may be such that, in ascertaining whether or not anything is due, there must be an inquiry in the nature of an accounting. Butler v. Union Trust Co. (Sup.) 172 Pac. 601. Where, as here, however, a plaintiff sues in claim and delivery for property pledged as security for an indebtedness, alleging that it has been paid or that nothing is due thereon, and defendant contents himself with a mere denial thereof, he is in no position to assert that an accounting should be had as a condition of plaintiff's right to recover the chattels. If an accounting, other than such as was incidental and necessary to a determination of the issue as to the alleged indebtedness, was deemed necessary by defendant, then it should, in its answer, have set up the facts upon which a demand therefor should have been based. Notwithstanding the clear-cut issue joined, the defendant was entitled to produce any evidence tending to controvert plaintiff's allegation. Walsh v. McKeen, 75 Cal. 522, 17 Pac. 673. Having this right and in the absence of any showing that it was precluded from introducing such evidence, we must assume the inquiry to have been sufficiently broad to justify the court in the conclusion reached.

[3] In its answer defendant alleged the pendency of another action for an accounting of the affairs of said parties growing out of their relations created by the contract. For what purpose this allegation was inserted in the answer is not made to appear. However, it was permitted to introduce a copy of the complaint in an action brought by plaintiff against defendant to recover the sum of $1,327.32, alleged to be due him in part as his share of the net profits of the business. Even if the pendency of the suit as alleged constituted a defense to the action, the proof offered wholly failed to sustain the allegation, since it appears from the complaint offered in evidence the action therein was not for an accounting, but in assumpsit to recover money alleged to be due plaintiff from defendant.

In our opinion, the relation between the parties did not constitute a copartnership. Nor, as a condition of maintaining the action, are any facts stated in the pleadings requiring, as in the case of a partnership, an accounting other than that which the court made in determining the issue as to indebtedness.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 618

LANG et al. v. PACIFIC BREWING & MALTING CO. (Civ. 2901; S. F. 8948.)

(District Court of Appeal, First District, Division 1, California. Dec. 5, 1919. Opinion of Supreme Court, in Bank, Denying Hearing Feb. 3, 1920.)

1. LANDLORD AND TENANT ⟸37 — LEASE SHOULD BE CONSTRUED ACCORDING TO TERMS AS WHOLE.

The scope, purpose, and effect of a lease must, under Civ. Code, § 1641, be determined from a consideration of it as a whole, rather than by resort to any individual clause.

2. LANDLORD AND TENANT ⟸37 — LEASE SHOULD BE CONSTRUED SO AS TO RENDER ALL ITS CLAUSES CONSISTENT.

Such construction should be placed on a lease as to render all its clauses harmonious and consistent.

3. LANDLORD AND TENANT ⟸37—CONSTRUCTION OF LEASE TO CONFORM TO INTENTION OF THE PARTIES.

Under Civ. Code, § 1643, a lease, having been construed to give effect to all its terms, should be given such an interpretation as will make it effective in conformity with intention of parties.

4. LANDLORD AND TENANT ⟸37—CONSTRUCTION OF LEASE IN ACCORDANCE WITH INTENT OF PARTIES.

Under Civ. Code, § 1649, if the terms of a lease are in any way ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it.

5. LANDLORD AND TENANT ⟸40—CONSTRUCTION IN LIGHT OF AGREEMENT OUT OF WHICH LEASE AROSE.

If necessary for a full understanding of its terms, a lease should be read in the light of a previous agreement under which it arose, in order, if practicable, to give effect to the agreement of the parties.

6. LANDLORD AND TENANT ⟸37—WORDS IN LEASE SHOULD BE CONSTRUED TO MAKE SENSE AND REASON.

Under Civ. Code, § 1644, words and sentences in a lease should be construed to make sense and reason.

7. EVIDENCE ⟸461(1) — INTENT MAY BE SHOWN BY PAROL IN CONSTRUING LEASE.

In construing a lease in accordance with sections of the Civil Code relating to the construction and interpretation of contracts, parol

evidence is admissible, for it is only upon the introduction of such evidence as to the intent of the parties, etc., that the principles of law embodied in those sections can be applied.

8. REFORMATION OF INSTRUMENTS ⊂=45(9)—EVIDENCE HELD TO SHOW THAT PARTIES CONTEMPLATED AN ARRANGEMENT BY WHICH DEFENDANT SHOULD OCCUPY THE PREMISES FOR A PERIOD OF TEN YEARS.

In an action for the reformation of a lease and to recover damages for breach, evidence held to show that parties contemplated defendant should occupy the premises for a full term of 10 years.

9. CORPORATIONS ⊂=426(10) — RATIFICATION OF AUTHORITY OF AGENT.

Where a corporation asserted that one who negotiated the lease was not its agent, and that it was not bound by his contract, corporation, having executed the lease and enjoyed its benefits for many years, must be deemed to have ratified the agent's acts, if unauthorized, and cannot thereafter repudiate.

10. LANDLORD AND TENANT ⊂=72 — LEASE HELD TO CONTINUE FOR TEN YEARS; "EXTENDED."

Where a lease provided that it was for the term of 10 years, commencing on the 1st day of August, 1907, and further provided that in event the lessor, who was to construct a building, should be unable to deliver possession at the time agreed, the lease should not be voidable, nor should the lessee be liable for rent until possession was delivered, but the terms of the lease should be "extended," the lease contemplated a full term of 10 years after delivery of possession, notwithstanding use of the plural word "terms"; the word "extended" meaning stretched, spread, or drawn out.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Extend.]

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Leonhard Lang and another against the Pacific Brewing & Malting Company. From a judgment for defendant, plaintiffs appeal. Reversed.

F. J. Castelhun, of San Francisco, for appellants.

Harding & Monroe, of San Francisco, for respondent.

WASTE, P. J. Appellants brought this action to reform a lease of real property, and for damages for its alleged breach. Defendant had judgment, and plaintiffs appeal.

In 1907, the Tacoma Bottling Company, of which George Alpers was president, was dealing with the defendant, and buying its product. Being desirous of a wider outlet for his company's goods, Alpers negotiated with plaintiffs for a lease of the property in question, in behalf of one of his customers, Faktor. He represented to the defendant, in substance, that the lease could be obtained if the defendant would guarantee its performance, to which defendant agreed. When the document was prepared, however, it was executed by defendant, not as guarantor, but as lessee.

Under the terms of the lease the appellants agreed to erect the building and let it to respondent "for the term of ten (10) years, commencing on the first day of August, one thousand nine hundred and seven." A further clause in the lease reads as follows:

"And said party of the second part agrees that in the event of the inability of the parties of the first part to deliver possession of said demised premises at the time herein agreed, then neither the parties of the first part, nor Wolf and Hollman, their agents, shall be liable for any damage thereby, nor shall this lease be void or voidable, but in this event, the party of the second part, shall not be liable for rent until such time as the said parties of the first part can deliver possession, and the terms of the lease shall be correspondingly extended."

The building was not completed, until in January, when respondent went into possession, paying no rent until the 1st of February, 1908. It continued to occupy, and use, the premises until August 1, 1917, when it surrendered possession, claiming that the lease terminated on that date. Appellant refused to accept this view, contending that the term of the lease actually began when the building was completed and ready for occupancy, and did not expire until 10 years from, and after, that time, which would be February 1, 1918. They demanded of plaintiff the payment of the rent, and endeavored to secure a tenant for the premises for the remainder of the alleged term, but, not being able to find one, brought this action, specifying the amount of rent for the six months in dispute, as damages. Claims for the cost of some repairs, and for an attorney's fee, were included in the action. They sought reformation of the lease, as will hereafter appear. The lower court denied reformation, found against the plaintiff on the allegations of the amended complaint, and gave judgment for the defendant. Insufficiency of the evidence to support the findings, errors in law in sustaining objections to questions as to what was said by the parties regarding the terms of the lease, before it was executed, and that the judgment is against law, are the points relied on by appellants in seeking a reversal of the judgment.

The solution of the question, thus presented, is to be found in the consideration to be given to the clause in the lease already quoted, and in the interpretation placed on the concluding phrase, "and the terms of the lease shall be correspondingly extended."

[1-7] The scope, purpose, and effect of the lease must be determined from a considera-

tion of it as a whole, rather than by a resort to any individual clause thereof. Civ. Code, § 1641. Such construction should be placed upon it as will render all its clauses harmonious and consistent. Jones on Landlord and Tenant, § 67. So construed, the lease must be given such an interpretation as will make it effective in conformity with the intention of the parties (Civ. Code, § 1643); and if its terms are in any way ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it (Civ. Code, § 1649). If necessary, for a full understanding of its terms, it should be read in the light of the previous agreement out of which it arose, in order, if practicable, to give effect to the actual understanding and agreement of the parties. Reading Iron Works—Sweatman's Appeal, 150 Pa. 369, 24 Atl. 617. Words and sentences should be construed to make sense and reason. Norris v. Showerman, 2 Doug. (Mich.) 16; Civ. Code, § 1644. The sections of the Code, which we have quoted, relating to the construction and interpretation of contracts, contemplate the introduction of parol evidence. For it is only upon the introduction of such evidence that it can be ascertained whether or not the principles of law embodied in those sections are pertinent and applicable to the facts of any particular case. Lassing v. James, 107 Cal. 348, 356, 40 Pac. 534.

[8] Appellants allege that, by the mistake of the typist who prepared the document, the word "terms," appearing in the clause, was inserted instead of the word "term," and that by the mutual mistake of all the parties the error was not discovered until after the commencement of this action. In proof of the allegation, and as tending to support the claim that the term of the lease did not begin until the completion and occupancy of the building plaintiffs, Leonhard Lang and Otto Lang, testified that during the negotiations, immediately prior to the actual signing of the lease, but after it had been prepared, "it was said" by them and Alpers, the president of the Tacoma Brewing Company, "that the lease should run fully for ten years * * * from the time the building was completed." There was no showing to the contrary. Viewed, therefore, in the light of the fact that the word "term," when applied to a lease, means "that period which is granted for the lessee or tenant to occupy and have possession of the premises" (Taylor v. Terry, 71 Cal. 46, 48, 11 Pac. 813, 814), we are of the opinion that there was evidence, before the lower court, tending to show that the parties did have in mind an arrangement by which the term of defendant's occupation of the premises should cover a period of 10 years from and after the date on which it entered into possession. It is but logical, therefore, to conclude that the clause in the lease under consideration was drawn with that end in view.

[9] The respondent attempts to escape the effect of this evidence by contending that Alpers was not the agent of, and in no way represented, the defendant in the matter. According to the testimony of the secretary and treasurer of respondent, and one of its officers executing the lease, the matter was "put up to" it to guarantee the lease, to which it agreed. It left the entire matter in the hands of Alpers. It received at his hands the completed document which it executed. While it may not have had knowledge of all the acts of Alpers, in connection with the negotiations for, and the preparation of, the lease, it had full knowledge of the provisions of the document, including the clause in question, before it was signed by its officers. Its secretary and treasurer so testified. If Alpers, as the agent of defendants, exceeded his authority and sought to bind defendants by an unauthorized agreement, defendant had ample opportunity to repudiate the transaction. It chose to retain the benefits of the lease, and cannot now successfully urge that it it is bound only by the obligations thereof to the extent that Alpers possessed authority to contract in its behalf. By claiming the right to enjoy the fruits of the lease, with full knowledge of its terms, made and assented to by Alpers, it ratified the lease and assumed its burdens. Patterson v. Crowell, 15 Cal. App. 105, 108, 113 Pac. 700; Wilder v. Beede, 119 Cal. 646, 650, 51 Pac. 1083.

[10] While the evidence falls short of establishing a mutual mistake in the preparation of the lease, it sheds light upon the intention of the parties in entering into it. They had in mind, and the lease provided for, the erection of a building on the demised premises. They also contemplated, and the lease specifies, a 10-year term. As the lease was executed May 1, 1907, and as the term did not, by its express provision, begin until the 1st day of the succeeding August, it is only reasonable to suppose that the parties likewise considered that three months was an adequate period of time within which to erect the building. It is also reasonable to conclude that they had in mind the uncertainty attending the construction of a new edifice, and sought to safeguard the interests of both parties by providing for the contingency which actually arose. Viewed in the light of the circumstances under which the lease was made, and the matter to which it relates (Civ. Code, § 1647), it is not hard to conclude that the parties understood, and fully intended, that the period granted defendant to occupy, and have possession of the premises, began when the building was completed and occupied, and that the term of the lease was for the 10 years thence next ensuing.

We are not disturbed, in arriving at this conclusion, by the fact that the plural word "terms" is used in the extension clause instead of the singular word "term." While the word "term," in instruments affecting real property, may relate to the estate of the lessee, it also refers to the time during which the estate may be enjoyed. It is capable of use in both senses. Whether the one sense or the other is to be attached to the form of expression depends upon the construction of the instrument containing it. Finkelmeier v. Bates, 92 N. Y. 172, 178; Taylor v. Terry, supra. In the case at bar the facts applicable to the construction of the lease, and that document itself, indicate that the word "term" was intended to be used as relating to the time, or period, of possession of defendant.

Respondent relies upon the decision of this court in Edward Barron Estate Co. v. Waterman, 32 Cal. App. 171, 162 Pac. 410, as fully upholding its position here. That case is to be distinguished from this. This court was there considering a lease which, at the outset, granted the demised premises to the defendants for the period of 5 years, commencing on the 15th day of January, 1909, and ending on the 14th day of January, 1914, at the monthly rental of $250. A subsequent clause of the lease provided that—

"In case the demised premises shall not be finished and ready for occupancy by the 15th day of January, 1909, the rent hereinbefore reserved shall *abate* and shall not be payable until said demised premises are ready for occupancy; but it is expressly understood that the failure to have said demised premises ready for occupancy by the 15th day of January, 1909, shall not be a cause for vacating, annulling or rescinding this lease, nor shall the lessees by reason thereof be entitled to any damage, *rebate* or recoupment except the rent hereinbefore expressly provided and agreed upon; but in that event the term of this lease shall be extended so that the lessee shall be *entitled* hereunder to the occupancy of the leased premises for the full term and period of five years from and after the date when said premises shall be ready for occupancy." (The italics are ours.)

The premises were not ready for occupancy until April 1, 1909, 2½ months after the beginning of the 5-year term. The lessee entered into possession on that day, remaining only until January 15, 1914, on which date the designated 5-year term ended. The lessor demanded the rent from January 15 to April 1, 1914, predicating his demand on the theory that the lease obligated the defendants to occupy and pay rent for the demised premises for a full term of 5 years, from April 1, 1909, the date of the actual occupancy of the premises. The plaintiff failed to recover. In affirming that judgment, the court merely considered the ordinary meaning and effect of the use of the words "rebated" and "entitled," and the sense in which each was used in the extension clause, and thereupon held that the lease was to be "construed to mean that although the leasehold interest was to take effect on January 15, 1909, nevertheless, if the lessor's delay in completing the demised premises operated to deprive the lessees of the use and occupation thereof on and after the date designated for the commencement of the term, then, and in that event, the rent was to be rebated, that is to say, proportionately deducted for the time that the occupancy by the lessees was delayed through the noncompletion of the building; and the term of the lease, if the lessees so desired, extended for the full period of five years from the date when said premises were ready for occupancy."

A different state of facts exists in the case at bar. Here there is nothing in the extension clause which even suggests a rebating, or proportionate deduction of rent, for the time that the occupancy by the lessee was delayed through the noncompletion of the building. On the contrary, the clause expressly provided that the lessees should not be liable for rent until such time as the lessors could deliver possession. Neither, in the instant case, is there any word or expression in the clause by which the lessee is given a choice or opportunity to exercise its personal desire in the matter of the extension of the term. The language is plain and positive to the effect that the terms of the lease shall be correspondingly extended. We do not agree with respondent's contention that the word "shall" must be read "may," in order to properly construe the lease. The word "extended" was doubtless used in its ordinary sense. It means, "stretched, spread, or drawn out." Webster's New International Dictionary. As thus used in the lease, it meant that the time, or period, granted appellant to occupy and have possession of the demised premises was, by the facts of the case, drawn out, or stretched, so that it would have a full period of 10 years from and after the time the premises were ready for occupancy, and was not limited by the first provision in the lease designating a fixed and arbitrary term. This construction, we believe, fully coincides with the prior understanding of the parties.

The alleged errors of the lower court, in refusing to admit certain evidence relative to the acts and understanding of the parties as to the nature and effect of the extension clause, resulted in no prejudice to the appellant. Other evidence establishing the facts was admitted.

The judgment is reversed.

We concur: KERRIGAN, J.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for a hearing in this court after decision

by the district court of appeal of the First appellate district, division one, we desire to say that we do so for the reason that we are entirely satisfied with the construction of the lease adopted by the district court of appeal, entirely regardless of the parol testimony material on the question of reformation.

All concur.

42 Cal. App. 618

KLEMMER v. KLEMMER. (Civ. 2896, S. F. 8907.)

(District Court of Appeal, First District, Division 2, California. Aug. 12, 1919. Opinion of Supreme Court in Bank Denying Hearing, Oct. 10, 1919.)

1. DIVORCE ⟸37(19)—DESERTION BY HUSBAND CURED BY WIFE'S INACTION AND DESERTION BY HER ARISES ON CONTINUED REFUSAL OF RECONCILIATION.

The wife not asserting within a reasonable time, as required by Civ. Code, § 124, subd. 3, her right to divorce for desertion, the separation becomes by consent, and the husband, under section 101, may in good faith seek a reconciliation and restoration, which if refused constitutes a desertion by her that if continued sufficiently long gives him ground for divorce.

2. DIVORCE ⟸150(2)—FINDINGS ON "RECRIMINATORY" PLEAS NECESSARY NOTWITHSTANDING FINDING FOR PLAINTIFF ON HIS GROUND OF DIVORCE.

Finding of defendant's desertion in action for divorce on that ground does not render unnecessary findings on defendant's recriminatory pleas supported by substantial evidence; recrimination under Civ. Code, § 122, being a showing by defendant of cause of divorce in bar of plaintiff's cause of divorce.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Recrimination.]

3. DIVORCE ⟸76—COPY OF PLEADING NOT REQUIRED TO BE SERVED ON ONE WHOM PLEA OF EXTREME CRUELTY ALLEGES PLAINTIFF BECAME PUBLICLY AFFIANCED.

Code Civ. Proc. § 1019, requiring a person named in pleadings in divorce as one with whom a party to the action committed adultery, to be served with a copy of the pleadings, has no application to one to whom a plea of extreme cruelty merely alleges plaintiff, while married to defendant, became publicly affianced.

4. DIVORCE ⟸116—EVIDENCE ADMISSIBLE IN SUPPORT OF PLEA OF EXTREME CRUELTY BY BEING PUBLICLY AFFIANCED TO ANOTHER WHILE MARRIED.

In support of recriminatory plea of extreme cruelty in that, while married to defendant, plaintiff became publicly affianced to T., plaintiff's petition seeking to take under will of T., in his favor, stating him to be her fiancé, is admissible.

5. DIVORCE ⟸119—HUSBAND'S PETITION TO TAKE UNDER WILL DESCRIBING HIM AS TESTATRIX'S FIANCÉ, EVIDENCE ON ISSUE OF GOOD FAITH OF HIS OFFER OF RECONCILIATION.

On issue of good faith of an offer of reconciliation by the husband, relied on by him, with his wife's refusal, to turn their separation into desertion by her, evidence that he shortly after the offer petitioned to take under the recent will of another, describing him as testatrix's bethrothed husband, is admissible.

6. DIVORCE ⟸133(3)—ABSENCE OF GOOD FAITH IN HUSBAND'S OFFER OF RECONCILIATION SHOWN BY EVIDENCE.

Evidence *held* to show that the element of good faith was entirely lacking in the husband's offer of reconciliation relied on by him, with his wife's refusal, to show desertion by her.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Divorce suit by Leonard L. Klemmer against Sarah Louise Klemmer. From an adverse decree, defendant appeals. Reversed.

Frank Freeman, of Willow, and John J. Barrett, of San Francisco, for appellant.

W. T. Belieu, of Willow, and Jos. L. Taaffe, of San Francisco, for respondent.

BRITTAIN, J. The defendant appeals from an interlocutory decree of divorce.

The parties were married in 1906. In 1911 the husband sued for divorce upon the ground of desertion. She answered, resisting the divorce, and in a cross-complaint for separate maintenance alleged cruelty, failure of support, and desertion on the part of the husband. In that suit the husband was denied divorce. The judgment, among other things, determined the fact of the husband's desertion in 1911, and allowed the wife $50 per month for the support of herself and her minor daughter, whose custody and control were awarded to the wife. The judgment was entered in June, 1912. From 1910 to 1913 the plaintiff did not see his wife.

In August, 1913, with his mother, the plaintiff arranged for his wife to meet him at the Hotel Sutter in San Francisco. In addition to that of the plaintiff and his wife, the only testimony given concerning this meeting was by the plaintiff's father. There was other evidence of demonstrative character contained in the letters, written after the meeting, from the plaintiff to the defendant. It is in opposition to the plaintiff's oral testimony that his wife then refused to return to him.

[1] On behalf of the appellant it is claimed that the decree in favor of the defendant in the first divorce suit was an adjudication of the plaintiff's desertion and that his offer of

reconciliation was too late. To support this position reliance is placed on a decision where it was held that, when the wife has a right of action for divorce, she is not obliged to condone the offense. Benkert v. Benkert, 32 Cal. 467. The Supreme Court has discussed a similar contention and disposed of it adversely to the appellant, holding that the wife is compelled to assert her right within a reasonable time (Civ. Code, § 124, subd. 3), and that under the provisions of section 101 of the Civil Code either party in good faith may seek a reconciliation and restoration, when refusal of the other to conform thereto constitutes a desertion on his or her part, which, if continued for one year, becomes a ground of divorce. McMullin v. McMullin, 140 Cal. 117, 73 Pac. 808.

[2] The prior desertion of the husband was not the only recriminatory matter pleaded by the wife. She alleged that the plaintiff had inflicted upon her grievous mental suffering, in that, in 1913, he became the affianced husband of one Logan Tooley Clark, sometimes known as Logan Tooley, and that by publication in the daily newspapers in Willow and in San Francisco the fact had become known to many of the friends and acquaintances of the defendant, to her great humiliation and mental anguish. It is further alleged, by way of recrimination, that the plaintiff, in the years 1914, 1915, 1916, and 1917, had lived openly, notoriously and scandalously at various places in this state with a woman other than his wife, named in the answer as Jane Doe, the defendant forbearing to give the true name of this woman. Substantially the same facts are set forth, coupled with the additional fact of alleged adultery between the plaintiff and the fictitiously named Jane Doe. There was no objection on the part of the plaintiff to the sufficiency of the pleading of any of these matters of recrimination. There was no finding upon any of them. On behalf of the appellant it is argued that the failure to find on the recriminatory pleas of extreme cruelty and adultery of the plaintiff, as well as those regarding the unsatisfied original judgment, willful neglect, and desertion, evidenced by the judgment in the prior suit, constitutes fatal error.

On behalf of the respondent it is argued that because the defendant, in pleading the recriminatory matter, did not seek a divorce from her husband, the court's finding of her desertion implied negative findings in regard to the recriminatory charges. The position of the respondent in this respect cannot be upheld.

"Recrimination is a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce. Civ. Code, § 122. * * * Recriminatory facts should be pleaded, but it would seem they are pleaded and proved as a defense simply and in bar of the plaintiff's cause." De Haley v. Haley, 74 Cal. 492, 16 Pac. 248, 5 Am. St. Rep. 460.

If evidence in support of the recriminatory matters was introduced or properly tendered on behalf of the wife, she was entitled to findings upon the issues raised by her pleading. Kusel v. Kusel, 147 Cal. 52, 81 Pac. 297. It has been held that, if no evidence was either introduced or offered in support of the recriminatory pleas, failure to find upon them might be excused. The same result would follow if the evidence was of so weak a character as not to amount to a showing that the wife at the time of the divorce suit had a subsisting cause of divorce. White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799.

[3] In regard to the charges of adultery and cruelty, based upon the cohabitation of the plaintiff with the fictitiously named Jane Doe, on the trial the defendant sought to introduce the deposition of one E—— M——, in which, with frankness which under other circumstances might have been commendable, she detailed at length the facts of her continued meretricious relationship with the plaintiff in the years 1914, 1915, and 1916. Objection was made to the introduction of this deposition on the ground that the pleadings had not been served upon E—— M—— in accordance with the provisions of section 1019 of the Code of Civil Procedure. The purpose of that section is to give one whose reputation might be assailed in divorce proceedings an opportunity to appear and defend against the offensive charges. When objection was made to the introduction of the deposition, an application for the continuance of the case so that formal service might be made upon E—— M—— was refused.

On behalf of the appellant it is argued that E—— M—— was not named in any of the pleadings, and therefore she was not within the protection of the section. The record shows that the case was presented upon the theory that Jane Doe and E—— M—— were names used to designate the same person. It is further argued that since in her deposition the witness had stated facts which warranted either the conclusion that she did not desire to defend her reputation or was unable to do so, and since she necessarily knew of the pendency of the action as well as the nature of the charges against her, the deposition should have been received. It is also urged that since the section does not in terms provide a penalty for its nonobservance, and the rejection of the deposition amounted to a penalty, it was beyond the power of the court, in effect, to add a penal clause omitted by the Legislature from the statute. The statute was passed to be obeyed. No party to a suit in equity may justify disobedience of a statute upon which his right depends by the statement that he did not think the observance of the law was necessary. In any suit in equity where it ap-

pears that proper, as distinguished from necessary, parties are not in court, it is within the discretion of the chancellor to order them to be brought in and to continue the trial of the case until such order shall have been obeyed. E—— M—— was not a necessary party to the action. The defendant had had ample time to cause the statutory notice to be given to her, and offered no substantial excuse for disregard of the statute. Under these circumstances, the refusal to grant a continuance in the middle of the trial was not an abuse of the discretion vested in the trial judge. The defendant went to trial lacking the ability to make preliminary proof necessary to the establishment of this plea in bar. It was not error to exclude the deposition. For the reasons stated, in regard to the exclusion of the deposition, the trial court did not err in excluding certain questions asked of the plaintiff in regard to his relationship with E—— M——. Failure to find on the issues of adultery with Jane Doe, the fictitiously named defendant, was not reversible error, because there was no showing of the existence of that cause of action for divorce subsisting in the defendant upon that ground. White v. White, supra.

[4] The conditions surrounding the exclusion of evidence in regard to the alleged extreme cruelty of the plaintiff in the matter of his engagement to marry Logan Tooley were entirely different. There was neither allegation nor offer of evidence charging her with adulterous conduct. Section 1019 of the Code of Civil Procedure has no application to this charge. It was that during the marital relationship the plaintiff had become the affianced husband of Logan Tooley and that publicity given to this fact caused the defendant such mental suffering as to stamp the act as one of cruelty. To support this charge the defendant offered in evidence a petition, verified by the plaintiff and filed in the matter of the Estate of Martha L. Tooley, the sole beneficiary of whose will was Logan Tooley. Before distribution in that estate Logan Tooley died. The plaintiff in this case sought to prevent the distribution in the estate of Martha L. Tooley to other persons and to have distribution made to the administratrix of the estate of Logan Tooley, otherwise known as Logan Tooley Clark. In the petition the plaintiff set forth that Logan Tooley died on August 6, 1913, leaving a last will reading as follows:

"I, Logan Tooley Clark, sometimes known as Logan Tooley, do hereby will and bequeath all the property of which I die possessed to Leonard Lenus Klemmer (with the exception of $25 per month to my Aunt Lizette Herndon-Leddy as long as she lives) to be his, to have and to hold as a deed of my love and affection from me his betrothed wife. I desire to state that I am of sound mind and make this will of my own volition on this fourteenth day of May, A. D. nineteen hundred and thirteen. Logan Tooley Clark.

"Understand all my property real and personal with the exception of $25 per month is to be given to Leonard Lenus Klemmer, my fiancé. L. T. C."

In his verified petition the plaintiff alleged that he is "the same Leonard Lenus Klemmer, and the same person named and referred to in said last will and testament of said Logan Tooley Clark, hereinabove set forth." He then alleged the facts concerning the proceedings in the estate of Logan Tooley Clark and the appointment of an administratrix of that estate with the will annexed, together with the fact of the admission of the will to probate. The plaintiff then alleged that—

Said administratrix "is entitled to have distributed to her all the residue of the property of the estate of Martha L. Tooley, deceased, for the purpose and to the end that she, as such administratrix, may administer thereon, and to have the same to wit, the residue, distributed to me, the said Leonard Lenus Klemmer subject to and in accordance with the provisions of the last will and testament of said Logan Tooley Clark, deceased."

This evidence was rejected by the trial court. It was material, relevant, and competent in support of the defendant's recriminatory charge of cruelty.

[5] The plaintiff was asked numerous questions, to which a blanket objection and ruling was made regarding his relationship with Logan Tooley. In none of these questions was there any charge of adulterous conduct between the parties. The date of the meeting at the Hotel Sutter had been fixed by the plaintiff by a reference to the burial of Logan Tooley. Both the plaintiff and his father testified regarding the conversation at the meeting concerning his claims against Logan Tooley's estate, and in his letters to the defendant the plaintiff repeatedly referred to those claims. The plaintiff's deposition had been taken and much of the evidence which was excluded was to the effect that the plaintiff and Logan Tooley had been engaged in vaudeville in Reno, Nev., and had subsequently agreed to go to Chicago, where they were similarly engaged for about a year. In the deposition, also, and excluded by the ruling of the court, was the plaintiff's statement that, while in Chicago with Logan Tooley, the plaintiff had commenced a second action for divorce against his wife, but that it had never resulted in a judgment because, as he said, of some conflict in the laws. The will in which the plaintiff was described as the betrothed husband of Logan Tooley was made in May, 1913. She was buried early in August, 1913. The meeting at the Hotel Sutter was within a few weeks of her death and before the excluded petition was verified by the plaintiff. The evidence offered was admissible, not alone in support of the recrim-

inatory charges, but upon the issue of good faith on the part of the husband, by a showing of which his offer of reconciliation only could have been supported under the rule declared in McMullin v. McMullin. The defendant was entitled to a finding upon the issue of the husband's cruelty pleaded in bar.

[6] The appellant contends there was no evidence of good faith on the part of the husband in asking the wife to return to him at the Hotel Sutter meeting. The presumption of good faith attends upon every act, unless the surrounding circumstances are such as to overcome the presumption. The long-continued and adjudged desertion by the plaintiff, his failure to provide support for his wife and child, his successive and unsuccessful suits for divorce, the will of Logan Tooley Clark describing the plaintiff as her betrothed husband, made shortly prior to the alleged offer of reconciliation, and his publication and reliance upon that will shortly after the offer of reconciliation, are all circumstances tending to overcome the presumption of his good faith. When, added to these circumstances, the letters written by the plaintiff to the defendant after the meeting at the Hotel Sutter are considered, it appears that the element of good faith was entirely lacking. There is no real or substantial conflict in the evidence.

There has been some attempt on the part of the respondent to shift the date of the meeting at the Hotel Sutter from August, 1913, to some time in August, 1914. The plaintiff's letters, coupled with his testimony, show there was but one such meeting. After the meeting and continuing until some time in 1915, the plaintiff wrote to his wife some 30 letters, expressing his fondness for her, and from time to time explaining to her that he was not yet ready to take her to Willow, because, as he said in one of his letters, it would cause the judge before whom his claim against the Estate of Tooley was pending to say he was trying to get that estate solely for the purpose of going back to his wife. The plaintiff first testified that he thought his father was at the Hotel Sutter meeting. After luncheon he testified positively that his father was there. The father testified he was present. In important details the statements of the father and son were at variance. In the first of the series of letters, which bore internal evidence of having been written by the plaintiff at Willow on the day following the meeting at the Hotel Sutter, he spoke of having reached Willow at 4 o'clock in the morning, of having that morning told his father of the meeting, and of his father laughing and crying because of his happiness at its outcome. The son testified that one Reva, a former wife of his brother, was present at the meeting. In the same letter the plaintiff wrote that—

> He "did not tell Otto or Reva anything just to see what they would say and they both said, 'I hope you and Sadie go back together.' I'm so happy I don't know which way to turn."

In this and numerous other letters he urged his wife to burn the letter. It is inconceivable that if the father and Reva were present at the meeting he should have told his father about it on his return to Willow the next morning or that Reva did not know all about what took place.

In this case the plaintiff had also alleged acts of extreme cruelty on the part of his wife, upon which a very large amount of extremely noisome evidence was introduced by and on behalf of the plaintiff. The trial court found that the charges of extreme cruelty were not sustained. The plaintiff's statements under oath in support of those charges were corroborated in many particulars by the evidence of members of his family. If his statements were true, the charges were amply proved. The finding of the court that they were not proved irresistibly leads to the conclusion that the plaintiff, considered as a witness, was within the rule that a witness false in one particular is to be distrusted in others. Code Civ. Proc. § 2061, subd. 3. It is not necessary to proceed further with an analysis of the evidence. If the errors at law did not require the reversal of the judgment, this court would be compelled to sustain the appellant's attack upon the ground of the insufficiency of the evidence to support the judgment.

The judgment is reversed.

We concur: LANGDON, P. J.; HAVEN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court, after decision by the District Court of Appeal of the First Appellate District, is denied.

In denying the application, we withhold our approval from that portion of the opinion dealing with the question of the admissibility of the deposition of one "E—— M——" referred to therein. The determination of this question is not essential to the reversal of the judgment.

44 Cal. App. 756

BLACK v. KNIGHT. (Civ. 3072.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1919. Hearing Denied by Supreme Court Feb. 9, 1920.)

1. MALICIOUS PROSECUTION ⊂=64(2)—FINDING OF MALICE AND WANT OF PROBABLE CAUSE UNWARRANTED.

Evidence *held* insufficient to sustain a finding of malice, bad faith, and want of probable cause in the prosecution of an unlawful detainer action.

2. MALICIOUS PROSECUTION ⊂=32—MALICE MAY BE PRESUMED FROM WANT OF PROBABLE CAUSE.

Out of the commencement and prosecution of a causeless action by one person against another, the presumption of malice may arise from proof of the fact of a want of probable cause for the institution of such action.

3. MALICIOUS PROSECUTION ⊂=16—CONCURRENCE OF MALICE AND WANT OF PROBABLE CAUSE ESSENTIAL.

Concurrence of malice and want of probable cause is essential to a recovery for malicious prosecution.

4. MALICIOUS PROSECUTION ⊂=15—"PROBABLE CAUSE" DOES NOT MEAN A LEGAL CAUSE.

"Probable cause" for the institution of an action does not mean "legal cause."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Probable Cause.]

5. MALICIOUS PROSECUTION ⊂=25(2)—INSTITUTION OF ACTION ON ADVICE OF COUNSEL NOT WITHOUT PROBABLE CAUSE.

Where, before bringing unlawful detainer, landlord laid all the facts in good faith before an attorney and acted on his advice to the effect that he had a good cause of action, it cannot be said that he instituted the suit without probable cause.

6. MALICIOUS PROSECUTION ⊂=25(3)—PROBABLE CAUSE PRESUMED FROM RECOVERY, THOUGH JUDGMENT REVERSED.

There is a presumption in an action for malicious prosecution that defendant had reasonable cause for instituting his suit, where he obtained a judgment in the trial court, although reversed on appeal, and such presumption is, in the absence of fraud in obtaining such judgment, conclusive.

7. MALICIOUS PROSECUTION ⊂=25(3)—DISMISSAL ON REVERSAL NOT EVIDENCE OF WANT OF PROBABLE CAUSE.

Plaintiff's dismissal of a cause, which under the rulings of the court of last resort, he could no longer maintain, is not such a voluntary abandonment of the case as to give rise to the presumption of such want of probable cause as would suffice to show malice, or to overthrow the presumption as to the existence of probable cause raised by his recovery in the trial court.

Appeal from Superior Court, City and County of San Francisco; John T. Nourse, Judge.

Action by Henry Black against Henrietta C. Knight. Judgment for plaintiff, and defendant appeals. Reversed.

Samuel Knight and F. Eldred Boland, both of San Francisco, and Carl H. Abbott, of Oakland, for appellant.

Arthur H. Barendt, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of $5,547.30 in an action to recover damages for the eviction of the plaintiff from certain leasehold premises, which eviction the plaintiff asserts to have been accomplished through an action in unlawful detainer, the prosecution of which was malicious and without probable cause.

This is the second appeal presented to the appellate tribunals in this case, the judgment rendered in the plaintiff's favor for the sum of $10,449 upon the first trial thereof having been affirmed in this court (Black v. Knight, 23 Cal. App. Dec. 905), but reversed by the Supreme Court in Black v. Knight, 176 Cal. 722, 169 Pac. 382, L. R. A. 1918C, 319. The fact that the case as now presented upon this appeal differs in certain material features from that considered by this court and by the Supreme Court upon the former appeal, both in respect to the parties defendant and to certain essential facts for the first time put in issue by amendments to the complaint, made after the reversal of the cause on the first appeal, upon which alleged facts the plaintiff and respondent relies for the support of his judgment upon the present appeal, renders necessary a more extended and detailed review of the history of the relations and litigation between the parties than would have otherwise been required.

In November of the year 1908 Robert S. Knight, the husband of the present defendant and appellant herein, was the owner of a lot in the city of San Francisco, which is now known as No. 650 California street, and at that time entered into an agreement with the plaintiff herein, by the terms of which said Robert S. Knight was to construct and, when completed, to lease to the plaintiff a building upon said lot for the term of 10 years, at a monthly rental of $325 for the first 5 years and $350 for the last 5 years of the term. The lease provided that immediately after the completion of the building and its occupancy by the plaintiff he should furnish it with suitable furniture for an apartment house having a cash value of not less than $3,000, which furniture should be free of liens, and that within 30 days thereafter the plaintiff should execute to said

Robert S. Knight a note for said sum of $3,000 secured by a chattel mortgage upon said furniture, which said note and mortgage was to be and remain as the said lessor's security for the rent due and to become due under the terms of said lease. The building was completed on or about the 25th day of June, 1909, at which time the plaintiff herein took possession. The basement of the building had been reserved by the lessor, and was by him on the 22d day of June, 1909, leased to a firm of carpenters, who then entered into the possession and use thereof. On July 12, 1909, the plaintiff, as lessee of his portion of said building, entered into a contract for the subletting thereof, with the knowledge and consent of the lessor, to one Ida Quinn, by the terms of which said Ida Quinn promised and agreed to take said premises for a 10-year term at a rental of $425 per month for the first 60 months of said term and of $460 per month for the last 60 months thereof. By the terms of her said agreement the said Ida Quinn was also to completely furnish said premises at a cost of not less than $4,500, and to give to her immediate lessor, the plaintiff herein, a chattel mortgage upon said furniture to secure the payment of the rent.

Ida Quinn took possession of said premises under said agreement for the lease thereof on or about the 12th day of July, 1909, and paid the first month's rent thereunder, but presently began objecting to her lessor as to the noise of the machinery, etc., incident to the conduct of the carpenter shop in the basement of the building, claiming a loss of patronage thereby, and refused to execute her lease or to pay any more rent until the nuisance occasioned by these noises was abated. The plaintiff, her lessor, immediately notified his lessor, Robert S. Knight, of the trouble caused by the noises of the carpenter shop, and demanded that these disturbances be abated. The evidence is in conflict as to whether Robert S. Knight acted very promptly upon this complaint, and the trial court in its findings herein resolved said conflict in the plaintiff's favor, finding that said Robert S. Knight refused and neglected to take any measures to abate said disturbance prior to the end of October, 1909, and then only so imperfectly that in February, 1910, said Ida Quinn lost roomers by reason of the noise in the said basement carpenter shop. In the meantime the plaintiff herein had not performed that portion of his lease of said premises, which required him to execute and deliver to Robert S. Knight as his lessor a promissory note for $3,000 and a chattel mortgage upon the furniture in said premises as security for his rent. Apparently the reason why he had failed to do so was that his subtenant, Ida Quinn, who had furnished the apartments therein, had not performed the like portion of her agreement. Accordingly, and on or about August 25, 1909, Robert S. Knight made written demand upon his lessee, the plaintiff herein, that he perform that condition of his lease within 3 days; within said time said plaintiff, while unable for the reason stated to give the required mortgage, offered to deposit in lieu thereof the sum of $3,000 in gold coin of the United States in any bank in the city of San Francisco to be selected by said Robert S. Knight, until such time as said plaintiff could literally perform said term in his said lease. Robert S. Knight, however, after seeking and obtaining the advice of his counsel, refused, in accordance with such advice, to accept said offer, and shortly thereafter and on September 4, 1909, commenced an action in his own name as plaintiff against his lessee to recover possession of the demanded premises, basing his right thereto upon the breach of the aforesaid condition of the lease. This cause proceeded to trial, and on March 3, 1910, a judgment was entered in favor of the plaintiff therein to restore the possession of said premises to Robert S. Knight, and to pay certain damages, costs, and counsel fees.

While these proceedings were thus pending the defendant therein was endeavoring on his part to oust his subtenant, Ida Quinn, from said premises for her failure and refusal to comply with the terms of her contract for a sublease thereof, and had commenced an unlawful detainer action against her, which went to judgment in his favor on March 2, 1910. While this latter suit was pending Ida Quinn had retained possession of the premises up to about the 23d of February, 1910, when she delivered the possession thereof to Robert S. Knight, who thereafter retained possession of the same. The defendant in the case of Knight v. Black and the plaintiff in this action took an appeal from the judgment rendered therein on March 3, 1910, to this court, urging upon said appeal that his offer to deposit the sum of $3,000 in lieu of the chattel mortgage provided for in his lease amounted to a substantial performance of the clause therein requiring such mortgage, and hence that he was not in default as to any of the terms of his said lease at the time of the institution of said action. He prevailed in this contention upon said appeal, this court deciding the point in his favor and reversing the judgment in said case on July 22, 1912. Knight v. Black, 19 Cal. App. 519, 126 Pac. 512. A petition for rehearing having been denied in this court and also in the Supreme Court, upon the going down of the remittitur in that case, the defendant therein moved the trial court for an order bringing in Henrietta C. Knight as a party plaintiff therein, which motion was on November 15, 1912, granted by the trial court by consent. Shortly thereafter, and on December 6, 1912, Robert S. Knight and Henrietta C. Knight, by her attorney in fact, Robert S. Knight, tendered possession of the

premises to the defendant in that action and the plaintiff in this action for the remainder of the unexpired term of his said lease. This tender was refused by him and shortly thereafter and on December 12, 1912, the then plaintiffs in said action caused to be entered a dismissal thereof. Within a short time thereafter the plaintiff herein commenced the present action against Robert S. Knight and Henrietta C. Knight for damages in the sum of $14,800 for his alleged unlawful eviction from said premises, and for the further sum of $611.50, his costs and expenses incurred in defending said former action. In his original and also in his first amended complaint filed in this action the plaintiff made no express averment charging the defendant with having acted maliciously or without probable cause in procuring the eviction of the plaintiff from the premises in question through the institution of the former action or during the pendency thereof. He relied upon the averments that his said eviction was illegal, because so determined to be by the decision of this court in the reversal of the judgment in said former action upon appeal.

The defendants in their answer denied the illegality of the plaintiff's eviction, and also denied the fact of such eviction, alleging that the said plaintiff had voluntarily surrendered and abandoned the possession of said premises pending said appeal, and denied that the plaintiff had sustained any damage thereby. They also pleaded ex industria that in the prosecution of said former action the plaintiff therein, Robert S. Knight, had acted without malice and with probable cause. They also pleaded certain counterclaims amounting to $2,510.10, for which they prayed a recovery. The cause proceeded to trial upon the issues as thus presented, with the result that a judgment was rendered and entered in the plaintiff's favor for the sum of $10,449, against the defendant Henrietta C. Knight, and the action was dismissed as to Robert S. Knight upon the finding of the trial court to the effect that in all the matters and proceedings leading up to and including the eviction of the plaintiff from the premises in question Robert S. Knight had acted as the agent of his wife, Henrietta C. Knight, upon the admitted showing that subsequent to the execution of the contract of lease between Robert S. Knight and the plaintiff herein, the said Robert S. Knight had conveyed all of his right, title, and interest in the premises to his said wife. The trial court in its findings and judgment made no reference to any malice on the part of said Robert S. Knight against the said plaintiff therein; and it is evident from the record that the matter of the existence or nonexistence of such malice on the part of said Robert S. Knight was not at that time an issue in the case.

From the judgment thus rendered an appeal was taken to the Supreme Court, which appeal was later transferred to this court for hearing, and upon said hearing the judgment was affirmed; but upon petition for rehearing the cause was transferred back to the Supreme Court, where the judgment of the trial court was, on December 14, 1917, reversed, the Supreme Court holding upon the record then before it that the mere prosecution to judgment by the landlord of an unlawful detainer action in good faith and without malice for the purpose of obtaining a judicial determination of the question whether he was entitled to possession by reason of some default on the part of the tenant, was not such an act of interference with the beneficial enjoyment by the tenant of the premises, short of actual physical ouster, as "will warrant the latter in abandoning possession and treating the conduct of the landlord as an unlawful eviction, with the right to damage consequent upon being deprived of the remainder of his term." Black v. Knight, 176 Cal. 722, 169 Pac. 382, L. R. A. 1918C, 319.

Upon the going down of the remittitur following this reversal of the judgment the plaintiff in the action, on February 25, 1918, served and filed a second amended complaint, wherefrom the name of the original defendant, Robert S. Knight, was omitted as a party defendant, but wherein and in the body of said second amended complaint said Robert S. Knight was alleged to have been, as to all of the acts and things charged to have been done or omitted by or on behalf of his former codefendant, Henrietta C. Knight, her fully authorized agent and representative, and the said Henrietta C. Knight was therein alleged to be chargeable with full responsibility for her husband's acts and conduct as such agent. The said second amended complaint then proceeded to set forth a series of alleged acts on the part of said Robert S. Knight, which were averred to have been done by him with the express and malicious intent of bringing about an ouster or eviction of said plaintiff from said premises, and which led up to the institution of the action for unlawful detainer, which action the plaintiff for the first time alleged was begun and prosecuted in bad faith with actual malice and without probable cause. The defendant in her answer denied that Robert S. Knight was her authorized agent as to many of the acts done by him in relation to the plaintiff's tenancy, and alleged that she was personally ignorant as to many of said acts of said Robert S. Knight which the plaintiff alleged to have been done maliciously and in bad faith, and, on the contrary, averred that whatever had been done on her behalf in the premises had been done without malice and in good faith, and further averred that in the institution of the said action for unlawful detainer the said Robert S. Knight had acted upon

the advice of counsel after a full and fair statement of the facts constituting the plaintiff's alleged breach of the covenants of his said lease. The defendant also repeated the averments of her former answer constituting her counterclaim.

Upon the issues thus made up the cause proceeded to trial, at the conclusion of which the court made its findings of fact in favor of the plaintiff upon the essential averments of his second amended complaint, and as conclusions of law from such findings of fact found that the plaintiff was wrongfully and illegally evicted from the demised premises; that the action of unlawful detainer commenced by Robert S. Knight against his lessee, Henry Black, was not instituted in good faith, but with malice and want of probable cause; that Robert S. Knight was, at all times since a date prior to the entry into possession of the demised premises by plaintiff, the agent of the defendant, his wife, Henrietta C. Knight; that the damages suffered by plaintiff by reason of said eviction and the costs and expenses incident thereto was the sum of $7,438.90; that the defendant, Henrietta C. Knight, was entitled to an offset in the sum of $1,891.60 upon her counterclaim. The court accordingly entered its judgment awarding the plaintiff $5,547.30, together with his costs. Said judgment was thus entered on December 18, 1918, and thereafter an appeal was taken and perfected therefrom to the Supreme Court, and was by said tribunal transferred to this court for hearing and decision.

While the foregoing résumé of the history of the relations between these parties and of the several proceedings growing out of such relations has been somewhat extended, the questions presented upon this appeal are few and simple. By the decision of the Supreme Court upon the former appeal (Black v. Knight, supra) it was held that, in the absence of a sufficient showing of both malice and want of probable cause on the part of the defendants in the institution and prosecution of the original action in unlawful detainer, this action, upon the other facts set forth in this plaintiff's first amended complaint and established at the first trial thereon, would not lie. Upon the consequent reversal of the judgment, and the return of the cause to the trial court, the plaintiff herein further amended his first amended complaint by the averment of an additional set of facts which he alleged was sufficient to show actual malice, bad faith, and want of probable cause in the institution and prosecution of said action for unlawful detainer, and which he contended at the trial and hearing thereon took the case out of the scope and effect of said former decision, and entitled him to a judgment notwithstanding such decision. The appellant, on the other hand, at said second trial contended, and here contends, that these alleged facts, even if proven were insufficient to show either malice, bad faith, or want of probable cause on the part of said defendant, and hence insufficient to sustain the findings of fact and conclusions of law of the trial court thereon, and that she is therefore entitled to a reversal of said judgment upon appeal.

[1] From our careful examination of the record herein we are satisfied that the finding and conclusion of the trial court to the effect that Robert S. Knight must be held to have been the agent of his wife, Henrietta C. Knight, in relation to all matters occurring after the date of his conveyance to her of all of his right, title, and interest in the premises in question is sufficiently sustained by the evidence in the case; but, having so determined, we are also satisfied from such examination of the record that the several acts and things done or omitted to be done by said Robert S. Knight and imputed to his said wife, the appellant herein, by virtue of such agency, and upon which the respondent herein relies as being sufficient to sustain his claim of malice, bad faith, and want of probable cause on the part of said Robert S. Knight, and hence of this defendant, in the institution and prosecution of the aforesaid action in unlawful detainer, and the unlawful eviction of the said plaintiff from the said premises thereby, are wholly insufficient as proof of such malice, bad faith, and want of probable cause on the part of said Robert S. Knight in the institution and prosecution of said action to justify the findings and conclusions of the trial court in that regard. A brief review of and comment upon the evidence educed by the plaintiff at the trial, and relied upon as supporting his said contention, will serve to show the basis of our said conclusion.

The relation between the parties to the original lease of the premises out of the plaintiff's occupancy of which the various controversies between the parties arose was entirely amicable at the inception of the transaction between them, and continued so to be down to a time subsequent to the plaintiff's occupancy of said premises. This amicable relation was in no wise affected by the fact that the lessor of that portion of the premises to be used by the plaintiff herein as an apartment house had, prior to the latter's occupancy of the same, leased the basement of the building to a firm of carpenters. He had a right so to do, and his act in doing so, and the consequences of said act in the later disturbance of the subtenant of the lessee, could not be attributable to or furnish any proof of ill will on the part of Robert S. Knight toward his said lessee, since there is not the slightest evidence to show that at the time of the letting and use of said basement as aforesaid the former was in anywise dissatisfied with his tenant or with the

terms of his said lease; and if it be claimed that the tardy action of Robert S. Knight in failing or refusing to attend to and remedy the matters of which the plaintiff's subtenant complained, namely, the noises arising from the carpenter shop, shows a state of dissatisfaction and ill will toward his lessee, this claim is self-destructive, since the undisputed evidence discloses that the said lessor did finally undertake to remedy the nuisance complained of, and did thereby show that he was not willfully or maliciously maintaining the same for the purpose of injuring his said tenant or causing his abandonment of his said lease.

The earliest possible point of time at which the plaintiff herein can claim that Robert S. Knight is to be chargeable with dissatisfaction with the terms of his said lease, or with any ill will towards the plaintiff as a result thereof, is the date when said Robert S. Knight first learned that the plaintiff, as his tenant, had made a sublease of the premises to Ida Quinn at a monthly rental much in excess of that which was receivable by said Knight under his original lease. It was not the fact of the subleasing which can be claimed to have caused such dissatisfaction, since said Knight had expressly consented to the making of said plaintiff's contract for such sublease with said Ida Quinn; but it was the fact of the increased rental, derived from said sublease which is claimed to have sown the seeds of ill will in the breast of said Knight. Yet the evidence of such sowing consists altogether in the fact that, when the latter learned of the plaintiff's apparently advantageous contract with said Ida Quinn, he one day suggested to the plaintiff that "you ought to divide the profits with me." The above quotation constitutes the entire conversation; and it goes almost without saying that it is a thread of evidence entirely too attenuated to furnish sufficient strength, either alone or in conjunction with any other facts, upon which the plaintiff could rely to support a charge of malice on the part of Robert S. Knight against his tenant, or to supply a reason based on ill will for the institution of a wrongful action in unlawful detainer against him. The plaintiff himself says in respect to such conversation:

"I paid no attention to it. I didn't give it any thought. I thought it was rather peculiar for him to mention it, and I gave him no answer."

The next bit of evidence upon which the plaintiff depends to sustain his claim of malice on the part of said Knight is the fact that said Knight at one time made overtures to the plaintiff's subtenant, Ida Quinn, to take a direct lease from him to said premises at the rental agreed to be paid by her under her contract for a lease from the plaintiff. Had such overtures been made at a time prior to the institution of the action in unlawful detainer against the plaintiff by Robert S. Knight, it might well have furnished some tangible proof of a malicious and wrongful intent in the institution of such action; but the uncontradicted evidence of Ida Quinn herself shows that the only conversation between Robert S. Knight and herself upon this subject occurred after the commencement of this action, and hence by no possibility could have supplied a motive for the institution of the same; besides, at all times both before and after such action was begun against the plaintiff, Ida Quinn was complaining of the nuisance of the noises of the carpenter shop, and was refusing to consummate her agreement for a lease with the plaintiff, or to pay him any more rent, and was thus in the attitude of a quite undesirable occupant of the premises.

It is hardly conceivable that Robert S. Knight should have been moved to such malice by anything occurring between himself and his tenant's rather undesirable subtenant as to have been led thereby to conceive and commence a causeless proceeding in unlawful detainer for the plaintiff's ouster, particularly in view of the fact that the latter was tendering and paying his stipulated rent with scrupulous promptitude, while his own subtenant was paying him no rent at all. If the conversation which Robert S. Knight is shown to have had with Ida Quinn with respect to the prospect of her immediate tenancy under him occurred after the commencement of the action in unlawful detainer, it would of itself not only have furnished no evidence of a prior malice in the institution of said action, but would rather supply some degree of evidence in support of the good faith of Robert S. Knight in the commencement and prosecution of said action, since it would serve to indicate that he, at the time of such overtures, believed that his said suit was well founded and would result in his favor, and that he would presently be in a position to relet his premises to another tenant.

The foregoing constitutes practically all of the evidence outside of the institution of the action in unlawful detainer itself upon which the plaintiff can rely to sustain his averments of malice on the part of said Robert S. Knight imputable to the defendant herein, and to justify the findings and conclusions of the trial court based thereon.

[2-6] As to the action itself as furnishing proof of such malice it may be stated at the outset that out of the commencement and prosecution of a causeless action by one person against another the presumption of malice may arise from proof of the fact of a want of probable cause for the institution of such action. Without the element, however, of want of probable cause, the existence of malice in the mind and purpose of the insti-

gator of such action can be of no avail to a defendant therein, who, after its termination by dismissal or otherwise, himself institutes an action for malicious prosecution against the plaintiff in the former action. In other words, both the elements of malice and want of probable cause must concur in order to form the basis of such latter suit. This proposition is so elementary as not to require the citation of authority in its support. This being so, the plaintiff herein must first have been able to establish by proof or presumption that his landlord, the plaintiff in said former action, acted without probable cause in the institution thereof. "Probable cause" for the institution of an action does not mean "legal cause" therefor; for, if it did, every plaintiff who failed to recover in his suit would be liable to an action for malicious prosecution. "Probable cause" has sometimes been defined as reasonable cause (McCall v. Alexander, 84 S. C. 187, 65 S. E. 1021); and in the case of both civil and criminal prosecutions has been further defined to be an honest suspicion or belief on the part of the instigator thereof, founded upon facts sufficiently strong to warrant a reasonable man in believing that the charge is true (Johnson v. Southern Pacific Co., 157 Cal. 363, 107 Pac. 611; Smith v. Liverpool Ins. Co., 107 Cal. 432, 40 Pac. 540; Dunlap v. New Zealand Fire Ins. Co., 109 Cal. 365, 42 Pac. 29; Carpenter v. Ashley, 15 Cal. App. 461, 115 Pac. 268; Carpenter v. Sibley, 15 Cal. App. 589, 119 Pac. 391; Redgate v. Southern Pacific Co., 24 Cal. App. 573, 141 Pac. 1191). In determining the question as to whether or not the plaintiff or prosecutor in a given action acted with such reasonable belief, knowledge, and prudence in the institution thereof as to absolve him from the charge of want of probable cause, there are two main facts, the existence of which, if proven, are held to be sufficient to establish probable cause. The first of these is the fact, if shown to be true, that the plaintiff or prosecutor of such action acted in the institution of the same upon the opinion and advice of counsel to the effect that he had a good cause of action after laying all of the facts of the case in good faith before such counsel; and the second of these facts, if proven, is the fact that the plaintiff succeeded in obtaining a judgment in his favor upon his alleged cause of action in the trial court.

As to the first of these essential facts the uncontradicted evidence in this case discloses that, before the said Robert S. Knight began his action in unlawful detainer against the plaintiff herein, he laid all of the facts upon which he relied for a recovery in said action before his attorney. There is not the slightest evidence that he did not do this fully and in the utmost good faith; and the undisputed evidence shows that, having done so, he was advised by his said counsel that he had a good cause of action. Thereupon, and acting upon such advice, and with the aid and counsel of his said attorney, he commenced his action in unlawful detainer. This undisputed evidence has been held to establish probable cause. Johnson v. Southern Pacific Co., supra.

The record herein also undisputably shows that the said Robert S. Knight recovered a judgment in his favor upon the trial of said action. This proven fact entitled him upon the trial of the instant case to the full benefit of the presumption of the existence of probable cause for the institution of his said former action; and the fact that a first judgment obtained therein was reversed upon appeal did not suffice to deprive him of the full benefit of that presumption. Carpenter v. Sibley, 15 Cal. App. 589, 119 Pac. 391; Holliday v. Holliday, 123 Cal. 26, 55 Pac. 703. The cases last above cited, not only fully sustain the view that the plaintiff in the action for unlawful detainer was entitled to the presumption of probable cause for its institution by virtue of the judgment in his favor in the trial court therein, but they go further than this, and hold that this presumption is, in the absence of proof of fraud in obtaining said judgment, conclusive. There is an entire absence of evidence in this case of any fraud on the part of the plaintiff in said former action in obtaining the judgment in his favor therein in the trial court.

[7] The respondent, however, seeks to avoid the effect of these decisions by the claim that each of said cases had its inception in a criminal prosecution, and that the rule therein announced as to the conclusiveness of a judgment is not to be applied to civil actions. We are unable to perceive any reason for such a distinction, and counsel for the respondent has cited no authority for making or supporting such a distinction. The cases cited and relied upon by the respondent to uphold his claim that the presumption arising from a judgment in plaintiff's favor in the original action is but a prima facie presumption, which may be overthrown by showing a reversal of such judgment and a subsequent dismissal of the case, are from other jurisdictions, and cannot be held to outweigh the above cases from our own courts; but even if it were to be held that such presumption was but prima facie, and could be overcome by the voluntary dismissal of the case after its reversal on appeal, we are still unable to agree with the respondent's contention that it would be overcome under such circumstances as the undisputed proof in the instant case discloses, for in the case at bar the record shows that the decision of this court in the original action of Knight v. Black, supra, upheld upon petition for rehearing in the Supreme Court, was such as to render impossible the further successful prosecution of the cause on the part

of the plaintiff in the trial court, and hence to make its dismissal therein imperative. Under such conditions, the plaintiff's dismissal of a cause which, under the rulings of the courts of last resort, he could no longer maintain, cannot be held to be such a voluntary abandonment of his case as to give rise to the presumption of such want of probable cause in its inception as would either suffice to show malice or to overthrow the presumption as to the existence of probable cause which was raised by the original judgment in his favor.

It follows, as our conclusion from the foregoing considerations, that the judgment must be reversed; and it is so ordered.

Judgment reversed.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 224

SAN ANTONIO UNION SCHOOL DIST. OF MONTEREY COUNTY v. HUSTON.

(Civ. 2965.)

(District Court of Appeal, First District, Division 1, California. Dec. 23, 1919.)

1. SPECIFIC PERFORMANCE ⊂97 — DEMAND FOR CONVEYANCE AND TENDER OF CONSIDERATION TO GRANTEE OF VENDOR PREREQUISITE TO RELIEF.

Where landowner entered into a contract to convey and subsequently sold the land, specific performance cannot be decreed against the purchaser of the land, where there was no demand for deed or tender made to the purchaser; a demand for a deed and a tender of the purchase price, subsequent to the sale, to the original owner being insufficient.

2. SCHOOLS AND SCHOOLS DISTRICTS ⊂65— LETTERS INSUFFICIENT TO SHOW CONTRACT OF SCHOOL DISTRICT TO PURCHASE LAND.

A letter, written by trustee of school district, asking a landowner how much he would take for one acre of land at a certain corner, and letters, stating $25 to be the price of an acre of land for the schoolhouse, and that $15 was received as part payment for the land for the schoolhouse, were insufficient to show a sale or an agreement to sell the land in fee, in view of custom of moving school buildings from place to place in the district.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by the San Antonio Union School District of Monterey County against Ada P. Huston. Judgment for defendant, and plaintiff appeals. Affirmed.

Hugh R. Osburn, of King City, for appellant.

C. F. Lacey, of Salinas, for respondent.

BEASLY, Presiding Judge pro tem. The plaintiff, San Antonio union school district of Monterey county, brought this action as successor in interest to the Franklin school district. From the prayer of the complaint the action was originally intended to quiet title to a small piece of property which is a part of the southwest quarter of the southwest quarter of section 32, township 22 south, range 8 east, Mount Diablo meridian. The entire quarter section was patented to Joseph Alcorn on September 25, 1888, and by mesne conveyances the defendant acquired the legal title to the whole quarter section on August 16, 1905, and, as will hereafter appear, the plaintiff at no time had the legal title to the acre in controversy.

Being met at the outset with the objection that an action to quiet title cannot be maintained by the holder of the mere equity against the holder of the legal title to real property, plaintiff's counsel in his brief apparently abandons the theory that the action is one to quiet title, and insists that his client be given relief under the general prayer of the complaint for "such other and further relief as to the court may seem just and meet in the premises," and from the language of appellant's brief we infer that the plaintiff now seeks specific performance of a contract to convey, made between Alcorn and the Franklin school district, and "for the enforcement of a trust in this property," for the benefit of plaintiff. Although from the prayer of the complaint it appears very clearly that the plaintiff at first intended to rely upon a cause of action to quiet title to the lot, we are inclined to consider the case upon its merits, without regard to the form of the action.

The plaintiff, in support of the contract to purchase which it now seeks to enforce, relies upon the following facts: Some time in 1886, and while Joseph Alcorn was the owner or in possession of the quarter section of which this lot forms a part, C. G. Heinsen was trustee of the Franklin school district, and wrote Alcorn, according to Heinsen's testimony, to know how much he would take for one acre of land upon which to build a schoolhouse, giving no description, but mentioning the corner needed, and not saying whether or not the school district desired to purchase the corner in fee or to secure the mere right to build and maintain a schoolhouse thereon. Running through the correspondence and the testimony of Heinsen is the statement of the purpose for which the land was desired, namely, for school purposes. On December 27, 1886, Heinsen received an answer signed by Mrs. Alcorn, wife of the owner of the property, dated at Boulder Creek, Cal., and saying:

"Your postal received and in reply will say that my husband thinks that twenty-five ($25) dollars is the price to ask for an acre of land for the schoolhouse."

Seven months after the receipt of this letter Heinsen sent $15, which Mrs. Alcorn received, and to this remittance Mrs. Alcorn sent a reply dated at Boulder Creek, July 24th, in which she said:

"We have received fifteen dollars ($15) as part payment for the land for the schoolhouse."

Mrs. Alcorn's name alone is signed to this letter. In none of the correspondence was the length or width of the acre given, and nothing was said about the terms of payments, whether in installments or in cash. Heinsen testified that within a year or two after the first letter the remaining $10 was available to pay for the land, and that he wrote for a deed, but did not send the money. No answer was received to this last letter. There were no other negotiations than those referred to in these letters. Mrs. Alcorn testified that she wrote the letter of December 27, 1886, at her husband's instance, and there is no evidence of any written authority held by Mrs. Alcorn, authorizing her to contract for the sale of the property. There is in the letters no agreement to sell. There is simply a recital of the price which Mr. Alcorn thought was proper for the land. Subsequently the Franklin school district fenced the property. Mr. Heinsen "stepped off" the acre the best he could, and a substantial fence was built around it, and from that time until the organization of the San Antonio union school district, the Franklin school district maintained a schoolhouse and kept a school on the property. The plaintiff, San Antonio union school district, is the successor in interest of the Franklin school district. There is no evidence that Alcorn ever had actual knowledge of the occupation of the property by the schoolhouse. There seems to be no evidence that he ever saw the property after this correspondence, and unless he must be held to have had constructive notice of what was going on upon his property, a point which we think it unnecessary to decide, he may be said not to have had any knowledge whatever of the erection of the schoolhouse or the possession of the Franklin school district. Some time subsequent to July 1, 1916, the San Antonio union school district was formed, as has been said, and took the place of four other districts of Monterey county, including the Franklin school district, and thereupon the Franklin schoolhouse was abandoned, and school ceased to be kept therein. On the 7th day of September, 1916, after such abandonment, the defendant took possession of the property, claiming to be the owner under her chain of title from Alcorn.

After 30 years had elapsed a tender of the remaining $10 was made to Mrs. Alcorn. The Alcorns had ceased to have any interest in the property on November 24, 1887. No conveyance was ever made by any one of the various owners of this property to the Franklin school district, and the entire right of the present plaintiff rests upon the validity of the agreement above set forth, if it constituted an agreement, and the subsequent action of the Franklin school district in fencing the land, taking possession thereof, and building and maintaining a schoolhouse thereon.

[1] Many of the elements necessary to sustain a demand for specific performance of this agreement are absent in this case, but in view of the construction which we think must be placed upon the evidence it seems to us unnecessary to go into the question of the rights to specific performance further than to say that specific performance cannot be decreed in this case because the demand for a deed should have been made to Mrs. Huston, the present owner of the record title to the entire quarter section, rather than to Mrs. Alcorn, and the tender also should have been made to Mrs. Huston rather than as it was made to Mrs. Alcorn.

[2] But the main obstacle to plaintiff's success in this appeal is that its contention that in equity this agreement, taken with the improvement of the property, should be construed as creating a trust in the owner of the property in favor of the Franklin school district cannot be upheld, and a clarifying inquiry at this point might be: A trust deed of what title—a fee or a right to use the property for school purposes? The letters and the testimony of Heinsen show that all that was asked was land for the purposes of the school, and here some general knowledge of California history and usage it seems to us is of value as casting light on this transaction. Schoolhouses were moved, 30 years ago in California, from one part to another in country districts, as the preponderance of population shifted from one part to another. And especially true was this in such country districts as this. It was not then unusual for owners of land to permit the use of their property temporarily for schoolhouses until a time came when the larger number of children would be served by the transfer of the school to some other section of the district. The letters, given even their strongest construction in favor of the plaintiff, show nothing more than a willingness that the school should take possession of an indefinite lot of land and use it for school purposes so long as it might be needed therefor, or so long as the district might find it convenient to maintain the school in that particular location. And, indeed, this is the view taken by the trial judge, who found that the plaintiff never had any right to use any of the real property described in the complaint except for the purpose of conducting thereon a public school, and that prior to the commencement of this action the plaintiff had ceased to conduct a school on the premises, and had

abandoned possession thereof to the defendant, and had waived all further right to possession for any purpose whatever. And it seems to us that this position of the trial court is sound.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

44 Cal. App. 744

McNULTY v. NEW RICHMOND LAND CO.

(Civ. 2942.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1919.)

1. VENDOR AND PURCHASER ⟸341(2)—DUE PERFORMANCE MUST BE ALLEGED IN ACTION FOR RETURN OF MONEY PAID.

In action by administrator of purchaser for return, pursuant to contract for purchase and sale of realty, of money paid by purchaser under terms of the contract, complaint was demurrable where it failed to show either due performance by buyer, expressly made a condition precedent to performance by defendant vendor, or waiver by defendant of strict performance.

2. CONTRACTS ⟸332(3) — CONDITION PRECEDENT MUST BE AVERRED.

Performance of conditions precedent in a contract must be averred in the complaint, either specifically or by authorized general averment, or a waiver thereof alleged.

3. PLEADING ⟸8(7) — CONCLUSION OF LAW THAT CONTRACT WAS IN FORCE AND EFFECT.

In action by administrator of purchaser for return, pursuant to contract for purchase and sale of realty, of money paid by purchaser under terms of the contract, averment of complaint that at time of purchaser's death the contract "was in full force and effect" is but the statement of a conclusion of law.

4. CONTRACTS ⟸305(3)—ACCEPTANCE OF PAYMENT AFTER DUE DATE NO EXCUSE FOR LACHES AS TO FUTURE PAYMENTS.

Where time is of the essence of the contract, the simple act of receiving a payment after the date when the payee was bound to accept it is no excuse for laches as to future payments.

5. VENDOR AND PURCHASER ⟸335—PAYMENTS MADE BY PURCHASER'S HEIRS UNDER LAND CONTRACT DID NOT REINSTATE CONTRACT; PURCHASER BEING IN DEFAULT.

Where contract for purchase and sale of realty gave purchaser's legal representative right to recover money paid by purchaser only in case all installments and interest had been paid according to contract, *held*, that acceptance by vendor from purchaser's heirs of amounts bringing installments down to date, purchaser being in default at time of his death, did not reinstate contract, so as to entitle purchaser's administrator to recover payments made by purchaser and heirs.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Frederick W. McNulty, administrator, etc., against the New Richmond Land Company. Judgment for plaintiff, and defendant appeals. Reversed.

Faulkner & Faulkner, of San Francisco, for appellant.

Frederick W. McNulty, of San Francisco, for respondent.

WASTE, P. J. This is an appeal by the defendant from a judgment in favor of the plaintiff for the return of money paid under the terms of a contract for the purchase and sale of real property.

Adam Van Prooyen, a resident of Oregon, on the 25th day of November, 1912, entered into a contract with the New Richmond Land Company, the defendant, wherein he agreed to purchase, and the defendant to sell, two lots of land in the city of Richmond. The purchase price of the property, specified in the contract, was $900; the sum of $50 to be paid on execution and delivery of the contract, the residue to be paid in monthly installments of $10 per month, commencing on December 25, 1912, with interest after two years. The buyer further agreed to pay all taxes and assessments levied on the property, and to discharge all liens accruing thereon. Failing to do so, the seller might pay and satisfy the same; the buyer to repay all such amounts, with interest, on demand.

After paying the initial amount, Van Prooyen, at various times, made 11 payments, aggregating $300, on account of the principal of the contract, and 2 payments of interest. He was behind in his payments after the first 5 months. He made a last payment of $10 on the agreement on January 19, 1916, which left him $70 in arrears on account of principal, besides some interest. He died April 14th following. The contract provides:

"In the event of the death of the buyer, this agreement, if then in force and unassigned, may, at the election of the legal representatives of the buyer, be continued in force, and further payments made as herein provided, or the seller will, upon request, on surrender and cancellation of this agreement, provided that all installments and interest have been paid as herein provided, pay to the legal representative of the buyer an amount equal to the sum of all payments made by the buyer under this agreement, with interest thereon from the date of such payments at the rate of 6 per cent. per annum."

It is also expressly stipulated in the contract that time is, and shall be, of the essence of the agreement, and that the—

"due performance of all covenants and agreements on the part of the buyer is a condition precedent, whereon depends performance of the agreements on the part of the seller."

No personal representative of the deceased was appointed in California until plaintiff qualified as administrator on August 3, 1916. Between the time of the death of Van Prooyen and the appointment of plaintiff, defendant was in communication with a firm of attorneys, purporting to represent the heirs of Van Prooyen and the administratrix of his estate, appointed in Oregon. The purport of this correspondence was that the father and mother of Van Prooyen, and his only heirs, desired to make a new agreement with the defendant, by which they might pay the balance due on the original contract, and secure a deed to the property, without the necessity of subjecting it to probate. Defendant agreed to this, and sent the attorneys a statement of the account with the decedent as the basis of such new agreement. Pending the outcome of these negotiations, the heirs in Oregon sent to the plaintiff, before he was appointed administrator, and he paid to the defendant, 3 sums, aggregating $135. Fifteen dollars of this amount was credited on account of interest on the contract, and the balance on the purchase price of the lots, which brought the installments down to date.

The correspondence between the heirs of the decedent and the defendant resulted in no further agreement. A request of defendant for a quick decision in the matter was answered by a demand by plaintiff, as administrator of the estate of Van Prooyen, for the return of all moneys paid under the contract, both by the decedent and by his heirs after his death.

The third amended complaint sets forth the contract in full, the dates and amounts of all the payments thereon, including those made by the heirs and contains the further allegation:

"That said contract was unassigned and in full force and effect at the time of the death of said decedent, Adam Van Prooyen."

Then follow allegations of the election of plaintiff, as personal representative of the deceased, to receive back from defendant the total amounts paid on the contract by all parties, the demand therefor, and the refusal by defendant. There is no general allegation of due performance on the part of the decedent, or by plaintiff.

[1, 2] Defendant's general demurrer to the complaint should have been sustained. The error thus committed is not one that can be cured by the action having proceeded to judgment, for in this instance it is not a question of sufficient facts insufficiently pleaded, but an entire absence of facts upon which to rest either a cause of action or a judgment. "Due performance" on the part of the buyer, Van Prooyen, was a condition precedent, whereon depended the carrying out of the agreement by defendant. Performance of conditions precedent in a contract must be averred in the complaint, either specifically or by authorized general averment, or a waiver thereof alleged. 21 R. C. L. 462; Krotzer v. Clark (Sup.) 174 Pac. 657, 658, and cases cited. In the instant case it clearly appears from the contract and the indorsements as to amounts and times of payment made thereon, as set forth in the third amended complaint, that at the time of the decedent's death he was many months in default by reason of his nonpayment according to the terms of his contract; some 9 or 10 installments, besides interest, being past due. No express waiver by defendant of the strict performance of the terms of the contract in the matter of payment is alleged, and no facts are made to appear from which such action may be inferred. Again, there is no allegation in the complaint that the decedent, or the plaintiff, as his legal representative, paid, or caused to be paid, the taxes levied and assessed against the property covered by the contract, or to the effect that, if defendant had paid the same, it had been repaid.

[3] The averment of the complaint that at the time of Van Prooyen's death the contract "was in full force and effect" is but the statement of a conclusion of law. Even if it were not, it would not save the complaint, for in addition thereto plaintiff has set out what was actually done, and such facts fall short of due performance. 13 Corpus Juris, par. 850, pp. 727, 728.

Not only was it incumbent upon plaintiff to allege either a performance of the contract by decedent or a valid excuse for nonperformance, but he had also the burden of proving one or the other. Krotzer v. Clark, supra; Estate of Warner, 158 Cal. 441, 445, 111 Pac. 352. He has not done so. As proof of performance he introduced in evidence the contract, with its indorsements of the payments made thereon, and the receipts for the payments made by the heirs after Van Prooyen's death. For the reason we have already discussed, this was not sufficient. In the matter of a waiver of performance, he places unwarranted reliance upon the fact that the defendant received payments from the decedent, Van Prooyen, after they were due, and did not take steps at any time to terminate the contract.

[4, 5] None of the cases relied upon to support respondent's view of the law in this regard go so far as to hold that the acceptance of one payment, after its maturity, will waive the right to declare a forfeiture if default occurs in subsequent installments. Where time is of the essence of the contract, the simple act of receiving a payment after the date when the payee was bound to accept it, without more, is no excuse for laches as to future payments. The effect of the acceptance is exhausted upon the payment made, and, as to those following, the provisions of the contract are left to operate with unim-

paired force. Boone v. Templeman, 158 Cal. 290, 296, 110 Pac. 947, 139 Am. St. Rep. 126; Bishop v. Barndt, 184 Pac. 901, 903. It was therefore within the power of defendant, under the facts as they existed at the time of the death of Van Prooyen, to stand upon the contract, remain inactive, and retain to its own use the moneys paid by the decedent. Glock v. Howard, 123 Cal. 1, 10, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17. In order to avoid the consequences of the situation thus presented, respondent argues that, by accepting the three payments made by the heirs after Van Prooyen's death, defendant reinstated the contract for all purposes, including the right of election by Van Prooyen's personal representative, to recover back "an amount equal to the sum of all payments made by the buyer."

We do not agree with this contention. The right of election was fixed by the status of the contract at Van Prooyen's death. He being grossly in default, and no excuse for nonperformance being shown, that privilege was denied his personal representative. No authority has been advanced in support of the theory that the personal representative could, under such a state of facts, by making subsequent payments, reinstate the contract, and by relation back to the time of the death of the decedent, elect to recover, not only all that the decedent had paid in his lifetime, but also the amounts paid after his death. We do not think any of the cases would so hold. We are of the opinion that the most that can be claimed for the subsequent payments is that, even if considered as made by the duly authorized personal representative of the decedent, they can only be regarded as having been made as further payments, under an election to consider the agreement continued in force. They were not so made, and no greater effect can be accorded to them, as voluntary payments, made by the heirs of decedent, and to that extent interested in, but in no sense parties to, the contract.

To hold otherwise would, in effect, be countenancing a fraud upon the defendant. The contract between Van Prooyen and the defendant was dead, if the latter elected to so regard it. Glock v. Howard, supra. The Oregon heirs asked defendant for "a new agreement * * * allowing them to pay the balance on the contract and get the deed, to avoid sending it through probate." Defendant agreed to this, apparently under the erroneous assumption that the administrator appointed in Oregon, and the father and mother of the deceased, his only heirs, were the "personal representatives," authorized to make an election to regard the contract in force and to continue the payments. The record makes it clear that the post mortem payments were received and accepted by it under this view, and it must follow it reinstated the contract for that purpose only.

The defendant, by way of a "second defense," contained in its answer, attempted to set up some of the matters which we have alluded to, and which appear from the evidence. Though improperly pleaded in some respects, the allegations raised issues which the trial court should have found upon.

The judgment is reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

45 Cal. App. 278

PETERSEN v. HOLDER et al. (Civ. 3063.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1919. Hearing Denied by Supreme Court Feb. 19, 1920.)

1. APPEAL AND ERROR ⊂⊃125—CONSENT JUDGMENT GENERALLY NOT REVIEWABLE.

Generally a judgment by consent will not be reviewed.

2. APPEAL AND ERROR ⊂⊃935(2) — RECORD HELD TO WARRANT PRESUMPTION THAT ORDER REFUSING TO SET ASIDE DEFAULT WAS PROPERLY VACATED.

Where it did not appear from record that defendants' attorney knew of order denying motion to set aside default judgment or that the judge was presiding when order was made or in fact knew of such order until a subsequent hearing on the motion, and where record showed that plaintiff's attorney made no objection to order vacating the order denying the motion to set aside default, court will assume, on appeal from order vacating order denying motion and from order setting aside default judgment, that the order denying motion was inadvertently made and properly vacated.

3. JUDGMENT ⊂⊃162(4) — DEFAULT WILL BE SET ASIDE ON SLIGHT EVIDENCE IN ABSENCE OF SHOWING OF PREJUDICE.

Where party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default.

4. JUDGMENT ⊂⊃143(11) — DEFAULT DUE TO MISTAKE OF LAW MAY BE SET ASIDE.

Where default was due to mistake of a clerk of the defendant's attorney in obtaining an extension of time when the court had no power to grant a further extension, and in misleading the attorney as to time within which to answer, court had a right to set aside the default, though the mistake was one of law.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry A. Petersen against Ella Holder and others. From order vacating order denying motion to set aside judgment by default and from order setting aside the default judgment, plaintiff appeals. Orders affirmed.

F. J. Castelhun, of San Francisco, for appellant.

Hugh K. McKevitt, of San Francisco (Royal E. Handlos, of San Francisco, of counsel), for respondents.

WOOD, Judge pro tem. This is an appeal from two orders made after judgment; the first bearing date June 21, 1919, vacating an order denying a motion to set aside the judgment by default, and the second one dated July 2, 1919, setting aside such judgment.

After the judgment was rendered, the defendants made a motion to set it aside. The motion was taken under advisement, and thereafter, in the absence of the parties, an order was entered denying the motion. It does not appear whether defendants' attorney knew of this order. Two days later he served notice that on June 21st he would move " for permission to make further argument on the motion to set aside the default." Upon the last-named date the order was entered vacating the order denying the motion to set aside the judgment, a stay of execution for 10 days was granted, and the motion to set aside the judgment submitted on briefs. The record presented here shows that, at the hearing had on June 21st, the law clerk of Mr. McKevitt (defendants' counsel) was sworn, and testified to the merits of the original motion to set aside the default, without any objection from plaintiff's counsel, who fully cross-examined him. He suggested that a stay of execution for 10 days be granted, and he obtained time to file a brief against the sufficiency of the showing made by defendants to set aside the default.

[1, 2] He made no objection of any kind to the action of the court in vacating the previous order. The order vacating the judgment does not show the grounds upon which it was made, or whether upon the court's or on plaintiff's, or on defendants' motion. There is nothing from which it may be inferred that Judge Troutt was presiding when the order denying the motion to set aside the default was made, or, in fact, that he ever knew of such order until the hearing on June 21st. The only authentication of the record by the judge is to the proceedings had at the time that the clerk of Mr. McKevitt was testifying. The certificate of the clerk attached to his transcript is to the effect that it contains true and correct copies of the original papers filed and the judgment roll in the action. In accordance with a stipulation, certain other papers were added to the record by permission of this court. Cases are cited by appellant holding that, to sustain an order vacating an appealable order, the record must show facts from which it may be inferred that such appealable order was inadvertently or improvidently made. In each of those cases, however, the vacating order was made in the absence of, or over the objection of, the adverse party. Here, by implication at least, plaintiff consented to the making of the order. As a general rule a judgment by consent will not be reviewed. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Erlanger v. Southern Pacific R. R., 109 Cal. 395, 42 Pac. 31; Pacific Paving Co. v. Vizelich, 1 Cal. App. 281, 82 Pac. 82. Upon a full consideration of the record, as brought up by the appellant, we think it should be assumed that the original order was inadvertently made, and properly vacated.

Turning now to the order setting aside the default, it appears that it was granted upon condition that plaintiff pay to defendants $50 within four days from its date. Upon the hearing, the defendants presented a verified answer setting forth a meritorious defense. They showed that after their demurrer was overruled, and they had been given time to answer, the law clerk of Mr. McKevitt, their attorney, obtained from the court three orders, each allowing 10 days' further time to answer, but that the second one was made 23 days after the first one was obtained. The last one was accordingly made at a time when the court had no power to grant a further extension. It specified that defendants be allowed to and including June 2, 1919, to answer. On May 26th plaintiff's attorney called the attention of the court to the fact that the last order had been made in excess of its jurisdiction, whereupon the court entered the default of defendants. The clerk of Mr. McKevitt thought that he was acting within the law because each of the three orders specified an extension of 10 days, aggregating only 30 days in all. Mr. McKevitt understoood from his clerk that he had all of June 3d to answer, and the answer was prepared by him and verified on that day. Notice of application to set aside the default was given on June 4th. There was no attempt to show that plaintiff would be injured in any way if the default was set aside, or that the verified answer was not tendered in good faith.

[3, 4] A situation was here presented, which appears to be disposed of by the case of Berri v. Rogero, 168 Cal. 740, 145 Pac. 97, in which the court said:

"Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default."

It is urged that no relief can be granted from the default because the mistake of the clerk was a mistake of law. The authorities hold to the contrary. See Staley v. O'Day, 22 Cal. App. 149, and cases cited at page 153, 133 Pac. 620, 622.

The orders appealed from are affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 194

FAYLOR v. GREAT EASTERN QUICKSILVER MINING CO. (Civ. 2963.)

(District Court of Appeal, First District, Division 1, California. Dec. 22, 1919. Hearing Denied by Supreme Court Feb. 20, 1920.)

1. NEGLIGENCE ⟸39(1)—UNGUARDED STOPE IN MINING TUNNEL, WITH PUSH CARS, CONSTITUTES NUISANCE ATTRACTIVE TO CHILDREN.

An open, unguarded stope in a dark abandoned mining tunnel, connected with a new tunnel, with a track for small push cars, left outside of the tunnels, unfastened and uninclosed *held* to constitute an attractive nuisance, rendering the mine owner liable for the death of a boy 11 years old, who fell into the stope while playing on the cars.

2. NEGLIGENCE ⟸136(19, 29) — CARE AS TO PLACE ATTRACTIVE TO CHILDREN QUESTION FOR JURY.

Whether an unguarded stope in a mining tunnel, with small push cars left unfastened, was a trap enticing and dangerous to children, and whether ordinary care was exercised to prevent children from wandering into danger while playing in the vicinity, and whether a child 11 years old was old enough and intelligent enough to anticipate, apprehend, and avoid the danger of falling into the stope, *held* to be questions for the jury.

3. DEATH ⟸58(1)—BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE ON DEFENDANT.

In an action for the death of a child, who fell into a stope in a mine tunnel while playing around the mine, the burden of proving contributory negligence rested on the defendant.

4. DEATH ⟸75—CONTRIBUTORY NEGLIGENCE NOT SHOWN BY EVIDENCE.

In an action for the death of a child, who fell into a stope in a mine tunnel while playing, a finding that deceased was not guilty of contributory negligence *held* justified by the evidence.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by John F. Faylor against the Great Eastern Quicksilver Mining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geary & Geary, of Santa Rosa, for appellant.

W. F. Cowan and Carl Barnard, both of Santa Rosa, for respondent.

BEASLY, Presiding Judge pro tem. This is an appeal by the defendant from a judgment against it based upon an adverse verdict of a jury in an action for the death of John Richard Faylor, a minor. The action is prosecuted by the boy's father. The verdict was for $5,500, and on motion for a new trial the court indicated its intention to grant the motion unless the plaintiff should agree to a reduction of the verdict to the sum of $4,250. This condition was met by plaintiff, and the motion for a new trial was accordingly denied. The facts are stated in the opening brief of appellant's counsel as follows:

For more than 30 years the defendant has operated a quicksilver mine about 3 miles from Guerneville, in Sonoma county. The mining property was part of a large tract of land, and was inclosed with a barbed wire fence. A public road passed near the property, and a large gate in defendant's fence permits travel between defendant's property and the county road. This fence and gate are about 25 feet from the county road. Posted in a conspicuous place on said gate was a sign 6 feet long and 18 inches wide, and with the word "Danger" painted thereon in letters 1 foot high, and the words "No admittance" about 8 inches high. About a half mile from defendant's property the plaintiff and his family, which included the deceased, resided, and opposite his dwelling was situated the public school attended by deceased. It was not necessary for deceased or any of plaintiff's children to pass near or through defendant's property in going to or from school. The mine has been operated about 30 years. In working it a tunnel about 500 or 600 feet long was driven into the ore body. This tunnel was known as the "old tunnel," and was about 4 feet wide. Two rails were laid in said tunnel, about 2 feet apart and extending through the mouth of said tunnel and across a practically level part of the property to the crushing plant, situated about 150 feet from the mouth of the tunnel. In moving ore from the mine, small cars 2 feet long and about 18 to 20 inches wide, consisting of four wheels and a box bed, were run on these tracks. There was a slight fall from the inside of the tunnel, and the cars were easily pushed along the rails by the workmen. Some 13 or 14 years ago, in working the mine, a stope was driven up through the floor of the tunnel. Where this break occurred, and where ore tracks passed over the stope, planks were laid, one 2x12-inch board between the rails, and a similar board on each side of the rail,

and, as so constructed, it was safe to push the cars over the rails, and the tunnel was so used for many years. The workmen continually passed back and forth over this part of the tunnel, walking on these boards, and it was considered safe.

During the winter of 1916–17, by reason of a cave occurring near the mouth of this old tunnel, it was impossible to use the part of it extending in about 75 feet from the mouth thereof, and a short tunnel, called the branch tunnel, was driven in about 50 feet to intersect this old tunnel beyond the caved-in part, and during the year 1917 and part of 1918 all ore extracted from the mine was moved out over this short tunnel to the crusher. The rails in the old tunnel between its mouth and its junction with the branch were removed, and at the time of the accident to John Richard Faylor there were no rails thereon, and no cars could be moved through the mouth of the old tunnel. When the mine was not being operated these little cars were left near the mouth of the tunnel which was in use. On Sunday, the 3d day of February, 1918, no work being then done in or about said mine, the deceased, an intelligent boy 11 years old, together with his brother and a boy named Ewan, went in upon the mining property to play. John Faylor ran the little car upon the track into the branch tunnel to the junction with the main tunnel once or twice and left it there, and, instead of returning the way he entered, passed into the old tunnel and proceeded towards the mouth thereof. His body was afterwards found in the stope. At the junction of the main tunnel and the branch tunnel there was a large timber in the center of the main tunnel, which one proceeding towards the mouth of the old tunnel would have to pass around. It was also obstructed by a pile of dirt and débris 2 feet high, and by a pipe line extending across it.

The following additional evidence, some of it contradictory to defendant's above-recited statement, is pointed out by appellant, namely: That the father of the deceased had been employed at the mine for many years, and that occasionally the deceased, with the children of other miners, would go upon the grounds to see their parents, but that they never at such times played with the cars, and had never entered the tunnels; that orders had been given by the managers of the mine to all their employés not to permit any one within the place; and that the deceased and other children had been ordered off the premises by a Mr. Roeth, an employé of the appellant, who drove them out, and told them to get out and stay out; that the father of the deceased had told his children that it would be dangerous for them to go in the tunnels or to play on the cars; that a foreman of the mine had seen two boys playing with the car, and took it away from them, and told them not to play there; that the children had played with the cars on the Sunday on which John Faylor was killed; that the Faylor children had been driven out of the mine about a month before the accident; that Johnnie Faylor, the deceased, had been ordered off the grounds several times by one Clyde Ayers, who stated he did not know on how many occasions he had done this; and that the tunnel and stope were an integral part of the mine and necessary to properly work the same.

The following additional evidential facts are pointed out by the respondent: The mine where the deceased met his death was partly inclosed by a fence on the northwest side, and is located within about 100 feet from the hoist, from which entrance is made onto the mining property through a gate. It was easy to enter the mining property through the fence, and a road leads from this gate over and across the mining property, which at an earlier date had been used as a public road. Upon this road school children living beyond the mine, prior to and at the time of the injury, would travel, and would cross the mining property, in going to and returning from school, located about one-half mile from the mine. On Saturdays and Sundays, and after school, and during the noon hour, school children and children of the neighborhood would go upon the mining property to play. One Louis Bonnacarsi testified that he had seen children at the mine for a year or more playing with the cars; that they usually played around there like most children would around a place like that, and that often he had seen them playing with the cars; that they would run them up into the tunnel a ways, and ride out on them, and sometimes some of the little boys would get in the cars, and others would give them a start and ride on the trucks behind, while the cars ran down towards the dump. On account of the cave-in at the mouth of the old tunnel, the old tunnel had been for a time in disuse; but at and prior to the date of the death of John Faylor the débris had been removed, so that the entrance was unobstructed. The tracks of the car line had been replaced at the time of the injury up to the stope where young Faylor met his death, which before the earthquake was built up from below the 140-foot level into and through the floor of the old tunnel at a point about 50 feet from the entrance. This stope was about 500 feet deep, and was filled with water below the 140-foot level at the time young Faylor met his death therein. It had not been used in the mining operations for a number of years, and was abandoned, and at the time of the death of the deceased, and for some months prior thereto, the stope was open and unprotected. It was dangerous, for miners had been warned to avoid the stope, and feared to go into the tunnel on account

of the stope. There was no watchman at the mine, and there were no lights in the main tunnel. Outside the two tunnels mentioned, and near by, was the hoisting shaft and pump. The track out of the branch tunnel ran near the hoist and down to the dump, and four cars were pushed and operated over the track. These cars could be pushed or shoved by children. None of these cars had blocks or other fastenings, except a foot brake. When not in use, the cars were left standing on the tracks outside the tunnels, unblocked, unfastened, uninclosed, and unguarded, and they were in this condition and uninclosed on Sunday, February 3, 1918, when the deceased met his death.

On that date the deceased and his brother Fred and another boy named Gilbert Ewan went upon the premises and played with two of the cars, one of the larger cars and the flat car. Clyde Trine, an employé of defendant and appellant, helped Fred Faylor and Gilbert Ewan push the large car, and the deceased pushed the flat car into the tunnel. After stopping at the water bucket for a drink, Fred Faylor and Gilbert Ewan pushed the big car, and the deceased pushed the flat car, back into the new tunnel at the junction. One of the cars left the track near the junction, and they heard the Faylor girls at the entrance of the tunnel, and Fred Faylor and Gilbert Ewan hid behind the car at the junction of the tunnels, and deceased started out of the old tunnel. John Faylor was never again seen alive, and his body was subsequently recovered from the stope. Finger prints were discovered on the side wall at the opening of the stope. The parents did not know their children played with the cars, nor around the tunnels or mine, nor did they know that they were going to play at the mine that day.

Upon these facts the respondent obtained a verdict, as above stated, upon the theory that the cars, tunnels, and stopes constitute an attractive and dangerous nuisance under the rule laid down in the turntable and kindred cases; and the appellant claims that the facts do not bring the case within that rule. The rule in California has been stated as follows: Those who place an attractive, but dangerous, contrivance in a place frequented by children, and knowing, or having reason to believe, that children will be attracted to it and subjected to injury thereby, owe the duty of exercising ordinary care to prevent such injury to them, because such persons are charged with knowledge of the fact that children are likely to be attracted thereto, and are usually unable to foresee, comprehend, and avoid the danger into which they are thus knowingly allured. Barrett v. Southern Pacific, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; Pierce v. United Gas & Electric Co., 161 Cal. 180, 118 Pac. 700; Cahill v. Stone & Co., 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094.

One theory on which this rule seems to be predicated is that the attractiveness of the dangerous contrivance or machinery raises an implied invitation to children to go upon the property. The rule of implied invitation is thus stated in Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004:

"If, therefore, the owner places something upon his premises which is easily accessible to children, and which is alluring and attractive to their childish propensities, and excites their curiosity and desire for play, it in effect amounts to an implied invitation to them to come upon the premises."

By reason of this implied invitation, such cases are sometimes said to be within the general and well-settled rule of law that the owner, or occupant, of lands or buildings, who by invitation, express or implied, induces persons to come upon his premises, is under a duty to exercise ordinary care to render the premises reasonably safe for them. This general rule is correctly stated in Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899, Means v. Southern Pacific Ry. Co., 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206, and Giannini v. Campodonico, 176 Cal. 548, 169 Pac. 80, and it is accordingly and logically held that it constitutes want of ordinary care to knowingly maintain in such places, where attractive contrivances to the knowledge of the owner invite children to play, a dangerous piece of machinery or other trap or snare for them, and that ordinary care in such cases may only be exercised by taking into consideration the propensities of the children who play there, the ability of such children to appreciate the danger, and their power to avoid it, and so protecting them reasonably from the danger, and in this connection there are certain qualifications of the rule to be hereinafter mentioned. The questions of the particular child's ability to appreciate the danger, and his power to avoid it, are usually questions of fact for the jury.

But there is another and more generally accepted theory on which the turntable and kindred attractive nuisance cases are rested, to wit, that, although the children are trespassers, these cases constitute an exception to the general rule that the owner of property owes no duty to mere trespassers to keep his property in a safe condition (Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106; Malloy v. Hibernian Savings & Loan Society, 3 Cal. Unrep. 76, 21 Pac. 525; Loftus v. Dehail, 133 Cal. 214, 65 Pac. 379); and this because the cases arise out of "instances where the owner maintains on his land something in the nature of a trap or other concealed danger, known to him, and

as to which he gave no warning to others." This language is quoted from the opinion of Mr. Justice McFarland in Peters v. Bowman, supra. The exception to the general rule that an owner owes no duty to protect trespassers which is established by the turntable cases, and is known as the attractive nuisance doctrine, is stated, with some of the qualifications above referred to, by the late Chief Justice Beatty in Peters v. Bowman, supra, as follows:

"The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural or common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all the surrounding circumstances and conditions. As to common danger existing in the order of nature, it is the duty of parents to guard and warn their children, and failing to do so, they should not expect to hold others responsible for their want of care. But, with respect to danger specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different."

In an exceptionally thoughtful opinion by the Supreme Court of Utah (Brown v. Salt Lake City, supra), this language of the Chief Justice is quoted with unstinted approval, and that court discussed fully the whole subject, and after so quoting and approving the above language of the late Chief Justice in Peters v. Bowman, supra, that court held that the rule as there stated applied to a water conduit maintained by Salt Lake City, wherein the danger was concealed, and in which a schoolboy, while playing, was drowned. The conduit was closed, and, in principle, the facts of the case cannot be distinguished from those of the case now under discussion.

Counsel for appellant insists that Peters v. Bowman, supra, Nicolosi v. Clark, 169 Cal. 746, 147 Pac. 971, L. R. A. 1915F, 638, Loftus v. Dehail, supra, and Polk v. Laurel Hill Cemetery Association, 174 Pac. 414, determine this case, and that under those cases the rule of the turntable cases cannot be extended to the facts developed by the evidence in this case. But we cannot agree with counsel in this contention. It was held in Peters v. Bowman that a body of water, either standing, as in ponds and lakes, or running, as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays, is a natural object incident to all countries which are not deserts; that the danger of drowning in it is an apparent open danger, the knowledge of which is common to all; and that there is no just view consistent with recognized rights of property owners, which would compel one owning land upon which such body of water stands or flows, to fill it up, or surround it with a wall, and that, while in that case the pond was an artificial pond, the same rule would be applied to it that would be applied generally to natural bodies of water, and justly, for the reason that the danger was not a concealed danger and that children from birth are taught, generally speaking, to avoid the danger of drowning, at least when the danger is open to their eyes.

Loftus v. Dehail, supra, was a case where the danger, an open cellar on a vacant lot, from which the house which had covered the cellar had been moved, was held not to be a concealed danger, and, further, the injured child was found to have been pushed into the cellar by another child, whose act was held to be the proximate cause of the injury.

In Nicolosi v. Clark, supra, a boy of 10 years stole a box of dynamite caps from a tool box used by a street contractor to store tools, and, not knowing that they were dangerous, exploded one of the caps, to his injury. It was held upon the facts that the boy was shown to have been guilty of contributory negligence, but the following language of the opinion is illuminating:

"If a boy of 10 years of age is not chargeable with knowledge that he has no right to make free with the contents of a box placed such as this, manifestly a box belonging to other people and containing their goods, it can only be because that particular boy is of deficient intellect and understanding."

In Polk v. Laurel Hill Cemetery Association, supra, the rule of the turntable cases was applied to a reservoir of water in which a child was drowned, apparently because the reservoir was so concealed as to be dangerous to persons passing near it, as the following language of the complaint indicates:

"That it was dangerous to all persons passing near the same, 'because the turf and ground sloped up to the edge thereof, so that any person walking or standing near the edge of said reservoir was without protection and without notice of proximity to a place of danger and was without any warning sign or indication that said place was dangerous."

In all these cases, except Polk v. Laurel Hill Cemetery Association, the danger was either so open that the injured child was held to have been able to see it, or so obvious that the particular child was held accountable for understanding the danger, and in Polk's Case the defendant was held answerable because the danger was concealed. And so far as we have been able to examine the authorities, the rule as laid down by the Chief Justice in Peters v. Bowman, supra, will be found to explain every case where relief has been denied in the states where the attractive nuisance doctrine is recognized.

[1] But the case at bar is distinguished from all the cases in our own, and so far as our attention has been called to them, in other, jurisdictions recognizing the rule where relief has been denied trespassing children injured by the condition of machinery or premises, for in the case at bar the danger was distinctly a concealed danger. The bait of the trap may be said to have been the push car, in itself an attractive lure to boys of the age of John Faylor. The tunnel, which, like any cave, natural or artificial, has been both in fiction and in fact, in their reading and in their play, since the days of Ali Baba, Robinson Crusoe, and the Count of Monte Cristo, irresistibly attractive to boys, and the concealed stope in the dark tunnel 500 feet deep and filled with water, was the trap into which the tunnel and cars led the boy's unwary feet. From the evidence in this case, the company knew that the children played about this mine. It must be taken to have been known to the defendant that its machinery was attractive to adventurous and playful children. It knew certainly of the open and unprotected stope in the dark tunnel near the end of the car line, and it must be held to the duty of recognizing the ordinary propensities of boys to play therein, their love of adventure, which the defendant must be held to have anticipated, would lead them into the tunnel, and the lurking danger against which the company might have simply provided by closing the tunnel when it was, as at the time of the death of John Faylor, not working the mine, and had no watchman there to guard it. The evidence certainly is sufficient, from a legal standpoint, to sustain a finding bringing this case within the attractive nuisance doctrine.

[2] The ultimate question as to whether this was a trap enticing and dangerous to children, and whether the company exercised ordinary care in failing to close the tunnel's mouth or otherwise to prevent children from wandering therein while playing with the cars, and from falling into the stope, and whether the deceased child was old enough and intelligent enough to anticipate, apprehend, and understand and to avoid the danger, were questions which are usually to be determined by the jury. Brown v. Salt Lake City, supra. We think the jury had sufficient evidence before it to justify a finding that the car, tunnel, and stope, taken together, did constitute an attractive nuisance within the general rule of the turntable cases, and in reply to the statement that no case has been found extending the doctrine to such a state of facts as this, it may be said in passing that, as has been shown, the rule has been applied to cases other than machinery, and, further, that while matching cases is an interesting mental recreation, it is not by matching cases, but by the correct application of sound legal principles that a case such as this is best determined, and that in at least one able decision, the rule has been applied to a state of facts very similar to those of the instant case—Brown v. Salt Lake City, supra.

[3, 4] The burden of proving contributory negligence rested on the defendant. We think an examination of the facts above recited will show that the jury were justified in finding from the above evidence that this burden was not sustained.

We are satisfied that the evidence sustained the verdict, and that the judgment should be affirmed; and it is so ordered.

We concur: RICHARDS, J.; KERRIGAN, J.

45 Cal. App. 46

SINNOTT et al. v. SCHUMACHER et al.
(Civ. 3065.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

1. CONTRACTS ⊂=322(4) — CONTRACTOR HELD TO HAVE FAILED TO GIVE ARCHITECT WRITTEN REPORT OF THE PERCENTAGE OF WORK DONE.

In an action by a contractor who repudiated the contract when he failed to receive the monthly payments, evidence *held* to sustain finding that the contractor did not furnish the architect with a report showing the exact percentage of the materials received and the percentage of the work installed, notwithstanding the architect furnished wrong blank and the contractor furnished a general statement to the effect that 8 per cent. of the work was done.

2. CONTRACTS ⊂=280(3)—CONTRACTOR'S STATEMENT OF PERCENTAGE OF WORK DONE NOT THE MONTHLY STATEMENTS REQUIRED BY CONTRACT.

A mere general statement by a contractor that 8 per cent. of the work was done is not a compliance with the provision requiring the contractor to furnish the architect a written report setting forth the exact percentage of the materials received and the exact percentage of the work installed, the purpose of the report being to enable the architect to correctly compute the work done so as to determine the amount due the contractor.

3. WORK AND LABOR ⊂=14(3) — CONTRACTOR WHO FAILED TO FURNISH REQUIRED REPORT OF WORK DONE NOT ENTITLED TO RESCIND CONTRACT AND RECOVER IN QUANTUM MERUIT BECAUSE PAYMENT WAS NOT MADE.

Where a contractor failed to furnish a report showing the exact percentage of the work done, etc., he is not entitled to rescind contract because of the owner's failure to make partial payment and to recover on the quantum meruit the amount due.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. PRINCIPAL AND SURETY ⊂=166—RIGHT TO RECOVER ATTORNEY'S FEES IN ACTION ON BOND.

Where a building contractor's bond provided for attorney's fees in event of breach of condition, the contractor, having wrongfully broken his contract, cannot complain of an award of an attorney's fee in favor of the owner.

5. DAMAGES ⊂=86—PENALTY IN BUILDING CONTRACT FOR DELAY NOT APPLICABLE WHERE CONTRACTOR WRONGFULLY REPUDIATED THE WHOLE CONTRACT.

Where a contractor wrongfully repudiated the whole contract and abandoned the work without cause, a provision in the contract for penalty for delay is wholly inapplicable.

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Action by Richard Sinnott and the Pacific Coast Casualty Company against Maria Schumacher and others, who cross-complained. From a judgment for defendants on their cross-complaint, plaintiffs appeal. Affirmed.

Chas. F. Hanlon, of San Francisco, for appellants.

W. B. Rinehart, of Oakland, for respondents.

Frank P. Deering and James Walter Scott, both of San Francisco, amici curiæ.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants and cross-complainants for the sum of $15,972 upon their cross-complaint against the plaintiff and the cross-defendant Pacific Coast Casualty Company.

The action was one originally brought by the plaintiff against the defendants to recover the sum of $6,800.28, the alleged value of labor and materials furnished by said plaintiff to said defendants under a building contract for the erection of a structure for said defendants at a cost of $50,000. The plaintiff entered upon the performance of said contract and proceeded therewith up to a time, when, according to his complaint, the first installment would be due and payable to him under his contract, and he alleges that after repeatedly demanding the payment of this installment so that he might be enabled to proceed with his work under said contract, but failing to receive any portion of the same, he abandoned work upon said building for that reason and gave notice of the rescission of said contract, and thereafter commenced this action in quantum meruit for the reasonable value of the work and materials supplied by him upon said building. The defendants answered, admitting the making of said contract, but denying that any installment was due or payable to the plaintiff at the time of his abandonment of such contract and of his notice of rescission thereof. The defendants also filed a cross-complaint against said plaintiff and against the Pacific Coast Casualty Company, his bondsman under said contract, by which they alleged that the said plaintiff's abandonment of his said contract and of the construction of said building was without cause, and that in consequence thereof said defendants were obliged to incur additional costs and expenses in the completion of said building amounting to a large sum, for which they prayed judgment upon their cross-complaint. The trial court found against the plaintiff upon his complaint, and in favor of the defendants upon their cross-complaint, and thereupon rendered judgment against plaintiff and his said bondsman for the sum above stated. From such judgment the plaintiff and the cross-defendant, Pacific Coast Casualty Company, have taken this appeal.

The record in the case is quite voluminous, but the questions presented upon the appeal, when stripped of much of the involvement in their discussion in the elaborate briefs of counsel, would seem to be few and simple.

[1-3] The first and in fact the main contention of the appellants is that a number of the findings of the court are not sufficiently supported by the evidence in the case. The first finding thus attacked is that portion of finding 10 which reads as follows:

"And the court further finds that said Richard Sinnott never at any time furnished to said owners or their architect any written report setting forth the exact or correct percentage of materials received at the building, or the exact or correct percentage of the work installed, but on the contrary demanded payment on and after the 4th day of December, 1914, for a percentage of work not installed and for a percentage of materials not received at the building far in excess of the actual percentage of work installed and materials received, to wit, for the sum of $4,000 or thereabouts."

This finding is an essential one, in view of the provisions of the contract between the parties, which contains the following stipulation:

"On the first day of each month as the work progresses a sum equal to seventy-five per cent. of the actual value of the materials and labor incorporated into the said building. * * * The architect shall compute the amounts at the times when the payments become due. * * * The contractor shall furnish to the architect at each time when payments become due a written report setting forth the exact percentage of the materials received at the building and the exact percentage of the work installed."

We are unable to agree with the appellants' first contention. The only evidence upon which the appellants rely as supporting their claim that the uncontradicted evidence shows that the plaintiff (contractor) did in fact comply with the terms of the foregoing

clause in the contract between the parties consists in certain letters which the plaintiff wrote to the defendants or their architect which contained the general statement:

"That the exact percentage as near as is possible to make it of the materials received at the building is 8 per cent. thereof, and the exact percentage of the work installed as near as is possible to make it is 8 per cent. thereof. I also notify you that there is now due, owing and unpaid to me as original contractor for the pro rata of materials received at the building, and the pro rata of the work installed, the sum of $4,000, or 8 per cent. of the total contract price."

It will be noted that the terms of the foregoing clause in the contract, with which the appellants claim that the above-quoted matter amounts to a compliance, read as follows:

"The contractor shall furnish to the architect at each time when payments become due a written report setting forth the exact percentage of the materials received at the building and the exact percentage of the work installed."

The purpose of requiring such a report from the contractor to be made to the architect is manifestly to enable the architect to correctly compute the amount of the installment which shall be due and payable to the contractor on the first day of each month as the work progresses, and it should require no argument to show that the mere general statement or conclusion of the contractor as to the percentage of materials received and work installed upon the building at the time he requires the installment payment upon the cost thereof does not amount to a compliance with the foregoing provision of said contract.

But aside from this conclusion as to the sufficiency of the plaintiff's showing in the above respect, the appellants contend that the contract between the parties requires the architect of the building to supply to the contractor upon demand a blank form upon which to make out and furnish the information as to the percentage of work done upon the building required by the foregoing clause in said contract, and that the architect supplied the contractor with the wrong blank form, which the plaintiff filled in with certain data which amounted to an insufficient compliance with the terms of the contract. Conceding this to be true, there is nothing in the evidence to show that the contractor, upon receipt of said blank form from the architect and upon his discovery that it was insufficient, ever applied to the architect, as the contract requires, for the proper form or blank, and the finding of the trial court in this respect which the appellant assails is fully supported by the evidence in the record.

Aside from the foregoing considerations, however, we have examined the record carefully for the purpose of determining just what the evidence does disclose with respect to the plaintiff's compliance or failure to comply with the requirements of the contract above referred to, and from such examination we find that at or about the time when under the terms of the contract a first installment would be due and payable to the contractor thereon, and after the contractor had filled in the insufficient form and furnished the general statement as to the percentage of the work done and materials installed in the building, the architect and the contractor had several sessions together, wherein the former undertook to get from the latter some exact statement as to the amount of work which had been done and materials furnished upon the building up to that time, as a result of which it appeared that the demand of the contractor for the payment of the sum of $4,000, based upon his alleged general statement that 8 per cent. of the work had been done and materials furnished upon said structure, was far above the actual amount which would be due him thereon, and that at the conclusion of the several conferences between the architect and the contractor it was agreed, and so stated by the architect, that, immediately upon the said contractor furnishing the written report required by said contract and containing the facts and figures as to the amount of work done and materials furnished upon said building deduced from their said conferences, the proper sum due him as his first installment upon said contract would be paid. In respect to this phase of the testimony, the appellants, however, insist that the architect coupled with his statement as to the acceptance of such report and payment of such installment a condition to the effect that an amount claimed to be due to a party named Sundberg for certain extra work which had been done in and about the foundations of said structure should be cut down to a sum much less than the actual cost of such extra work and the actual amount which said Sundberg would be entitled to receive or would accept therefor. The evidence, however, upon this subject is conflicting, the architect having stated that an actual computation of such extra work done by said Sundberg showed that the amount due him was no greater than the sum which he was willing to allow; and the architect further testified in that regard that said Sundberg had been notified by him prior to the doing of any such extra work that he was not to do such work at the expense of the owners.

If, however, it should be conceded for the sake of the argument that the contention of the appellants to the effect that said Sundberg was entitled to a larger amount for the extra work done by him than that which the architect was apparently willing to allow, this fact would not suffice to excuse the contractor for his failure to furnish the written

report as to the percentage of work done and materials furnished upon said structure required by the terms of his contract as a prerequisite to his right to receive the installments from time to time due or to become due thereon. Having failed to furnish said report, the contractor had not placed himself in position to properly demand or receive the first installment due or to become due upon said contract; nor was he placed in a position which entitled him to abandon said contract and rescind the same and sue for the amount claimed to be due him upon quantum meruit by reason of the fact that he had failed under said circumstances to receive said payment. We are of the opinion that the evidence in the case fully sustains the findings and conclusion of the trial court in that respect, and hence that the contention of the appellants therein must be held to be without merit.

The appellants further assail a number of other findings by the trial court which all have their relation to the findings above considered in detail and which, upon an examination of the record, we find to be sufficiently sustained by the same evidence which sustains such former findings. In short, we have arrived at the conclusion that the entire substance of finding 10 is supported by the evidence in the case.

[4] The appellants also demur to the finding of the trial court wherein the sum of $2,500 as attorneys' fees was awarded to the defendants and cross-complainants herein, the contention of the plaintiff being that there was nothing in his contract with the defendants which permitted the allowance of attorney's fees to them upon any breach by him of the terms of said contract. This would be a good contention were it not for the fact that the bond which was given by the plaintiff and his bondsmen, the Pacific Coast Casualty Company, expressly provided for the payment of attorneys' fees in the event of a breach of the conditions of said bond; and the record shows that said bond was signed, not only by the said surety company, but also by the plaintiff herein, with the necessary consequence that he as well as his bondsmen, would be liable upon said bond.

[5] As to the appellants' contention that the court was in error in its finding and conclusion as to the amount of damages sustained by the defendants and cross-complainants by reason of the plaintiff's unjustified abandonment of work upon said building, and his failure, neglect, and refusal to complete the same it may be stated that this contention is based upon the clause in the contract which relates to the matter of delay in the time of completion of said building and which purports to fix a penalty of $50 per day for such delay; but this provision of the contract has no application to a condition wherein the contractor is shown to have abandoned his contract without sufficient cause, in which case the right of the defendants to damages as a result of the plaintiff's breach of said contract could not be affected or limited by said provision of the contract for a penalty for delay in the completion of the structure beyond the stipulated time for such completion.

The foregoing review of this case covers, considers, and decides every material contention urged by the appellants upon this appeal.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 181

PAPINEAU v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al. (Civ. 3091.)

(District Court of Appeal, Second District, Division 1, California. Dec. 20, 1919.)

1. MASTER AND SERVANT ⊂⊃375(2) — INJURY TO EMPLOYÉ PROCURING MILK FOR LUNCH ARISES OUT OF AND IN "COURSE OF EMPLOYMENT" WITHIN WORKMEN'S COMPENSATION ACT.

Where a barber shop porter, pursuant to custom, and with his employer's consent, left the shop during the forenoon to procure a bottle of milk to use with his lunch and was injured while entering the elevator, the injury arose out of and in the course of employment, within Workmen's Compensation Act 1917, though the elevator was controlled by owner of building and was for use of all persons having occasion to use it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

2. MASTER AND SERVANT ⊂⊃389 — EMPLOYER PAYING COMPENSATION ENTITLED TO RECOVER FROM WRONGDOER WHO HAS SETTLED WITH INJURED EMPLOYÉ.

Where employé's injury for which employer has been required to pay compensation was due to negligence of third party, employer under Workmen's Compensation Act 1917, § 26, has an interest in employé's cause of action against third party, in the nature of a lien which he can enforce in his own name and which cannot be impaired by a settlement by employé not concurred in by employer; the third party being chargeable with notice that settlement could not affect employer's rights.

Proceedings under the Workmen's Compensation Act by Jack Miles, opposed by O. L. Papineau, employer. Award by Industrial Accident Commission of the State of California, and the employer applies for certiorari to review the order of the commission. Award affirmed.

Kuster & Salisbury, of Los Angeles, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

SHAW, J. Review of an award made to Jack Miles for injuries sustained by him while working in the capacity of bootblack and porter in the employ of petitioner, who conducted a barber shop on the second floor of an eleven-story building, access to the floors of which was by means of elevators controlled and operated by the owners of the building for the common use of tenants, their employés, and all persons having occasion to visit the upper floors of the building.

It is conceded the evidence tends to establish the following facts: That with the knowledge, approval, and consent of his employer, it was the custom of the claimant to leave the barber shop in the forenoon, when business was slack, and go out and purchase a bottle of milk to drink with his lunch, which he ate in the barber shop. At the time when he was injured he had left the barber shop on such personal errand. Upon reaching the elevator, the door of which was open, he asked the operator if he was going down, and, receiving an affirmative answer, he proceeded to enter, when he was caught in the closing doors and injured.

Upon these facts petitioner insists that the injury did not arise out of and in the course of the employment of Miles. Three reasons are assigned for this contention: First, that the claimant had left the premises of the petitioner on a personal errand and was not engaged in the performance of any service for his employer; second, that the injury was not due to a risk incident to his employment, but caused from a peril common to all persons using the elevator; and, third, that the injury was caused by a joke perpetrated by the operator of the elevator.

[1] While it is sometimes difficult to distinguish the line between an injury arising out of and in the course of employment and one which does not so arise, nevertheless the facts here presented bring the case within the rule announced in the opinion in Archibald v. Ott, 77 W. Va. 448, 87 S. E. 791, L. R. A. 1916D, 1013, wherein it is said:

"Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment."

In leaving the barber shop, with the knowledge, consent, and approval of his employer, for the purpose of procuring a bottle of milk to use with his lunch, as was his custom, the claimant, while ministering unto himself, was nevertheless, in a remote sense, in that one who works must eat, engaged in an act which contributed to his efficiency and furtherance of the work. Thus compensation has been awarded for an accident suffered where the employé had left the performance of his work to procure drinking water. Keenan v. Flemington Coal Co., 5 F. 164, St. of Sess. Other cases sustaining the rule are cited in the opinion in Whiting-Mead Commercial Co. v. Industrial Accident Commission, 173 Pac. 1105, wherein an award for an injury resulting to an employé from a burn sustained from igniting a turpentine-soaked bandage on his hand, while lighting a cigarette for his personal use, was upheld.

The fact that the elevator in question was controlled by the owners of the building is unimportant for the reason that the tenant had the right, as an appurtenance of the premises leased by him, to the use of the elevator for himself and employés in going to and from the barber shop, and hence the elevator was a part of the employer's premises. As supporting this proposition, see Starr Piano Co. v. Industrial Accident Commission, 184 Pac. 860, wherein the case of In re Sundine, 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A, 318, is cited, which involved an award made for an injury sustained by an employé while using a stairway in going from her place of work for lunch.

That the elevators were for the use of all persons having occasion to use them as a means of access to the building could not affect claimant's right to the award. A like argument might be made with reference to injuries sustained by persons whose employment requires them to travel upon lines of railway or upon the public streets, right to recover for which is supported by ample authority.

Conceding that evidence on which petitioner relies tends in a slight degree to show that the claimant, upon entering the car, asked the operator if he was going down, to which he, in the spirit of a joke, replied, "No, going up," whereupon claimant attempted to get out of the elevator nevertheless such evidence is inconsistent with the testimony of Miles, upon which conflict of evidence that of the latter was accepted by the commission as true. However considered, we do not think the facts approach those involved in Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, upon which petitioner relies.

It appears that, after the injury and before the filing of his claim with the Industrial Accident Commission, Miles, in consideration of $300 paid to him, and without petitioner's knowledge, executed to the owners of the building a release of all liability against them on account of the injury sustained. It is now urged that by such act he

destroyed the employer's right, as provided by section 26 of the act, to recover against the building company for liability created on account of the award made in favor of claimant against petitioner. Except in so far as it is incidental to the inquiry, the question as to whether or not petitioner could successfully maintain an action against the building company to recover damages on account of compensation by him paid to claimant is not involved in this proceeding.

Section 26 of the act (Stats. 1917, p. 854), provides:

"When any injury for which compensation is payable under the provisions of this act shall have been sustained under circumstances creating in some other person than the employer a legal liability to pay damages in respect thereto, the injured employé may claim compensation under the provisions of this act, but the payment or award of compensation shall not affect the claim or right of action of such injured employé against such other person, but such injured employé may proceed at law against such person to recover damages; and any employer having paid, or having become obligated to pay, compensation may bring an action against such other person to recover damages."

It being further provided that, since the employer or employé under such circumstances may sue, either thereof, upon bringing such action, is required to notify the other of such fact, and the one so notified may join as a party plaintiff, and if upon notice he fails to join as party plaintiff, his right of action against such third party shall be barred. The employer's right of recovery in such action, to the extent of the compensation which he is obligated to pay his employé under the provisions of the act, together with attorney's fees and costs, takes precedence over that of the employé.

[2] As we have seen, the injury was one for which Miles was entitled to an award of compensation under the provisions of the act, and, conceding it was sustained under circumstances out of which a cause of action for damages arose in his favor against the building company, such cause of action, while not the subject of an assignment by him, was, nevertheless, to the limited extent specified in the statute and by operation of law, vested in the employer who, as to his interest therein, was entitled to sue thereon in the manner specified in said section. In cases of the character mentioned in section 26, the interest of the employer in the cause of action which the injured employé has against the third party, whose negligent act caused the injury, is in the nature of a lien thereon which he can enforce by action in his own name and which right cannot be impaired or destroyed by any act of the injured employé not concurred in by the employer. The building company, due to whose act the injury occurred, must be deemed chargeable with notice of the fact that, under the provisions of section 26, petitioner as the employer of Miles had an interest in the latter's cause of action for damages which could not be divested by any act of the injured party, and hence that any settlement made with or release obtained from Miles without petitioner's concurrence could not affect the latter's right to sue for the recovery of any sum which he was obligated to pay the employé under the provisions of the act.

From what has been said, it follows there is no merit in the contention that the findings are not supported by the evidence. Conceding, as claimed, that some of the findings consist of conclusions rather than findings of fact, petitioner could not have been prejudiced thereby.

The award is affirmed.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 63

ROBSON v. O'TOOLE et al. (Civ. 2966.)

(District Court of Appeal, First District, Division 1, California. Dec. 17, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

1. MORTGAGES ⊂⊃291, 558—MORTGAGEE MAY OBTAIN DEFICIENCY JUDGMENT AGAINST PURCHASERS FROM MORTGAGOR ASSUMING DEBT.

A mortgagee, where the mortgagor has sold the property and successive grantees have agreed to assume and pay the mortgage, may accept the benefit of such several agreements and make each, or any, or all of said persons defendants in foreclosure proceedings, and obtain a deficiency judgment against such of said persons as he so elects to make parties to the proceedings, the rights existing in the mortgagee being entirely several as to each of such persons, none of whom have a right to insist that any of the others should be made parties defendant, or to be embraced in any judgment in the mortgagee's favor.

2. MORTGAGES ⊂⊃291—SUCCESSIVE PURCHASERS OF LAND ASSUMING MORTGAGE BECOME PRINCIPAL DEBTORS IN TURN.

A person who in taking over mortgaged premises agrees to assume and pay the mortgage becomes by virtue of such agreement the principal debtor, while the person with whom he makes such agreement becomes, as to such agreement and as to such mortgage, his surety that he will perform the same, and there arises out of such an agreement an implied agreement to the same effect as to predecessors of the immediate grantor back to the original mortgagor.

3. MORTGAGES ⊂⊃455—MORTGAGOR OR SUBSEQUENT VENDEE OF THE MORTGAGED PREMISES NEED NOT PRESENT CROSS-COMPLAINT.

In an action by mortgagee to foreclose against the mortgagor and all of the successive

grantees, the mortgagor, or any subsequent grantor, may present a cross-complaint against his grantee or any subsequent grantee, each having respectively assumed the mortgage, to compel him to pay any deficiency judgment that there might be, but is not bound to do so, in the face of the fact that as between the different grantees no right of cause of cross-complaint comes into being until after a judicial sale of the property; the successive purchasers of the land not being adverse parties in the foreclosure proceedings.

4. MORTGAGES ⊂=497(1)—DECREE IN MORTGAGE FORECLOSURE NOT RES ADJUDICATA AS TO RIGHTS BETWEEN SUCCESSIVE PURCHASERS OF MORTGAGED PREMISES UNDER AGREEMENT TO ASSUME MORTGAGE.

A judgment in an action to foreclose is not res adjudicata as between the mortgagor and successive purchasers who assumed the mortgage, and, in an action by the mortgagor or any of the successive grantees against a subsequent grantee to recover a deficiency judgment rendered and paid, either is entitled to have adjudicated every question involving the validity or amount of deficiency judgment, and also every question as to whether the plaintiff was legally or properly compelled to pay same, or any portion thereof.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Kernan Robson against Michael O'Toole and others. From a judgment in favor of one of the defendants, plaintiff appeals. Reversed.

Jas. P. Sweeney, of San Francisco (Frank J. Fontes, of San Francisco, of counsel), for appellant.

J. J. Lermen, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the defendant Hoyt after an order by the trial court sustaining said defendant's demurrer to the plaintiff's third amended complaint.

Said complaint is in two counts, in the first of which the facts upon which the plaintiff relies for a recovery are set forth in detail. The second count is an ordinary common count for moneys paid out and expended within two years for said defendant's use and benefit and at his special instance and request. Both of these counts, however, admittedly refer to the same transaction.

The facts of the case, as set forth in the first count of said complaint, and which are taken to be true for the purposes of this appeal, are the following: On December 12, 1905, one Theresa Levin executed a note to the Hibernia Savings & Loan Society, secured by a mortgage upon certain premises for the sum of $80,000, payable one year after the date thereof. In January, 1906, said Theresa Levin sold and conveyed the mortgaged premises to Kernan Robson, the plaintiff and appellant in this action, subject to said mortgage debt, of which a balance of $33,000 remained due, and which said Robson assumed and agreed to pay. In July, 1906, said Robson sold and conveyed the said premises to one Michael O'Toole, the same balance being still due, and which said O'Toole assumed and agreed to pay. In October, 1906, O'Toole sold and conveyed said premises to one Curtis Hillyer, and he in turn assumed and agreed to pay said balance which still remained due. In December, 1906, said Hillyer sold and conveyed said premises to John G. Hoyt, the defendant and respondent herein, who also assumed said mortgage and agreed to pay the balance still remaining due thereon. In September, 1908, the said balance due on said note and mortgage not having been paid by any of said parties, the Hibernia Savings & Loan Society commenced foreclosure proceedings against the said Theresa Levin, and also against said Robson, O'Toole, Hillyer, and Hoyt, her subsequent and successive grantees of the premises covered by said mortgage. In September, 1911, judgment in said foreclosure proceeding was rendered and entered against all of said defendants thereto for the sum of $44,006.21. The said premises were ordered to be sold under said judgment, and were sold for the sum of $30,000, which, having been credited thereon a deficiency judgment for the sum of $14,799.09, was docketed against each and all of said defendants. In the meantime said defendant John G. Hoyt had made a motion for a new trial, which said motion was at first denied by the trial court, but subsequently said order denying the same was set aside and a new trial granted to said John G. Hoyt by the trial court in April, 1913, upon the production of an agreement theretofore entered into between said Hoyt and the Hibernia Savings & Loan Society, by the terms of which it had consented and agreed to the granting of said new trial as to said defendant Hoyt. Thereafter and on or about August 15, 1916, the Hibernia Savings & Loan Society, by the issuance of an execution in said action and by the levy thereof upon and threatened sale of the property of said Robson, compelled the latter to pay the sum of $18,350.81, the then amount of said deficiency judgment in full, and thereupon and upon such payment by him a satisfaction of said judgment was entered against all of said defendants and a dismissal of said action. Shortly thereafter the said Robson commenced the present action against Michael O'Toole, Curtis Hillyer, and John G. Hoyt, his codefendants in the former action, setting up the foregoing facts, and seeking to recover from them and each of them the said sum of $18,350.81, the amount which he had been compelled to pay upon said deficiency

judgment. The defendant Hoyt appeared and demurred in said action, and his said demurrer being by the trial court sustained, judgment was accordingly entered in his favor. From this judgment the plaintiff herein prosecutes this appeal.

The contention of the appellant herein, briefly stated, is that as between himself and the subsequent and successive grantees of the premises covered by said mortgage, and who in their turn assumed and agreed to pay the same, a contract existed by which each of said persons agreed to pay whatever deficiency judgment he, the said Robson, was properly and legally compelled to pay in the course of the foreclosure of said mortgage. It is this contract which he is seeking to enforce against the defendant and respondent Hoyt in this action.

[1] A number of interesting questions present themselves in the course of the determination of the merits of this question. The first of these is as to just what legal relations between the original mortgagee and the said several grantees of the mortgaged premises arise by virtue of their and each of their respective agreements with their immediate grantors of said premises to assume and pay the mortgage thereon. It seems to be practically conceded by the parties hereto that this relation was one by which the said mortgagee, if it was so disposed to accept the benefit of such several agreements as against each, any, or all of said persons making the same, could in its foreclosure of said mortgage make each, or any, or all, of said persons defendants in such foreclosure proceedings, and could obtain a deficiency judgment against such of said persons as it so elected to make parties to such proceedings. This right existing in the mortgagee was entirely several as to each of said persons, none of whom would have a right as against said mortgagee to insist that any of the others should be made parties defendant to said foreclosure proceeding or be embraced in any judgment in the mortgagee's favor to be rendered therein. It would seem to be also conceded that the relation of each of said successive persons agreeing with their immediate grantors to assume and pay said mortgage became, by virtue of said agreements, that of principal debtors thereon upon said mortgagee's acceptance of the benefit derivable to it by their said several agreements.

[2] The next question which presents itself in the course of this determination is as to what legal relations arose and existed between the said successive persons acquiring said mortgaged premises and each in turn agreeing to assume and pay the mortgage thereon. Upon this question also the parties hereto seem to be in practical accord; but, even if they are not so, the law seems to us to be well settled that the person who, in taking over mortgaged premises, agrees to assume and pay the mortgage becomes by virtue of said agreement the principal debtor, while the person with whom he makes such agreement becomes as to such agreement and as to such mortgage his surety that he will perform the same. This agreement as to his immediate grantor is express; but there arises out of it also an implied agreement to the same effect as to the several predecessors of his immediate grantor back to the original mortgagor. The following authorities fully sustain this view as to the law defining these relations: Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Roberts v. Fitz Allen, 120 Cal. 482, 52 Pac. 818; Ward v. Deoca, 120 Cal. 102, 52 Pac. 130.

Upon this statement of the law applicable to the relation of the parties to this action the appellant insists that his complaint herein shows that the defendant Hoyt has failed and neglected to pay the deficiency judgment rendered and entered in said foreclosure proceeding against the plaintiff herein in accordance with said defendant's implied agreement that as principal he would pay the same; and, since it also appears that the said plaintiff herein, as the surety of said defendant by virtue of said agreement, has been compelled to pay said deficiency judgment, he is entitled to maintain this action for the breach of the defendant's said obligation and recover the amount he has thus been compelled to pay.

[3] Against this claim on the part of the appellant the respondent offers several objections. In the first place, he contends that it was the duty of the said plaintiff in this action to have filed a cross-complaint against the defendant herein in the foreclosure proceedings, wherein and whereby he could have obtained all the remedies which he seeks to enforce in this action.

We do not think this position tenable. The implied agreement of the defendant Hoyt was, as we have seen, that he would pay whatever deficiency remained and existed upon said mortgage debt after the exhaustion of the security for such debt by a foreclosure proceeding. There could be no actual breach of this obligation until such deficiency arose and existed; and it certainly had not come into being at any time prior to the entry of the judgment and sale of the mortgaged premises thereunder for a less sum than the amount of the mortgage debt. The plaintiff herein had no ripened cause of action against Hoyt as his codefendant in said foreclosure proceedings at any time prior to the entry of judgment therein. It would seem, however, to be a rule of practice in foreclosure proceedings, in order to avoid circuity of action and to protect the mortgagor as the immediate party from being compelled to pay whatever deficiency there

might be after a judicial sale, and then to seek redress from his grantee or grantees who had assumed to pay the same, that equity will permit the bringing in of all the parties who are liable principally or ultimately before the court to have their rights adjusted in a single suit. Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868.

While, therefore, we are of the opinion that Robson, as a codefendant of Hoyt in the foreclosure proceedings, might have presented a cross-complaint against the latter therein, presenting the same matters which are here attempted to be presented, we are not disposed to hold that he was bound to do so in the face of the fact that as between themselves no ripened cause of cross-complaint had then come into being. They were, in fact, not adversary parties in that foreclosure proceeding. This was so expressly held in the case of Robson v. Superior Court et al., 171 Cal. 588, 154 Pac. 8, in which case the parties to the present action were also parties to it, and which case involved another phase of the litigation between the parties hereto arising in the course of said foreclosure proceedings, a decision whereon would vitally affect certain problems presented in the instant case. The record in said former case discloses that the trial court in the foreclosure proceedings, after rendering its judgment therein against all of the defendants, had entertained a motion of defendant Hoyt for a new trial, and had at first denied said motion, but later, and upon a showing by Hoyt that its order denying his motion for a new trial had been made inadvertently, set aside said order, and thereupon and in accordance with an agreement between said defendant Hoyt and the plaintiff in said foreclosure suit had granted as to said Hoyt a new trial. The several orders thus made, resulting finally in the granting of a new trial as to said defendant Hoyt, had been made without the defendant Robson's consent and without notice to him. Thereupon Robson applied to the Supreme Court for a writ of prohibition to prevent the trial court from proceeding to hear or try any of the issues raised by defendant Hoyt upon a retrial of the cause; the petitioner's contention being that the trial court had no jurisdiction to grant said new trial without notice to him and without his consent. The Supreme Court denied said writ, and in so doing decided, as we have seen, that Robson and Hoyt were not adversary parties in said foreclosure proceeding. In so deciding it also decided certain other matters which, as above stated, are vital to the present controversy. The Supreme Court held that the relation between each of the defendants Robson and Hoyt arising out of the successive assumptions by each of the mortgage debt was an entirely several and separate relation as to the plaintiff in said foreclosure proceeding, and that, this being so, the plaintiff therein was in a position to stipulate with the defendant Hoyt as it pleased with respect to his motion for a new trial, and that the defendant Robson was in no wise affected by such stipulation granting the defendant Hoyt a new trial, nor by any later action which the trial court might take thereon. The court said:

"Petitioner is not an aggrieved party because in the event of Hoyt's escaping a judgment all of the liability might fall upon him. The conclusion of the court in the suit for foreclosure of the bank's mortgage will not be binding in any action which Robson may bring against Hoyt. The decree in favor of the bank fixed none of the rights or obligations of the defendants among themselves. Robson is not an interested party in the proceedings for a new trial of the issues between plaintiff and Hoyt."

In further support of this position the Supreme Court, in its decision, cited with approval the case of Wiltrout v. Showers, 82 Neb. 777–779, 118 N. W. 1080. This last-named case is itself important as shedding an even more direct light upon the situation of the parties to the instant case. The facts of that case were these: The plaintiff therein was the mortgagor of a note and mortgage which the defendant therein, as his grantee of the mortgaged premises, had assumed and agreed to pay. Suit having been brought to foreclose said mortgage, the mortgagor defaulted, but his grantee appeared and contested the mortgagee's right to recover against him, and was successful in such defense. Judgment, however, having been taken against the mortgagor upon his default, he had been compelled to pay such judgment, and, having done so, he brought suit against his grantee, Showers, upon his agreement to assume and pay such mortgage. Showers pleaded in defense to said suit that the former judgment in said suit was res adjudicata. The Supreme Court of Nebraska held against said defendant upon this contention, saying:

"As between the two defendants in that action no issue was joined. Wiltrout and Showers were not adverse parties. The question of liability of Showers on the oral contract to assume and pay the notes was not litigated and determined as between Wiltrout and Showers. The rule of law is well settled that parties to a judgment are not bound by it in a subsequent action unless they were adverse parties in the original action."

It is interesting to note that in the case of Wiltrout v. Showers, supra, the defendant Showers was held liable to pay to Wiltrout the sum which the latter had been compelled to pay upon the judgment rendered against him in the foreclosure proceedings, although Showers had successfully defended himself against liability to the plaintiff in said foreclosure proceeding. In the foregoing respect

the case of Wiltrout v. Showers has direct bearing upon the case at bar, since here as there the plaintiff is seeking to require the defendant to pay the amount of a deficiency judgment in a foreclosure proceeding to which they were both parties and which the plaintiff himself had been compelled to pay, although as to the defendant no judgment for such deficiency had been rendered, but on the contrary, the action as to him had been dismissed.

[4] The decision in the above case, if adopted by us, would seem to be conclusive of the case at bar; and that it should be adopted we think a closer consideration of the actual agreement between the parties hereto will serve to demonstrate. The defendant herein assumed and agreed to pay the mortgage debt for which the plaintiff herein was liable upon his own earlier agreement to the same effect. In so agreeing the defendant had made himself a principal as to his obligation to assume and pay said debt, and, as we have seen, the plaintiff had become his surety for the performance of said obligation. It is true that the said defendant's agreement was, under the authorities, merely one to pay the amount of such deficiency judgment as might be entered after the foreclosure of the mortgage and the sale of the mortgaged premises; but what deficiency judgment was it that he thus assumed to pay? Not, as the respondent herein claims, a deficiency judgment against himself, since as to him there might never be a deficiency judgment, for the reason that he need not have been made a party to the foreclosure suit of the plaintiff therein; or, had he been made such party, the plaintiff therein might, as we have seen, have properly dismissed said action as to him, and by so doing have placed him in the same position as though he had never been made a party thereto. It follows, therefore, that it was not against a deficiency judgment against himself that the defendant had bound himself as a principal by his implied agreement with the plaintiff herein to pay. It must therefore have been such deficiency judgment as his grantor, either immediately or mediately, of the mortgaged premises should be compelled to pay. It is precisely this obligation that the plaintiff in the present case is seeking to enforce. This interpretation of the agreement between the defendant and his preceding grantors is not only reasonable, but it is also just, since the defendant in taking over the mortgaged premises retained, and still retains, from the purchase price thereof a sum sufficient to cover his obligation to assume the mortgage debt and to pay whatever deficiency judgment might be entered upon the foreclosure of said mortgage against his obligees or any of them. It is true that as to such deficiency judgment the defendant has not yet had his day in court; but he has it now, and he is entitled to have adjudicated in this action every question involving the validity or amount of such deficiency judgment, and also every question as to whether the said plaintiff was legally or properly compelled to pay the same or any portion thereof. None of these questions are res adjudicata between the parties to this action under the former decision in Robson v. Superior Court et al., supra. We therefore arrive at the conclusion that the plaintiff's third amended complaint herein stated a cause of action, and that the defendant's demurrer thereto was improperly sustained.

The respondent's contention that the plaintiff's cause of action is barred by the statute of limitations we find to be without merit.

Judgment reversed.

We concur: WASTE, C. J.; KERRIGAN, J.

45 Cal. App. 186

EBNER v. WEST HOLLYWOOD TRANSFER CO. et al. (Civ. 3147.)

(District Court of Appeal, First District, Division 2, California. Dec. 20, 1919.)

1. CORPORATIONS ⊂=426(10) — ESTOPPED TO DENY EXECUTION OF NOTES WHERE BENEFITS WERE RETAINED.

Where an old note of a corporation, given for the purchase price of property, was marked "paid" and canceled, and the corporation retained and enjoyed the benefits of the transaction, it was estopped, in an action on renewal notes, to deny the execution of said notes on the ground that the officers executing the same were not authorized to do so.

2. BILLS AND NOTES ⊂=489(6) — NOT NECESSARY TO INTRODUCE NOTE IN EVIDENCE WHERE PLEADINGS ADMITTED EXECUTION.

In an action on notes executed by a corporation, where it was admitted by the corporation in the pleadings that the notes were executed by certain persons claiming to act for the company, it was not necessary to introduce in evidence the notes, although there was a denial of the allegation that the notes were executed by the company, where it appeared that the notes were given in renewal of an old note, executed by the corporation for the purchase price of property, and the corporation retained and enjoyed the benefits of the transaction.

3. BILLS AND NOTES ⊂=489(6)—NOT NECESSARY TO INTRODUCE NOTE IN EVIDENCE TO SHOW WRITTEN GUARANTY ADMITTED IN PLEADINGS.

In an action on a note against a guarantor on a written guaranty indorsed on the note, it was not necessary to introduce in evidence the written guaranty, where the guarantor admitted in the pleadings that he had executed the same.

4. APPEAL AND ERROR ⊂⊃1047(2)—RESERVATION OF RULING ON ADMISSIBILITY OF EVIDENCE NOT PREJUDICIAL.

Where the reservation of a ruling on the admissibility in evidence of a note sued on was a mere irregularity, plaintiff having established a case on other evidence, and did not result in any real injustice, the judgment will not be disturbed on appeal, although one of the parties was misled to a certain extent by such action of the court.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by William M. Ebner against the West Hollywood Transfer Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Ogden & Esteb, of Los Angeles, for appellants.

Emmet H. Wilson, Harlan G. Palmer, and Wm. J. Palmer, all of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants, West Hollywood Transfer Company and P. Steffenson, from a judgment against them in an action to recover upon three promissory notes of the defendant corporation, and the guaranties by the individual defendants. The defendant G. U. Barck agreed, in open court, that judgment might be entered against him as such guarantor.

The principal objection of the appellants is that the notes upon which suit was brought were not admitted in evidence by the trial court, and that as the suit was upon the notes, and the guaranties written upon the backs thereof, there was nothing before the court upon which its judgment could be based. It appears from the record that the notes were offered several times by the plaintiff; they were marked for identification, but no ruling was made thereon, and the notes were not admitted in evidence during the trial of the case. It is argued by the respondent that the notes should have been admitted in evidence, and that the court, at the time it arrived at its conclusion, so decided, and admitted the notes in evidence at the time it gave judgment for the plaintiff.

[1] It appears from the record that the notes upon which the judgment is based were signed by the West Hollywood Transfer Company, by G. U. Barck, president, and P. Steffenson, secretary. There was no seal of the corporation attached thereto, and there was no showing made by the plaintiff that the president and secretary had authority to sign these notes. The notes were set out in the complaint. The answers of the appellants deny that the corporation made the notes, but admit that Barck, claiming to act as president, and Steffenson, claiming to act as secretary, of the company, did execute the said documents set out in the complaint. The answers also deny that Barck was authorized by the corporation to execute said notes, but do not deny the authority of Steffenson. There is also a denial that the corporation ever delivered the notes. While it is true that the authority of the president and secretary to execute these notes was not shown, there were other facts shown which would estop the corporation from denying the due execution and delivery of the notes. It was shown that G. U. Barck was the president and P. Steffenson was the secretary of the corporation at the time the notes were signed. It was shown that the corporation had previously purchased certain property of the Hollywood & Los Angeles Daily Express Company, for which property it had given its note, dated April 17, 1915, in the sum of $6,903.50, to the plaintiff. At the time this note was given, the defendant G. U. Barck was the president of the corporation, and one C. B. McCall was the secretary thereof. In August, 1916, this note remained unpaid, and at that time the defendant Steffenson purchased an interest in the transfer company. At this time he received the stock of the company held by McCall, and gave his check for $3,000, which was deposited to the credit of the company and used to pay its debts. He also at this time, together with Barck, guaranteed the notes sued upon in this action, which notes were given in payment of the old note of the company for $6,903.50, which note was, at that time, marked "paid" and returned to the company. Said canceled note for $6,903.50 was introduced in evidence by the plaintiff, and was admitted to have come from the custody and control of the defendant company. It therefore appears that the notes sued upon here were given by the company for a valid and subsisting indebtedness; that, as a consideration therefor, the company received its former note, canceled, which had been given for the purchase of certain property. The corporation has retained and enjoyed the benefits of the transaction. The giving of the notes in suit was not an ultra vires act. Under such circumstances, the corporation would be estopped to deny the execution of said notes, and defendants' denial that the president was authorized to execute the notes would become unimportant.

[2, 3] As stated before, it appears from the record that the trial court, in effect, reserved its ruling upon the admissibility of the notes.

It becomes unnecessary, however, for us to determine whether or not the notes should have been admitted in evidence. For it is admitted in the pleadings that the notes were executed by Barck and Steffenson claiming to act for the company. The denial of the

allegation that the notes were executed by the company can be of no avail, in view of the evidence we have just reviewed, which would preclude the company from denying the due execution of the notes. It is admitted by the pleadings that the defendant Steffenson executed a written guaranty of said notes, which guaranty is set out in the complaint. Since the notes were valid obligations of the corporation, upon the theory of estoppel, at least, the defendant Steffenson is liable thereon as a guarantor. The cases cited by appellant, on this question, are not in point here. In one or two of these cases it is held that where the principal debt is barred by the statute of limitations, the guarantor cannot be held. This rule is based upon a fundamental principle not involved here. That principle is that the guarantor has certain rights of subrogation against the principal, and therefore if the creditor allows the obligation of the principal debtor to expire by limitation, he seriously injures the guarantor, who is thus deprived of his remedy against the principal, and for this reason the creditor may not, under such circumstances, enforce the guaranty. Also is this the case where the creditor extends the time of payment. It is said that this deprives the sureties or guarantors of their right to collect out of the assets of the principal debtor as such assets existed at the time the debt was due. But no such reason exists in the present case. Whatever rights the guarantor is entitled to in the matter of subrogation to the claim of the creditor against the principal debtor are unimpaired by any irregularities in the notes sued upon, because, as we have just said, such irregularities, if any there be, may not be set up by the corporation to avoid its obligation under the circumstances in evidence here. The admission in the pleadings that the defendant Steffenson executed the written guaranty disposes of his objection that the written guaranty was not admitted in evidence.

[4] But it is insisted by the appellant that the defendant Steffenson was prejudiced and misled by the action of the trial court in not ruling upon the admissibility of the notes before the time of giving judgment. This argument is predicated upon the following facts: The answer of Steffenson set up as an affirmative defense to the contract of guaranty that his signature thereto had been obtained by false and fraudulent representations upon the part of the creditor. The court found that no such representations were made. Steffenson, however, contends that, as the notes were never received in evidence, and there was no written guaranty in evidence, there was nothing upon which to base the judgment, and it therefore never devolved upon him to prove his affirmative defense because a prima facie showing was not made by the plaintiff. It is argued that, as Steffenson was excused from offering evidence upon his affirmative defense, the finding upon such defense was improper. He urges that, if the notes were to be admitted in evidence, then the case should have been reopened so that he might have had an opportunity to offer evidence upon his affirmative defense. This argument, of course, loses much of its force in view of our conclusion that the judgment was warranted without the admission of the notes, under the admissions in the pleadings and the evidence before the court as to facts which would estop the corporation to deny the due execution and delivery of the notes. For it follows that, even without the admission of the notes, it became the duty of the defendant Steffenson to establish his affirmative defense to the guaranty by any evidence which existed. Furthermore, the defendant Steffenson had filed in the action a cross-complaint which set up substantially the same allegations as those contained in the affirmative defense in the answer. The record shows that Steffenson attempted to establish the allegations of fraud, but for some reason abandoned the attempt and dismissed his cross-complaint. The attorney for Steffenson, in examing the witness McCall, attempted to bring out the facts regarding the financial condition of the West Hollywood Transfer Company at the time Steffenson was induced to purchase the stock and indorse the notes in suit. Among others, he asked the following question:

"Well, I will get you to state, Mr. McCall, if you know, what was the financial condition of the West Hollywood Transfer Company along in July and August, 1916."

The question was objected to, and the objection was overruled. The attorney for said defendant failed, however, to secure an answer to the question or to follow it up in any way. The record ends abruptly here with the question unanswered and a ruling of the court in favor of the defendant. It therefore appears that Steffenson voluntarily abandoned the proof of his allegations of fraud, and also that, under the admissions in the pleadings, he was called upon at this time to establish said defense if he desired to rely thereon. While it is true that the practice of reserving rulings upon evidence has been frequently criticized by our Supreme Court, and while it is true that the defendant may have been misled to a certain extent by the action of the trial court in reserving its ruling upon the admission of the notes, it is apparent that no prejudice has resulted to him from such error. Where the reservation of a ruling is a mere irregularity, and does not result in any real injustice to the appellant, the judgment will not be disturbed upon appeal for this reason. Whether the practice of reserving rulings will be ground for

reversal in any given case will depend upon the particular circumstances of that case. Martin v. Lloyd, 94 Cal. 204, 205, 29 Pac. 491. We think, under all the circumstances in the present case, the record discloses no prejudicial error.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

44 Cal. App. 738

CURTIS et al. v. RIALTO IRR. DIST.
(Civ. 3051.)

(District Court of Appeal, Second District, Division 2, California. Dec. 11, 1919. Hearing Denied by Supreme Court Feb. 9, 1920.)

1. LIMITATION OF ACTIONS ⟸22(5)—ACTIONS ON COUPONS FOR PRINCIPAL OR INTEREST OF IRRIGATION BONDS PAYABLE FOUR YEARS BEFORE FILING OF COMPLAINT ARE BARRED.

In view of Code Civ. Proc. § 312, under sections 337, 338, and 343, each and every cause of action on any coupon for principal or interest of irrigation district bonds issued under the Wright Act, which by their terms were payable four or more years prior to filing of the complaint, are barred.

2. LIMITATION OF ACTIONS ⟸48(4), 51(3)—STATUTE BEGINS TO RUN AGAINST ACTION ON BONDS AND COUPONS WHEN RIGHT OF ACTION ON EACH IS COMPLETE.

The statute of limitations begins to run against action on bonds of an irrigation district and their coupons when the right of action on each bond and each coupon, a distinct obligation, is complete.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by G. M. Curtis and others against the Rialto Irrigation District. From judgment for defendant, plaintiffs appeal. Affirmed.

C. C. Haskell, of San Bernardino, for appellants.

Leonard, Surr & Hellyer, of San Bernardino, for respondent.

THOMAS, J. This is an action brought to recover the sum of $72,601.75, alleged to be due upon 93 of the bonds of the defendant corporation. Subsequent to the commencement of this action plaintiffs, by leave of court, filed a supplemental complaint, in which it was alleged that certain coupons, attached to the bonds, had matured since the institution of the action, and judgment was prayed for in the additional sum of $15,394.75. The sum total for which judgment was prayed, therefore, was $87,996.50.

The bonds sued on were for the principal of $500 each, and in form were in words and figures as follows:

"Bond No. ——.

"United States of America, State of California.

"$500.00. $500.00.

"Bond of the Rialto Irrigation District.

"Total Issue: $500,000.00. Located in San Bernardino County, Cal.

"For value received, the Rialto irrigation district, a public corporation, duly organized and existing under, and pursuant to the laws of the state of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of ($500.00) five hundred dollars, in gold coin of the United States, at the dates and upon installments as follows: At the expiration of eleven years from date, five (5) per cent. of said sum; at the expiration of twelve years from date, six (6) per cent. of said sum; at the expiration of thirteen years from date, seven (7) per cent. of said sum; at the expiration of fourteen years from date, eight (8) per cent. of said sum; at the expiration of fifteen years from date, nine (9) per cent. of said sum; at the expiration of sixteen years from date, ten (10) per cent. of said sum; at the expiration of seventeen years from date, eleven (11) per cent. of said sum; at the expiration of eighteen years from date, thirteen (13) per cent. of said sum; at the expiration of nineteen years from date, fifteen (15) per cent. of said sum, and at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

"Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons hereto attached. And said district promises to pay interest on the said principal at the rate of six (6) per cent. per annum, payable in gold coin of the United States at the office of the treasurer of said district semiannually, on the first day of January and July of each year, upon the surrender of the respective interest coupons hereto attached. Both principal and interest are payable at par.

"This bond is one of a series of bonds amounting in the aggregate to five hundred thousand dollars, caused to be issued by the board of directors of said Rialto irrigation district, and pursuant to a vote of the electors of said district at an election held for that purpose on the 15th day of November, 1890. The said series of which this bond is one, is composed of one thousand bonds, each of the denomination of five hundred dollars, and the said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of the act of the Legislature of the state of California, entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, and the acts amendatory and supplementary thereto.

"The Rialto irrigation district is composed of citrus producing lands divided into ten and twenty acre farms, irrigated by one thousand

(1,000) inches of water measured under a fourteen-inch pressure piped to each farm lot. All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are, by said act of the Legislature made a lien upon all said real property.

"In witness whereof the said Rialto irrigation district has caused these bonds to be issued and signed by its president and secretary, and its corporate seal to be hereunto affixed, and the lithographed signature of its Secretary to be affixed to each of said coupons at the office of the board of directors in said district, this 17th day of November, A. D. 1890. Rialto Irrigation District, by A. B. Fowler, President of said Board; by D. Robinson, Secretary of said Board. [Seal of Rialto Irrigation District.]"

Attached to each of said bonds at the time of the disposal and delivery thereof were certain coupons, numbered respectively 1 to 40, both inclusive, which said coupons were and are in words and figures as follows:

"$——. No. ——.

"Rialto Irrigation District

will pay to the bearer at the office of the treasurer of said district, at the town of Rialto, county of San Bernardino, state of California, on ——, ——, on surrender of this coupon, the sum of —— dollars, in U. S. gold coin being semiannual interest on bond No. ——.

"Dated November 17th, 1890.

"No. ——. D. Robinson, Secretary."

The form of these bonds and coupons was by the answer admitted to be as alleged in the complaint. The answer also sets up the statute of limitations against certain of these bonds and coupons as a defense, and particularly under and by the provisions of subdivision 1 of section 337, subdivision 1 of section 338 and section 343 of the Code of Civil Procedure.

The case was tried by the court without a jury. The court found that plaintiffs were the owners of but 92 of the bonds sued on, that there was due and unpaid on said bonds the sum of $80,268.60, principal and interest, and that no part of the same had been paid. The findings further set forth that each and every cause of action on any coupon, either principal or interest, which by their terms are payable four or more years prior to the filing of complaint, are barred by the provisions of subdivision 1 of section 337, Code of Civil Procedure of the state of California. The amount so found to be barred was $39,383.80; and judgment was given accordingly.

Appellants urge, and respondent concedes, that the only point raised on this appeal is the exclusion from the judgment of any recovery on the coupons, principal or interest, which were by their terms made payable four or more years prior to the filing of plaintiffs' complaint, by reason of which the said sum of $39,383.80 was held to be barred under the statute of limitations. In other words, the attack is upon that particular finding of the court holding that the statute of limitations applies to the bonds and coupons above quoted. The question for our consideration, therefore, is: "Is that finding correct?"

[1] As we construe sections 337, 338, and 343 of the Code of Civil Procedure with and in the light of section 312 of the same Code, we are of the opinion that the finding is correct.

At the outset we might suggest that it seems to us that appellants are laboring with the question as to how the judgment may be enforced, in case one is recovered by them, rather than with the question confronting us. It is contended by appellants that—

"The letter and spirit of the law [the Wright Act, Stats. 1886, p. 29] on which the bonds [and coupons] sued on were issued, provides that on the twentieth year a sufficient amount shall be levied as an assessment to pay off said bonds, and in no other year is there such provision made. The law prevents the statute of limitations from running before the twentieth year."

It would seem that this is a thought which has occurred to appellants since the bringing of the action, for the reason that if this view be correct then this action must be dismissed as having been prematurely brought. This hypothesis is supported by the fact of the filing of the supplemental complaint. If the cause, or causes, of action had not accrued at the time of the commencement of this suit (and this would seem to be the conclusion to which we are irresistibly driven, if we correctly apprehend the argument of counsel when he says that the statute of limitations does not begin to run until the twentieth year), then this action must be dismissed, because none of the bonds or coupons, including those referred to in the supplemental complaint, had matured. For reasons which appear obvious, to us at least, appellants, at the time of the commencement of this action, must have been of the opinion that a cause or causes of action had accrued, otherwise they would realize that they had no standing in court. Confronted, therefore, with this situation, is it not a rather strange contention to assert that a cause of action had accrued at that time, and, in the same breath, deny the operation of the statute of limitations in reference thereto? It would seem that the mere statement of such a case is to answer it.

[2] In the absence of any provision to the contrary, each bond and each coupon is a distinct obligation; and the rule is—and we think it supported by reason as well as by overwhelming authority—that the statute of limitations begins to run when the right of action is complete. As already intimated, it would be a strange contention, and, as we see it, an illogical conclusion, to hold that

the statute sleeps with respect to bonds or coupons, detached or otherwise, whilst a complete right of action upon such claims exists in the holder. Amy v. City of Dubuque, 98 U. S. 470, 25 L. Ed. 228; California, etc., Co. v. Sierra, etc., Co., 158 Cal. 690, 112 Pac. 274, Ann. Cas. 1912A, 729; Meyer v. City & County, 150 Cal. 131, 88 Pac. 722, 10 L. R. A. (N. S.) 110; San Francisco Savings Union v. Reclamation District, 144 Cal. 639, 79 Pac. 374; Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153; Stowell v. Rialto Irr. Dist., 246 Fed. 294, 159 C. C. A. 24; Rialto Irr. Dist. v. Chellis, 246 Fed. 308, 159 C. C. A. 38. The three cases last cited are referred to by appellants in their opening briefs as supporting their view that the statute of limitations does not run as to bonds and coupons such as we are now considering. But, as decided by the Circuit Court of Appeals, they coincide with the views here expressed, reversing the judgment of the lower court and holding squarely that the statute runs and bars all coupons that were more than four years overdue at the time of the commencement of the action, and also holding such instruments to be "general" obligations of the irrigation district. We invite a careful study of the cases here cited for elaboration of the reason for the conclusions there reached, and refrain from further discussion thereof.

We have considered every other point urged by appellants, but are of the opinion that no good purpose could be served by discussing any one of them here, in view of our conclusion on the concededly only point in the case; and, deeming such "points' without merit, so far as this case is concerned, we dismiss them with this general statement.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

45 Cal. App. 176

AVERY v. HAGENIOS. (Civ. 2338.)

(District Court of Appeal, Second District, Division 1, California. Dec. 20, 1919.)

1. APPEAL AND ERROR ⊂=2—DISMISSAL OF APPEAL FROM ORDER NOT APPEALABLE.

Appeal from an order denying motion for new trial, which when made was not an appealable order under the Code section, should be dismissed.

2. BILLS AND NOTES ⊂=445—NO RIGHT OF ACTION PRIOR TO MATURITY OF NOTE FOR INTEREST TO BE COMPOUNDED AND ADDED TO PRINCIPAL.

No right of action existed for interest due on a note prior to its maturity date, though there had been a default in the payment of interest, where the note provided that, if the interest was not paid, it should be compounded and added to the principal.

3. MORTGAGES ⊂=218 — NECESSITY OF FORECLOSURE BEFORE OBTAINING PERSONAL JUDGMENT AGAINST MAKER ON NOTE SECURED BY MORTGAGE.

The payee and holder of a note secured in part by a mortgage on real property was required to proceed by foreclosure before he could obtain personal judgment on the note against the maker.

4. LIMITATION OF ACTIONS ⊂=201—RIGHT OF DEFENDANT TO FINDING ON ISSUE.

In an action to recover an advancement made up of five items, wherein defendant pleaded that recovery was barred by the limitation provisions of Code Civ. Proc. § 339, defendant was entitled to have a finding on the issue of limitations, and the finding, to support judgment for plaintiff, should have determined such issue expressly in his favor.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by J. F. Avery against Bertha Hagenios. From judgment for plaintiff, defendant appeals. Reversed.

N. C. Folsom, of Los Angeles, for appellant.
Geo. M. Harker, of Los Angeles, for respondent.

JAMES, J. [1] Defendant herein appealed from a judgment entered against her, also from an order denying a motion made, requesting that a new trial be had, and also from an order refusing to vacate the conclusions of law and enter a different judgment. The order denying the motion for a new trial, at the time it was made, was not an appealable order under the Code section as amended. That appeal should be therefore dismissed. All of the questions sought to be presented, however, are reviewable under the appeal from the judgment.

The appeal being taken under the alternative method, appellant's opening brief did not meet the requirement of section 953c, Code of Civil Procedure, which in express terms directs that the parties shall print in their briefs such portions of the record as they desire to call to the attention of the court. The meaning of this provision is most plain and a reading of it could admit of no misunderstanding as to what the requirement is. By numerous decisions made prior to the present year it was held that the failure of an appellant to comply with this direction imposed no duty upon the appellate court to examine the typewritten record in order to ascertain the validity of any contentions made upon appeal. However, the Legislature of 1919 (apparently at the instance of some counsel who, through the negligent failure to meet the requirement of the section, had not secured consideration for contentions

made), adopted an amendment to the section, which provides that an appeal shall not be decided adversely to a party by reason of the failure to print portions of the record relied upon, but that in such case the court shall make an order, directing the party to file such supplement containing printed portions of the record relied upon, and fixing the time within which such may be done. Paraphrasing the amendment a little, it requires the court to say to a party:

"You have failed to read or observe an unmistakably plain provision of the statute; therefore we will allow you time within which to do this."

To that extent the appellate court becomes an adjunct of the law school. After respondent in this case had filed his brief, the appellant did offer a printed supplement in which certain exhibits and the findings of the court were printed, but she failed to incorporate the second amended complaint or the answer, a consideration of which is necessary in order to determine the issues tried. However, as the typewritten record is not particularly voluminous, we have, without assuming to establish any precedent thereby, examined the pleadings found in the clerk's transcript and much of the evidence set out in the reporter's record. With the information thus obtained, we may fairly consider the contentions of appellant.

As illustrated by the record, certain of the contentions of appellant seem clearly to possess merit. The action as it was finally formulated in the second amended complaint was divided into two counts; the first alleged cause being for interest due upon a promissory note, which note is in the following terms:

"$4,858.18. Los Angeles, Calif., Aug. 23, 1913.

"On or before four (4) years after date, for value received, I promise to pay to J. F. Avery or order, the sum of forty-eight hundred fifty-eight dollars and eighteen cents, with interest from date at rate of five (5%) per cent. per annum, interest payable quarterly from date, and if not paid, then in that event to be compounded quarterly and added to the principal and, in event of a failure to pay this note according to its terms, I further agree to pay a reasonable sum for attorney's fees in case suit is instituted for the collection of this note.

"[Signed] Bartha Hagenios."

The second alleged cause of action was to recover the sum of $417.30, alleged by the plaintiff to have been advanced on behalf of defendant, this sum being made up of five items, which it was alleged were advanced "after August 23, 1913." There is an additional allegation that the defendant had promised to pay these items "within two years last past." The answer of the defendant denied that any money was due upon either cause of action, and particularly pleaded as to the second that recovery was barred by the provisions of section 339, Code of Civil Procedure. A separate written contract entered into contemporaneously with the execution of the promissory note, was set out in hæc verba in the answer, and was admitted by the plaintiff to have been made, to which contract reference will hereinafter be made.

[2, 3] The first objection urged by appellant is that the promissory note was not due at the time the action was brought. This suit was commenced by the filing of the original complaint on September 10, 1915. The note, as will be observed, was payable "on or before four years after date." The maturity date for the principal of the note, therefore, had not arrived at the time the action was brought. Nor could it be claimed that under the terms of the note a right of action existed, assuming that there had been default in the payment of interest, for the note provides that if the interest be not paid it shall be compounded and added to the principal. Counsel for appellant cites pertinent authority to the effect that under such a reading of the note it was optional with the maker whether she should pay the interest at the quarterly due dates or submit to the amounts being added to the principal to be collected upon maturity of the whole. Wood v. Whisler, 67 Iowa, 676, 25 N. W. 847. It is very clear, then, that plaintiff's suit was premature as to any recovery for interest on the note, and the court should have disallowed that claim. It, moreover, appears that by the contract which was made contemporaneously with the note, defendant had given a deed to certain real property and a bill of sale of certain fixtures, furniture, etc., of an apartment house, all of which instruments were so made as security for the payment of the note. The note then became one which was secured in part by a mortgage upon real property, which would require that the plaintiff proceed by foreclosure before obtaining personal judgment upon the note against the maker thereof. Lodge v. Turman, 24 Cal. 385.

[4] As to the second alleged cause of action, the court failed to make a finding upon the plea of the statute of limitations, or to find (assuming that such latter finding would be sufficient), facts showing that the items sued for in the second alleged cause of action did not accrue more than two years prior to the commencement of the suit. There was no finding, either, that said items constituted an open-book account, which would be subject to the four-year limitation under the provisions of section 337, Code of Civil Procedure. Appellant was entitled to have a finding upon the issue. See Duff v. Duff, 71 Cal. 513, 12 Pac. 570, in which it is said:

"If the court finds that the cause of action is not barred by the statute of limitations, it should so find, and not merely facts from which it may be inferred. This court is not authorized

to infer facts from facts found; that is the province of the trial court."

See, also, Luco v. De Toro, 91 Cal. 405, 18 Pac. 866, 27 Pac. 1082. It may be conceded that the position of respondent with regard to the second alleged cause of action is correct, and that the evidence in the case showed that the charges became an open-book account, and that the four-year statute of limitation applied. As we have shown, however, the finding, in order to support the judgment, should have determined the issue presented in that regard.

The appeal from the order denying the motion for a new trial, for the reasons stated, is dismissed. The judgment appealed from is reversed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 19

HAZZARD v. JOHNSON et al. (Civ. 3081.)

(District Court of Appeal, Second District, Division 1, California. Dec. 15, 1919. Rehearing Denied Jan. 12, 1920; Hearing Denied by Supreme Court Feb. 13, 1920.)

1. PARTNERSHIP ⊂=159—FIRM CHARGED WITH PARTNER'S KNOWLEDGE.

One dealing with a partnership cannot be said to have been guilty of misrepresentation, where one of the partners was in possession of all the facts, under Civ. Code §§ 2332, 2429.

2. MINES AND MINERALS ⊂=23(4)—WANT OF AFFIDAVIT OF ASSESSMENT WORK DOES NOT IMPAIR RIGHT TO PATENT.

The fact that the owner of an uncontested mining claim on which the required assessment work has been done has not filed an affidavit showing work for a particular year does not impair his right to a patent.

3. MINES AND MINERALS ⊂=53—RESCISSION OF MINING LEASE MUST BE PROMPT.

One entitled to rescind a lease of mining property containing an option on the ground of fraud must rescind promptly upon discovering the fraud; Civ. Code, § 1691, being mandatory.

4. MINES AND MINERALS ⊂=53—OBLIGATIONS TERMINATED BY DEFAULT IN PAYMENT OF INSTALLMENTS UNDER MINING LEASE.

Failure to make a payment due under a lease of a mine, the lease containing an option to purchase, and the purpose of the lease being the sale and purchase of the mine, time being expressly agreed to be of the essence of the contract, terminated the lease, and consequently the option.

5. MINES AND MINERALS ⊂=53—VENDEE IN DEFAULT CANNOT RESCIND FOR FACTS KNOWN TO HIM FROM BEGINNING.

One leasing a mine with option to purchase is not entitled to rescind on the ground of defective title, etc., where the facts were known to him prior to entering into the agreement and he took possession and operated the mine until he found that the results were not satisfactory, and cannot, after default in payment of an installment, claim that the vendor was first in default, in that he was to be at all times ready to convey good title.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by George W. Hazzard against James M. Johnson and others. From a judgment in favor of some of the defendants upon a cross-complaint plaintiff appeals. Reversed.

Wright, Winnek & McKee, of San Diego, for appellant.

Jas. G. Pfanstiel, Theron Stevens, and Chas. G. Briggs, all of San Diego, for respondents.

CONREY, P. J. Plaintiff appeals from a judgment for $3,499.30, entered in favor of defendants Johnson, Willard, and Skeats upon their cross-complaint.

On December 11, 1915, the plaintiff, as party of the first part, and the defendants in their capacity as partners doing business under the firm name of North Hubbard Syndicate, as parties of the second part, entered into a contract in writing, whereby the first party leased to the second parties a certain "mine, mining claim, and mining property" in San Diego county, known and described as the North Hubbard mine, "together with the appurtenances thereto," including various items of machinery, tools, and appliances, "also four buildings now upon said premises, to wit, one engine house, one blacksmith shop, one boarding house, and one bunk house." This lease was to run for a term of three years, beginning with December 15, 1915, "unless sooner forfeited or terminated through the violation of any covenants hereinafter against said lessees reserved, or through their failure to exercise their optional right to purchase said properties hereinafter given, or to make the payments therefor strictly as hereinafter required." The lessees were "to pay the lessor the sum of $100 coincidently with the signing of these presents," and also certain royalties. It was further agreed that—

"Upon the violation by said lessees, or any person under them, of any covenant or covenants herein reserved, the term of this lease at the option of said lessor shall expire and the same and the said premises with the appurtenances thereto shall become forfeited to said lessor, and the said lessor or his agents may thereupon enter upon said premises and dispossess all persons occupying the same, and with or without force, and with or without process of law. Or at the option of said lessor the said tenants and all persons found in occupation may be proceeded against as trespassers

from the beginning of said term, both as to royalty and the ore severed therefrom, or as guilty of unlawful detainer.

"And in consideration of said initial payment of $100, the party of the first part hereby gives to the parties of the second part the optional right to purchase said mine, mining claim, and premises, together with all the appurtenances and other property hereinbefore specified, for the sum and amount of $15,000, payable as follows: Said $100 initial payment for rental in that event to apply on said purchase price, and the residue to be paid $1,900 on or before 90 days from the date hereof;" the remaining $13,000 to be paid in three installments, the last payable on or before December 15, 1918.

"All or any of said payments may at the option of the lessees be made prior to the date on which they are herein required to be made, and all royalties to be paid to the lessor under the terms hereof shall, in the event of the exercise by the lessees of their optional right to purchase, apply upon the installments of the purchase price next to fall due.

"But it is hereby expressly understood and declared that this lease and agreement is made in contemplation of the exercise by the lessees of said option to purchase, and not otherwise, and that in the event of the failure of the lessees to exercise said option or to make either or any of the payments of $1,900, $3,000, $5,000, and $5,000 hereinbefore specified strictly within the time allowed for so doing, such failure shall at the option of the lessor work a forfeiture not only of said option to purchase but of this lease as well; and any forfeiture of this lease by said lessees shall also at the option of the lessor work a forfeiture of said optional right to purchase, and all payments made shall be forfeited to the lessor and vendor.

"In the event of the exercise by said lessees of their optional right to purchase said property and of the payment by them pursuant to the terms hereof of the first $2,000 of the purchase price in full, within the time herein provided for so doing, the lessor agrees coincidently therewith to make and deposit in escrow with the bank at which payments are to be made a good and sufficient deed of conveyance of said premises and other property hereinbefore described to said lessees, to be by such bank delivered to said lessees upon their full compliance within the time hereinbefore allowed for so doing, with the terms of sale of said mine and property herein before specified, and after full payment by them of the entire purchase price thereof."

Under date of March 10, 1916, the parties made and executed an extension agreement whereby the plaintiff extended the time for making the said payment of $1,900 for an additional 60 days over and above the time allowed by the original agreement The time was thus extended to the tenth day of May, 1916. As one of the conditions of this extension, the lessees agreed:

"That the gross proceeds of each clean-up of the working of said premises during the period of such extension, up to the sum of $1,900, shall be turned over to said George W. Hazzard for the purpose of making the said $1,900 payment."

It was further agreed that—

"In the event the proceeds of the clean-ups of the working of said premises during the period of such extension shall be insufficient to make said payment of $1,900, then that as a prerequisite to the further working of said mine by the parties of the second part said Johnson, Willard, and Skeats will make good to said George W. Hazzard any deficiency in said $1,900 payment; provided, however, that the only penalty for failure so to do will be the forfeiture of any further right to continue under said lease. This agreement is not intended to alter the terms of the arrangement between the four parties of the second part as between themselves, but is intended merely as an arrangement between them of the one part and said George W. Hazzard as of the other."

By his complaint the plaintiff alleged the execution of the said agreement and extension thereof, and further alleged that the defendants had not paid the sums due under the contract and had not delivered to plaintiff the proceeds of clean-ups made on the mine as required by the contract and extension thereof; and demanded that the defendants be required to account for the proceeds of whatever things of value they had taken from the mine, and that plaintiff have judgment for the amount so ascertained.

At the time of the trial of this action the only proceeds of the mine not paid to the plaintiff consisted of certain bullion which by stipulation had been deposited in a bank in escrow pending the legal determination of the rights of the parties. Before the findings were filed this bullion was delivered to the plaintiff, who thereby obtained all that he was seeking to recover in this action.

The cross-complaint of defendants Johnson, Willard, and Skeats declares upon a cause of action for rescission of the contract. Facts are alleged showing that Hazzard and McHenry conspired together to deceive and defraud the cross-complainants; that Hazzard did not own the mine; that the buildings referred to in the contract were not on the mine, and did not belong to Hazzard; that the mine was subject to certain easements detrimental to its value; that these defects of title were unknown to cross-complainants until the 12th day of May, 1916, and were concealed from cross-complainants; that, relying upon Hazzard's representation that he owned and was able to convey all of said property, cross-complainants entered into the contract, took possession of the mine, and expended thereon various sums of money and much time and labor, to their damage, etc. It was further alleged that on May 24, 1916, and before Hazzard gave notice of his election to exercise his option, if he had any, to declare the contract of lease and option forfeited cross-complainants gave notice of rescission, delivered the property to Hazzard, and demanded that Hazzard refund the moneys expended by them, and re-

imburse them for the time and labor expended by them on account of said lease and option; that Hazzard failed and refused to make such payment and reimbursement. Plaintiff, Hazzard, having answered the cross-complaint, the case went to trial on the issues tendered. The court made its findings and entered the judgment in favor of cross-complainants, from which judgment this appeal is prosecuted.

Some time prior to December, 1915, McHenry had been the owner of an interest in the North Hubbard mine as lessee and purchaser by virtue of certain contracts between him and Hazzard. This interest had expired. At the time of the commencement of the transactions here in question McHenry had no interest in this mining property. He was anxious to obtain another lease and option to purchase and Hazzard was willing to give him the opportunity. Under these circumstances, McHenry negotiated with cross-complainants and they entered into a copartnership under the firm name of the North Hubbard Syndicate, for the purpose of leasing, purchasing, and operating the North Hubbard mine. The contract of lease and option and the extension thereof were made by Hazzard with this partnership. There is no evidence to sustain the court's finding that Hazzard well knew that McHenry was privately financially interested in the lease and option other than as a member of the partnership, and there is no evidence that such private and separate interest existed. The evidence shows without conflict that at all times from the beginning to the end of these transactions McHenry was fully acquainted with the facts concerning the title and condition of the mine and mining property, including the fact that no patent for the mine had been issued, that certain of the buildings described in the contract were located on an adjoining mine and not on the North Hubbard mine, and that the contract had been made which cross-complainants claim constituted a detrimental easement on the mining property. In its findings of fact the court found that Hazzard, for the purpose of inducing cross-complainants to execute the contract, falsely and fraudulently represented that he was the owner and entitled to possession of said buildings and that all of said buildings were located upon the mining claim; that cross-complainants relied upon such representations and believed them to be true and were induced thereby to enter into the contract and the said extension thereof; that said representations were untrue and that Hazzard did not own either of said buildings and that three of them were not located on the mining property, but were located upon an adjacent mine not owned by him; that the fact that these buildings were not located upon the mining claim greatly lessened the value thereof and detrimentally affected its operation; that Hazzard was not the owner of the legal title to the mine, the title being during all of said times in the United States; that the North Hubbard mine has never been and is not a patented mine; that cross-complainants did not know at the time of entering into said contract and extension thereof that the plaintiff did not own the legal title to said mine and did not become informed of this fact until May 12, 1916; that on the 3d day of April, 1914, McHenry as owner of the North Hubbard mine entered into an agreement with the owners of an adjacent mine purporting to create easements, servitudes, and incumbrances upon the North Hubbard mine and mining claim; that on the 28th day of April, 1914, McHenry, by conveyance from Hazzard, became the owner of Hazzard's interest in the North Hubbard mine and mining property; that on the 20th day of May, 1914, McHenry and the owners of said adjacent mine, D. D. Bailey and Mrs. J. O. Bailey, duly acknowledged said written agreement before a notary public, and that subsequent to April 28, 1914, McHenry recognized and ratified said agreement; that the existence of said agreement was not made known to cross-complainants at the time of the execution of said lease and option to purchase said North Hubbard mine, nor thereafter until the 12th day of May, 1916; that said written agreement remained in full force and effect at all of the times mentioned in the complaint and cross-complaint and greatly diminished the value of the North Hubbard mine and mining claim. It should be noted here that McHenry, in April, 1915, had reconveyed to Hazzard all of his interest in the property.

The court found that the evidence does not support the allegations of conspiracy stated in the cross-complaint between Hazzard and McHenry. But the court also found that McHenry did not, during any of the times covered by these transactions, act in good faith with his copartners "with reference to the representations and concealments aforesaid, and the said George W. Hazzard permitted the said J. M. McHenry to act as his representative in dealing with the said North Hubbard mine at the time of the execution of the said lease and option to purchase said mine."

The finding that the evidence does not support the allegation of conspiracy is undoubtedly correct. It may further be conceded, for the purposes of this decision, that McHenry did not act in good faith with his copartners, the cross-complainants. But we have searched the record in vain to find evidence sufficient to support the finding that Hazzard permitted McHenry to act as his representative at any time or in any manner in the course of these transactions. It was shown that Hazzard was very friend-

ly toward McHenry and was very willing to give him an opportunity to become interested a second time in this mine because the mine had been unprofitable to McHenry under his former lease; but it is perfectly clear from the evidence (and there is nothing to the contrary) that Hazzard dealt with McHenry exactly on the same basis that he dealt with the cross-complainants; that is to say, he dealt with each and all of them equally as members of the copartnership with which he was making the lease and contract; and he had no knowledge or notice of any fact informing him or warning him that McHenry was not dealing in good faith with his partners.

[1] The only evidence contained in the record of any representations made by Hazzard of the facts which he is charged with having misrepresented are the representations which might be implied by law from the fact that he made the lease and contract set out in the pleadings and said extension thereof. Assuming that Hazzard had not yet obtained a patent for the mine, and that some of the buildings described in the contract were not located on the mining claim, and that the mine was subject to the easements complained of by cross-complainants, there was no misrepresentation by Hazzard, since all of these facts were well known to McHenry, who was a member of the partnership with which the contract was made. Civ. Code, §§ 2429, 2332.

[2] So far as the title is concerned the evidence is positive and uncontradicted that Hazzard had been in possession of the mine, subsequent to its location, ever since he purchased the claim in the year 1884. The assessment work had been done for many years, and paid for by Hazzard. There was no contesting claim, and he was in a position to obtain a patent whenever he would care to make proof and apply for it. The fact that he had not filed an affidavit showing assessment work for the year 1915 (which work in fact had been done) did not, under these circumstances, impair his rights in the premises. Lindley on Mines (3d Ed.) §§ 62, 688, and 274.

[3] The cross-complainants were guilty of laches to an extent which deprived them of the right to rescind the contract on account of any of the alleged imperfections of title. A person entitled to rescind a contract "must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind." Civ. Code, § 1691. He may not wait to ascertain whether the transaction will be profitable to him, and so speculate upon the property and rights of the adverse party. "In such a case a party cannot wait until time shall demonstrate whether the contract sought to be rescinded turned out to be good or bad; and this is particularly true in a new country, where values change rapidly." Hammond v. Wallace, 85 Cal. 522, 531, 24 Pac. 837, 838 (20 Am. St. Rep. 239). It is also particularly true in relation to contracts concerning mining property. The language of the Code, above stated, requiring promptness in rescinding upon discovery of the fraud, is mandatory. Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107.

[4] Cross-complainants did not attempt to rescind the contract until after the time allowed by the extension agreement had expired. Hazzard refused to further extend the time. This being so, and the required payment being not made, the lease was at an end, and by the terms of the contract the option expired with the lease. By failure to make the payment due on the 10th day of May, 1916, the defendants committed a breach which placed them in default and terminated the lessor's obligations. Schwerin Estate Realty Co. v. Slye, 173 Cal. 170, 159 Pac. 420. Time was expressly agreed to be of the essence of the contract.

[5] Cross-complainants contend that Hazzard was first in default, and that therefore their failure to pay within the stipulated time did not deprive them of the right to rescind. This contention is based upon the fact that their payments were to be made on or before the stated dates, and that therefore, by the terms of the contract, Hazzard was bound to be at all times ready to convey good title. Burks v. Davies, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213, and Prentice v. Erskine, 164 Cal. 446, 129 Pac. 585, are relied upon in support of their argument. Giving full credit to these decisions, they are not applicable where, as we have found to be true here, the parties attempting to rescind made their contract knowing (the knowledge of one partner being the knowledge of all) all of the facts on which they rest their claimed right of rescission. Having made their contract with those facts in view, and having taken into possession and operated the mine until they found that the results of the enterprise were not satisfactory, they should not then be permitted to use those same facts as their justification for repudiating the contract, by asserting that the adverse party was first in default.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

44 Cal. App. 652

TRACY BRICK & ART STONE CO. v. WURSTER et al. (Civ. 3111.)

(District Court of Appeal, First District, Division 1, California. Dec. 8, 1919.)

1. EVIDENCE ⊂=442(6)—PAROL EVIDENCE OF WARRANTY NOT INADMISSIBLE AS VARYING WRITTEN CONTRACT TO FURNISH MATERIALS.

In action for price of materials actually furnished under a contract having inception in oral agreements several months before making of formal written contract, presented simply to furnish evidence as to value of materials supplied under its terms, considerable material having been supplied under the oral contract prior to the making of the writing, admission of parol evidence as to warranty claimed to have been given by plaintiff's manager during the oral negotiations was not inadmissible as varying the written contract, which was silent as to warranty.

2. APPEAL AND ERROR ⊂=553(2)—INSTRUCTIONS NOT PRESENTED BY APPEAL ON ALTERNATIVE METHOD IN ABSENCE OF SHOWING OF CERTIFICATION BY TRIAL JUDGE.

On appeal taken on the alternative method provided by Code Civ. Proc. § 953a, requiring appellant to furnish a reporter's transcript of the testimony, of the rulings of the court, of the instructions, and of all objections and exceptions of counsel occurring during trial, where the instructions given are omitted from the reporter's transcript, but included in the clerk's, apparently made a part of the record, in the absence of anything to show they were certified by the trial judge to be correct, or were the instructions actually given, though at the foot of each a typewritten notice appears, "Given, S., Judge," or "Refused, S., Judge," such instructions are not properly presented, and cannot be considered.

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the Tracy Brick & Art Stone Company against F. H. Wurster and others, copartners, etc. From judgment for defendants on their cross-complaint, plaintiff appeals. Affirmed.

Crouch & Chambers, of San Diego, for appellant.

Henning & McGee and Wright & McKee, all of San Diego, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants upon their cross-complaint in an action brought by the plaintiff to recover an alleged balance of $7,840, claimed to be due for materials furnished by the plaintiff to the defendants at their special instance and request, of the reasonable value of $15,188.78, upon which certain payments were made, leaving a balance in the amount for which suit was brought.

The defendants in their answer admitted that the stone work and ornamental moldings referred to in the complaint had been delivered to them by the plaintiff for use in the construction of a certain building being erected by the defendants in the city of San Diego, but denied that the reasonable value of said materials was the sum of $15,188.78, or any other sum, and alleged that said materials were of no value whatever. They further presented a cross-complaint wherein it was averred that the plaintiff had delivered to the defendants, at their special instance and request, the stone work and ornamental moldings referred to in the complaint, but that in so doing the plaintiff had represented and warranted to the defendants that said materials so delivered were durable and would stand the weather and climatic conditions existing in the city of San Diego, and were in every way fit and desirable to be used in the construction of the building in which they were to be used; that said stone work and ornamental moldings were, in fact, worthless, and became so disintegrated when used in the construction of said building that it would be necessary to remove all of said material therefrom; that the said defendants had already paid to plaintiff on account of such material the sum of $7,348.37, the return of which sum they demanded in the prayer to their cross-complaint.

The plaintiff filed an answer to said cross-complaint denying in detail the allegations thereof, and alleging that whatever deterioration there might have been in said materials so furnished by it was due to the negligence of the defendants in the treatment and use of said material in their said building and in the course of construction thereof.

The cause went to trial before a jury upon the issues thus made up, and from the evidence educed at such trial the following facts appeared in relation to the inception and conduct of the negotiations between the parties with respect to the subject-matter of this suit: The Tracy Brick & Art Stone Company was, in the latter part of the year 1913, a corporation engaged in the manufacture and sale of certain artificial stone work and ornamental moldings for use in the construction of buildings. This corporation at that time was under the management of a Mr. Tracy. The Wurster Construction Company was a copartnership composed of the defendants in this action, of which the defendant Wurster appears to have been the manager. Negotiations were entered into between Mr. Tracy and Mr. Wurster in the latter part of the year 1913 for the manufacture and delivery of certain artificial stone and moldings for use in the construction of a music pavilion within the exposition grounds of the city of San Diego. Under

the oral arrangement then entered into, a certain portion of the stone work in question was supplied during the first seven months of the year 1914. In the meantime Mr. Tracy had ceased to be the manager of the plaintiff, and the work of manufacturing and furnishing said materials was suspended for a time. On the 11th of September, 1914, the parties hereto executed an agreement in writing, which recited that it was to serve as a contract between them, whereby the Tracy Brick & Art Stone Company agreed to furnish and deliver all of the composition art stone and ornamental moldings for the said music pavilion as per drawings theretofore delivered to the Tracy Brick & Art Stone Company for the sum of $5,569, payable by the said defendants at various times upon and after the delivery of such materials. Work was renewed upon the manufacture and delivery of these materials immediately after the execution of said contract and continued for a short time when, according to the testimony of the parties, it was found impossible to manufacture and deliver such materials under said contract, or at the price agreed therein, owing to many changes which had been made in the plans and specifications of said building; and it was thereupon orally agreed that the said materials should be manufactured and furnished by the plaintiff to the defendants at the actual cost thereof to plaintiff without allowing for any profit. Thereafter the work of manufacturing and supplying these materials went on for some time and until an amount far in excess of that provided for in the written agreement had been supplied, and of which the reasonable value would have been the sum of over $15,000 had such material corresponded to the alleged representations and warranties of the plaintiff. There was a sharp conflict in the evidence as to just what were the terms of this latter oral agreement between the parties, but that conflict was resolved in favor of the defendants' version of said agreement by the jury, which also by its verdict found that the claim of the defendants with respect to the plaintiff's warranty of said materials, and the breach of said warranty, had been sustained by the evidence. A verdict was accordingly rendered in favor of the defendants for the sum of $6,448.37 upon their cross-complaint, and from the judgment for said sum entered in accordance with said verdict the plaintiff prosecutes this appeal.

Two contentions are urged by the appellant upon the appeal. In the first of these the appellant urges that the trial court erred in allowing the introduction of parol evidence as to the warranty claimed to have been given by Mr. Tracy as manager of the plaintiff during the earlier negotiations and oral agreement of the parties; it being the contention of the plaintiff that all of such negotiations and agreements were merged in the written contract between the parties, and that the admission of such evidence constituted a variance of the terms of said written contract.

[1] This contention, we think, is without merit. It is conceded that the transaction between the parties had its inception in the oral representations and agreements of their managers several months before the making of the written contract, and that considerable material had been supplied under said oral understanding and agreement prior to the making of such writing. It is also conceded that not long after the making of said written contract it was found impossible of fulfillment and was practically abandoned by the parties to it. The plaintiff in bringing this action did not rely on said written contract, but sued for a balance alleged to be due under the earlier and later oral agreements between the parties. The written contract was introduced in evidence at the trial; but the record clearly shows that the purpose of its introduction was not to show a writing between the parties by the terms of which they were bound, but that said writing was presented simply for the purpose of furnishing evidence as to the value of such of the materials as had been supplied under its terms. Furthermore, it appears that the writing itself is silent as to any warranty of the materials which would be furnished in accordance with its terms; and, this being so, the admission of parol evidence as to the existence, either of oral warranties made during the inception of the transaction between the parties, or of such implied warranties as arose by operation of law from the making of either oral or written agreements between the manufacturer and the purchaser of such materials as furnished the subject-matter of the transaction between the parties, could not be held to vary the terms of the written agreement in question. It was not error, therefore, for the court to admit such evidence.

The next contention of the appellants is that the court erred in the instructions which it gave to the jury with respect to the existence and nature of the plaintiff's warranty of the said materials. We have examined the instructions to which the appellant urges its several objections, and we are unable to perceive any respect in which they are erroneous in view of our above conclusion that the court properly admitted evidence of an express warranty between the parties. The particular instruction to which the appellant objects, and which has reference to the implied warranty which arises upon the sale of materials by sample, we do not find to be objectionable in view of the evidence presented in the case as to the materials furnished under the earlier oral understanding of the parties and which were

sold by sample and were, according to the evidence of the defendants, purchased upon the assurance that the materials furnished would be similar to the samples displayed.

While we have thus considered the instructions to which the appellant objects, we have not been unmindful of the objection to their consideration, which the respondent urges, and we think said objection to be well taken.

[2] The record herein discloses that this appeal was taken upon the alternative method provided in section 953a of the Code of Civil Procedure, by the terms of which section the appellant is required to furnish a reporter's transcript of the testimony in the case, of the rulings of the court, of the instructions, and of all such objections and exceptions of counsel as occur during the trial of the cause. This transcript, when so prepared by the reporter, is to be presented to and certified by the judge, and when so presented and certified it becomes a part of the judgment roll in the case, and is to be considered on appeal in lieu of the bill of exceptions. The record herein discloses that the instructions given by the court were wholly omitted from the reporter's transcript, but were included in the clerk's transcript herein; but, although thus included and made apparently a part of the record upon this appeal, there is nothing before us to show that the body of instructions thus embraced in the clerk's transcript were ever certified by the trial judge to be correct or to be the instructions which were actually given upon the trial of the cause. It is true that throughout the copy of said instructions, which has been thus presented to us, there appears at the foot of each instruction the notation in typewriting, "Given, Sloane, Judge," or, "Refused, Sloane, Judge," or, "Given as amended by erasure and interlineation, Sloane, Judge." But these notations, while supposedly made by the trial judge in the course of his consideration of the instructions proffered by the respective parties to the case, furnish no evidence, and certainly amount to no certificate as to which of said instructions were actually given or refused. The record as to these instructions being thus lacking in the certificate of the trial judge required by section 953a of the Code of Civil Procedure, we are satisfied that they are not the proper subject of consideration by this court, and that the objection of the respondent to their consideration, or to any alleged error or errors embraced therein, must be sustained.

No other error appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

44 Cal. App. 728

PAYNE v. PULLAN. (Civ. 2918.)

(District Court of Appeal, First District, Division 1, California. Dec. 11, 1919.)

1. APPEARANCE ⊂⊃10 — TAKING ORDER EXTENDING TIME TO ANSWER BY DEFENDANT WHO HAD APPEARED SPECIALLY CONSTITUTES PERSONAL APPEARANCE.

Defendant, who had appeared specially to move that service of summons by publication be quashed, by moving for and taking order extending time in which to answer in case motion to quash service of summons should be denied, personally appeared in the action.

2. APPEAL AND ERROR ⊂⊃113(2)—ORDER REFUSING TO VACATE DEFAULT JUDGMENT NOT APPEALABLE WHERE GROUND REVIEWABLE ON APPEAL FROM JUDGMENT.

Order refusing to vacate default judgment on the ground that the service of summons by publication for a period of less than two months was insufficient to give the court jurisdiction, under Code Civ. Proc. § 413, was not appealable, where the court before entering default had denied defendant's motion to quash the service of summons, since the order refusing to quash the service of summons could have been reviewed on appeal from the judgment.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Grace Sabin Payne against Marianne Pullan. From an order refusing to vacate default judgment, defendant appeals. Affirmed.

Martin Stevens, of San Francisco, for appellant.

James P. Sweeney, of San Francisco (Frank J. Fontes, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an appeal from an order refusing to vacate a judgment taken by default in an action in unlawful detainer. The complaint was filed on December 14, 1915, and two days later an order was made directing service of summons upon the defendant by publication for three days; the ground of such order being that the defendant was concealing herself in order to avoid being served with summons. On December 24, 1915, the defendant, appearing specially for the purpose, served and filed a notice of motion to quash such service of summons, basing the motion upon the ground that at the time of the making of the order therefor and prior thereto she was a resident of the state of Washington; that therefore jurisdiction of her person could not, under the provisions of section 413 of the Code of Civil Procedure, be acquired by publication of the summons for a period of less than two months. On December 28th, pending the making of this motion, the court, upon affi-

davits filed on behalf of defendant, made an order extending her time within which to appear and plead to the complaint two days after denial of her motion to quash the service of summons, if denied. This order, upon notice and after argument by both parties, was, on December 30th, vacated and set aside. The record does not show what disposition was made of the motion to quash the service of summons; but it was in effect denied by the action of the court in directing judgment against the defendant, based upon the conclusion that she had personally appeared in the action by procuring the order extending her time to plead, and had not thereafter within due time caused any pleading to be filed on her behalf. No appeal was taken from such judgment.

On June 29, 1916, the defendant served and filed a notice of motion for an order vacating and setting aside the judgment by default taken against her; the grounds of the motion being that the summons had not been served upon her, and hence that jurisdiction over her had not been acquired by the court, she being a nonresident of the state, and summons not having been published for the time fixed by law to acquire jurisdiction over a nonresident. The motion was noticed to be made on July 14, but it was not in fact made until the following October. On November 28, 1916, the court denied the motion, and on January 15, 1917, the defendant appealed from that order, which is the matter now before us.

[1, 2] The motion to set aside and vacate the judgment, and the motion theretofore made to quash the service of summons, were both based on the same ground, i. e., that the court had not acquired jurisdiction of the person of the appellant. Both motions were decided against the appellant upon the sound theory that when she took the order extending her time to plead to the complaint she had thereby personally appeared in the action. Security Co. v. Boston Co., 126 Cal. 422, 58 Pac. 941, 59 Pac. 296. As the order of the court upon the first of said motions could have been reviewed on appeal from the judgment, it follows under the settled law in this state that the second order refusing to vacate the judgment is not an appealable order. It may be said here, as was said in the case of Mantel v. Mantel, 135 Cal. 315, 67 Pac. 758, that—

"The grounds upon which the defendant sought to have the judgment vacated existed before the judgment was entered, and would have been available upon an appeal from the judgment."

In Kent v. Williams, 146 Cal. 3, 79 Pac. 527, it was held that—

"The rule is well established that an order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order or judgment."

The order appealed from is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 118

AMERICAN NAT. BANK v. WHEELER et al. (Civ. 2945.)

(District Court of Appeal, First District, Division 1, California. Dec. 18, 1919, Hearing Denied by Supreme Court Feb. 16, 1920.)

1. BILLS AND NOTES ⟸149 — POSTDATED CHECK MAY BE TRANSFERRED BEFORE DAY OF DATE.

A postdated check may be transferred before the day it bears date with like effect as if transferred on the day of its date.

2. BILLS AND NOTES ⟸373—MAKER STOPPING PAYMENT ON CHECK IS LIABLE TO PURCHASER FOR VALUE WITHOUT NOTICE WHO TOOK IT BEFORE DAY OF ITS DATE.

The maker of a postdated check who stopped payment thereon on the ground of fraud was liable to a holder who acquired it in good faith and for value, without notice of any infirmity, though before the day of its date.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the American National Bank against Earl W. Wheeler and others. From a judgment for defendants, plaintiff appeals. Reversed.

Edgar C. Chapman and A. Heynemann, both of San Francisco, for appellant.

Frank W. Sawyer, of San Francisco, for respondents.

KERRIGAN, J. This was an action brought by the American National Bank to recover from the defendants the sum of $300 due upon a certain check which plaintiff had cashed. The check reads as follows:

"Clearing House No. 1.
"San Francisco, Cal., March 7, 1916, No. 1758.
"The Mission Bank 11–16:
"Pay to the order of T. W. Spaulding $300.00.
"Pay 300 and 00cts.....dollars.
"Wheeler Bros.
"D. W. Wheeler."

[1] This check was presented by Spaulding to the plaintiff bank, and upon indorsement by him was paid. Spaulding had received the check from Wheeler Bros. as the result of a certain business transaction. There is testimony to show that the check was issued March 6, 1916, and that it was understood

between Spaulding and Wheeler Bros. that the same was not to be presented for payment until the following day. On March 7, 1916, Wheeler Bros., concluding that they had been defrauded by Spaulding, gave notice to the Mission Bank, on which the check was drawn, to stop payment thereon. There is a conflict in the testimony as to whether the plaintiff cashed the check on the 6th or 7th day of March. The sole question here presented is whether or not plaintiff acquired the instrument in due course and in the ordinary course of business. The trial court adjudged and decreed that plaintiff was not an indorsee of the check in due course of banking business without knowledge of its dishonor, and accordingly rendered judgment against plaintiff. There is no evidence in the record to show that plaintiff knew or had cause to know that Spaulding was not rightfully in possession of the check and had not the full right to transfer it for value. The judgment of the trial court was evidently based upon its conclusion that the check was postdated and that its negotiability was affected thereby. A postdated check may be transferred before the day it bears date with like effect as if transferred on the day of its date. 7 Cyc. p. 531; Walker v. Geisse, 4 Whart. (Pa.) 252, 33 Am. Dec. 60; 2 Dan. Neg. Instruments, § 1772; Frazier v. Trows Co., 24 Hun (N. Y.) 282.

[2] Here the evidence shows that the instrument was presented to plaintiff bank by the person named in the check, and that the bank took it in good faith and for full value, without notice of any infirmity in the instrument, and it was therefore an innocent purchaser and holder for value. This being so, it follows that Wheeler Bros., as makers, are directly liable to plaintiff, regardless of the stop notice given by them.

For the reasons given, the judgment is reversed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 88

CALAVERAS COPPER CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 3220.)

(District Court of Appeal, First District, Division 1, California. Dec. 17, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

MASTER AND SERVANT ⊂⊃405(4) — TRUCK DRIVER, OPERATING SAW IN EMPLOYER'S MILL, ACTING WITHIN SCOPE OF EMPLOYMENT UNDER WORKMEN'S COMPENSATION ACT.

A finding that a truck driver, injured while sawing boards in his employer's sawmill to be used as side boards for his truck was acting within the scope of his employment within the Workmen's Compensation Act *held* sustained by the evidence.

Certiorari to Industrial Accident Commission.

Proceeding by Andy Jordan under the Workmen's Compensation Act (St. 1917, p. 831), to obtain compensation for personal injuries, opposed by the Calaveras Copper Company, the employer, and its insurer. There was an award of compensation, and the employer and the insurer bring certiorari. Award sustained.

Redman & Alexander, of San Francisco, for petitioners.

A. E. Graupner, of San Francisco, for respondents.

RICHARDS, J. The petitioners, as the employer and its insurer of one Andy Jordan, seek by this proceeding to have annulled an award made by the Industrial Accident Commission to said Andy Jordan by reason of certain injuries received by him while in the employ of said Calaveras Copper Company. The sole question presented for our consideration is as to whether or not at the time of his said injuries said Jordan, in doing the work out of which his injuries immediately arose, was acting within the scope of his employment.

The particular work which said Jordan was doing at the time the accident occurred which caused his said injuries was this: He was at said time, and for some time prior thereto had been, employed by the Calaveras Copper Company as a truck driver in and about its property at Copperopolis, Cal., which property included a sawmill upon its premises at said place, his duty as such truck driver being to haul such lumber, wood, or other articles from place to place as directed by his employer. On the date of his injuries he had been instructed to haul some wood for one of the officials of the company, and in order to facilitate the doing of said work he concluded to put some additional sideboard on his truck and to fix the tailboard thereof so as to be able to carry at each load a larger quantity of wood. In order to procure the materials for these changes he went into the sawmill of the company and started up a ripsaw therein in order to cut the pieces required for such purpose to the needed sizes. While so engaged the teeth of the saw caught Jordan's glove, drawing his fingers into contact with the saw and lacerating them severely.

The petitioners contend that in thus making use of the saw Jordan was acting outside of the course of his employment as a truck driver, and was not therefore entitled to be awarded compensation for his injuries occasioned thereby. Upon a careful reading of the record herein we are satisfied that upon the facts presented to the commission this

contention cannot be sustained. The evidence is quite conflicting, but we think sufficient appears from the testimony of the injured employé and others to show that there was sufficient evidence before the commission to sustain the award.

Jordan, while denominated a truck driver, and while such was in the main his employment, was also made use of by his employers to do other things than such as would come within the strict course of his duties as such truck driver. The testimony, for example, shows that upon other occasions, while awaiting a truckload of lumber at the mill, he would join with those immediately in charge of the saws in the task of sawing out such lumber. He was thus familiar with the work of running such saws, and it is not contended herein that his injuries were the result of any lack of skill or knowledge as to the manipulation of the saw which he was making use of at the time of his injuries. There is evidence also tending to show that on prior occasions he had been instructed to do work which required him to use or assist in using the saws. He also testifies that upon prior occasions he had been accustomed to make such repairs and changes in his truck as might be needed or as would facilitate the work which he was required to do with it. The particular changes which he was undertaking just prior to his injuries were such as would facilitate the performance of the immediate work which he had been ordered to do, and would thus be beneficial to his employer. On the particular occasion Jordan took the boards he had selected into the mill for the purpose of having them sawed into proper lengths. One of the regular sawyers asked him what was wanted, and Jordan replied that he desired to have the board sawed. The sawyer told him to wait a few minutes and he would do this, but Jordan, being in a hurry, undertook to use the saw himself. No objection to his doing so was made by the sawyer, and in fact Jordan testifies that he had never been instructed not to use the saws, but, on the contrary, used them for the doing of other work upon prior occasions with the knowledge of his employer and without objection. While the evidence with respect to some of these matters is conflicting, and while, on the whole, the weight of such evidence might preponderate in favor of the petitioners, we are still of the opinion that if the commission believed the statements made by Jordan in the premises it would have been entitled to make an award in his favor based thereon.

The petition will therefore be denied, and the award sustained. It is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 138

FREIBURG v. ISRAEL et al. (Civ. 3143.)

(District Court of Appeal, First District, Division 2, California. Dec. 19, 1919.)

1. DAMAGES ⊂=161—EVIDENCE AS TO WORRY ADMISSIBLE THOUGH NOT SPECIALLY PLEADED.

In an action for damages for personal injuries and for injuries to plaintiff's buggy, harness, and horse, due to a collision between buggy and defendant's automobile, allegation being that by reason of injury plaintiff endured "great pain and physical suffering and also severe mental suffering and mental anguish, worry, and anxiety," there was no error in permitting plaintiff to testify that, while he was confined to his bed because of the injuries, he was worried over his condition as interfering with the harvesting of his crops.

2. DAMAGES ⊂=149—CONSEQUENTIAL MENTAL ANGUISH NEED NOT BE SPECIALLY PLEADED.

Mental anguish of plaintiff farmer, injured in the middle of the harvest season, when defendant's automobile collided with his buggy, is one of the consequential results of the injury, which need not be specially pleaded under rule as to pleading special damages.

3. APPEAL AND ERROR ⊂=1170(5)—ERROR IN ADMISSION OF EVIDENCE AS TO WORRY, SPECIAL DAMAGES NOT HAVING BEEN PLEADED, HARMLESS.

In action for injuries from collision between plaintiff's buggy and defendant's automobile, error, if any, in permitting plaintiff, who did not plead special damages, to testify that, while he was confined to his bed, because of injuries he was worried over the harvesting of his crops, *held* not to warrant reversal, in view of Const. art. 6, § 4½, as to not setting aside judgment for error not resulting in miscarriage of justice.

4. TRIAL ⊂=28(3)—NO ERROR IN PERMITTING JURY TO VIEW INJURED BUGGY A YEAR AFTER ACCIDENT.

Where witness testified that buggy was in substantially the same condition at the time of the trial, about a year after the accident, that it was in immediately after the accident, there was no error in permitting the jury to view the damaged buggy.

5. APPEAL AND ERROR ⊂=216(1)—ONE NOT REQUESTING INSTRUCTION CANNOT COMPLAIN OF FAILURE TO GIVE.

Where instructions taken as a whole were such that men of ordinary intelligence could not have been misled by failure to define either negligence or contributory negligence, appellants, who did not request an instruction specifically defining contributory negligence, cannot, on appeal, complain of court's failure to define the term.

6. TRIAL ⊂=295(1)—INSTRUCTIONS TO BE READ AS ENTIRETY.

The instructions must be read as an entirety.

7. TRIAL ⊂⊃228(3)—USE OF INDEFINITE ARTICLE IN INSTRUCTION NOT MISLEADING.

Contention that court erred in using article "a" instead of "the" in instruction that, if defendant automobile driver's failure to sound audible signal was "a" proximate cause of the accident, verdict must be for plaintiff in the absence of contributory negligence *held* not well taken; possibility that jury was misled being remote.

8. HIGHWAYS ⊂⊃184(4)—LAW AS TO OPERATION OF MOTOR VEHICLE CORRECTLY STATED IN INSTRUCTION.

Instruction that every person having control of a motor vehicle on a public highway approaching any vehicle drawn by a horse shall operate the motor vehicle "in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse and to insure the safety and protection of any person driving the same" is in the exact words of Motor Vehicle Act, § 20, subd. (h), and was a proper statement of the law.

9. HIGHWAYS ⊂⊃184(4) — INSTRUCTION AS TO SPEED OF AUTOMOBILE NOT MISLEADING.

That one instruction stated that it is against the law to operate a motor vehicle at a greater speed than 20 miles an hour when the territory contiguous thereto is closely built up and another instruction stated that defendants were permitted under the law to operate an automobile at a reasonable rate of speed, but not in excess of 30 miles an hour, *held* not to have misled the jury.

10. DAMAGES ⊂⊃216(8)—INSTRUCTION AS TO COMPENSATION FOR LOSS OF EARNING POWER NOT ERRONEOUS.

In action for damages for personal injuries, instruction that, if injury has impaired plaintiff's power to earn money in the future, "such sum as will compensate him for such loss of power" should be included in the damages *held* not subject to objection.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by C. A. Freiburg against Mrs. W. J. Israel and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Duke Stone, of Los Angeles, for appellants.
E. S. Williams, of Los Angeles, for respondent.

BRITTAIN, J. The defendants appeal from a judgment for $1,575 for personal injuries to the plaintiff and for injuries to his buggy, harness, and horse, sustained in a collision between the buggy he was driving and an automobile owned by the defendants Israel and driven by their chauffeur, the defendant Wahlicht.

The plaintiff, a farmer, was driving a one-horse buggy or light spring wagon towards his home in the afternoon of August 1, 1916. He was driving south on Lankershim boulevard in Los Angeles county. The boulevard is 56 feet wide from concrete curb to concrete curb, graded and surfaced over the full width, the center portion of 22 feet being a hard pavement of asphalt, with a shoulder on each side, graveled, sanded, oiled, and rolled, so that the whole width of 56 feet furnishes a smooth driving surface. The plaintiff was driving on the right-hand side of the boulevard, about 15 feet from the right curb, so that his farm horse might find softer footing in the graveled shoulder of the boulevard than on the hard pavement in the center. The roadway at the place where the accident occurred was clear of vehicles other than those of the plaintiff and the defendants. The defendants' automobile was being driven in the same direction as the plaintiff's buggy, and approached the buggy from behind. The defendant Wahlicht was driving the automobile, and he had with him his sister. He saw the plaintiff when he was about 50 or 60 feet ahead of them. Wahlicht drove up to about 4 or 5 feet directly behind the buggy before he attempted to turn out to avoid it. It is claimed on behalf of the defendants that when they were about 4 or 5 feet behind the buggy the plaintiff suddenly stopped his horse, so that the automobile could not turn out in time and the bumper of the machine lightly struck the wheel of the buggy, scaring the horse so that he ran away, throwing the plaintiff out. The plaintiff denied that he stopped the horse, and upon this question there is a clear conflict of evidence. There was no warning given by the driver of the automobile as he approached the buggy, and with a clear road there was ample room for the automobile to have turned out to pass the buggy on the left. The plaintiff testified he was thrown violently to the ground by the collision, and sustained bruises and injuries from which he suffered, and which required him to remain in bed for some weeks, during which time he was unable to carry on any of his farm labor or to supervise it. This was in the middle of the fruit season or harvest. There was evidence that by reason of his injuries the plaintiff, who theretofore was a rugged, strong farmer who had not lost a day's work on account of illness, developed a condition similar to jaundice, with certain complications. There was evidence concerning the character of the injury to the buggy and the harness, and that after the collision the horse became skittish and not safe to drive, starting to run whenever he heard an automobile approaching from behind.

The appellants' contention that the verdict is not supported by the evidence is unworthy of consideration. In addition to this contention for reversal the appellants rely on claimed errors of law in the admission and rejection of evidence, in the instructions given by the court and in the

failure of the court specifically to define contributory negligence.

[1, 2] The plaintiff was permitted to testify that while he was confined to his bed from the injuries he was worried and anxious about his crops and the work then waiting to be done on his ranch. The allegation was that by reason of the injury received by the plaintiff he endured "great pain and physical suffering, and also severe mental suffering and mental anguish, worry, and anxiety." In the appellants' brief is a quotation which they maintain correctly states a general rule in regard to mental suffering:

"Consequences which naturally follow from a personal injury, because of the nature of the injury, are general damages, and need not be specially pleaded in order to recover damages resulting therefrom." Worden v. Central, etc., Co. (Sup.) 155 Pac. 839.

The rule announced in that case warrants a somewhat broader interpretation than that placed upon it by the appellants. The law permits a recovery for something more than the mental suffering produced by physical pain. Mental suffering may involve numerous phases, varying "with the nervous temperament of the individual, his ability to stand shock, his financial condition in life, whether dependent upon his own labor or not, the nature of his injuries, whether permanent or temporary, disfiguring and humiliating and so through a long category, the enumeration of which it is unnecessary here even to attempt. Worry and anxiety over the future of his family would be a great element of mental suffering to a man dependent upon his own exertions for his and their support. * * * Mental worry, distress, grief, mortification, where they are shown to exist, are properly component elements of that mental suffering for which the law entitles the injured party to redress in monetary damages." Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. "As mental suffering is something which may be presumed to follow upon a serious injury producing physical suffering and impairment of one's capacity to earn a living, it has been held not necessary to be specially pleaded." Ryan v. Oakland Gas Co., 21 Cal. App. 14, 130 Pac. 693. To state that the mental anxiety of the farmer stricken down in the middle of the harvest season is not one of the general consequential results of the injury would be too greatly to narrow the application of the rule of pleading special damages. Such an interpretation would enable negligent persons to escape the consequences of their wrongful acts by the application of an ultrarefined and technical rule of practice rather than upon the substantive law of right.

[3] Where the facts appear at the trial, and injurious surprise to the defendant does not appear, the judgment should be affirmed. Under all the circumstances of this case the court is of the opinion there was no error in admitting the evidence of the plaintiff's worry over his condition as interfering with harvesting his crops. If there was error, it was not such as to warrant reversal. Const. Cal. art. 6, § 4½.

[4] It is next contended the court erred in permitting the jury to view the injured buggy, the trial being about a year after the accident. Witnesses testified it was in substantially the same condition that it was immediately after the accident, and they were subject to cross-examination on behalf of the appellants. There was no error in this particular.

[5] The appellants contend the court erred in not defining contributory negligence. In a number of instructions the court defined specific acts, for instance, the violation of various sections of the Motor Vehicle Act, in regard to which there was some evidence, as constituting negligence on the part of one or the other of the parties to the action, and in a number of the instructions used the ordinary form of statement that if certain facts were found by the jury, their verdict should be for the plaintiff, unless they should find that the plaintiff had been guilty of contributory negligence. "Ordinary care" was properly defined in the instructions. Taken as a whole, and as applied to the facts of the particular case, the instructions were such that men of ordinary intelligence could not have been misled by the failure of the court to define either negligence or contributory negligence. The court was requested on behalf of the appellants to give numerous instructions. It was not requested to give an instruction specifically defining contributory negligence. The case falls within the rule that the appellant cannot on appeal for the first time take advantage of the court's failure to give an instruction not requested before the jury retired. Hardy v. Schirmer, 163 Cal. 272, 124 Pac. 993; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; People v. Bruggy, 93 Cal. 476, 29 Pac. 26; Scott v. Wood, 81 Cal. 398, 22 Pac. 871.

[6] The appellants attack 16 specific instructions. Most of the objections to the instructions need not be considered. The instructions themselves must be read as an entirety, and the instructions in this case when so read clearly show the groundlessness of most of the objections.

[7] In one of the instructions the jury was instructed that the law requires a person operating an overtaking vehicle to sound audible and suitable signal before passing a vehicle proceeding in the same direction, to which was added:

"If you find that the defendant automobile driver failed to do so, and that such failure was a proximate cause of the accident, your verdict, in the absence of contributory negligence

on the part of the plaintiff, must be for the plaintiff."

It is contended the court erred in using the indefinite article "a" instead of the word "the" in connection with the words "proximate cause." In a case decided by the Supreme Court on November 17, 1919, in which the facts were somewhat similar to those in this case, the appellants seriously contended that the trial court erred in giving an instruction in substantially the same language, except that the word "the" was used instead of the indefinite article "a" before "proximate cause." Considering the instructions in that case as a whole, the court said:

"The possibility that the jury could have been misled by the error complained of was so remote as to be altogether unworthy of serious consideration." Squier v. Davis Bread Co. (Sup.) 185 Pac. 391.

[8] It is contended that one of the instructions informed the jury that the defendants were the insurers of the safety and protection of the driver of the buggy. The court stated that by statute the rule of the road in California is that every person having control of a motor vehicle on a public highway approaching any vehicle drawn by a horse shall operate the motor vehicle "in such manner as to exercise every reasonable precaution to prevent the frightening of any such horse * * * and to insure the safety and protection of any person * * * driving the same." The instruction is in the exact words of section 20, subd. (h), of the Motor Vehicle Act (Stats. 1915, p. 407), and was a proper statement of the law.

[9] There was some evidence to the effect that the houses along Lankershim boulevard at the place of the accident were built closely together. One of the instructions stated that it is against the law for any person to operate a motor vehicle at a greater speed than 20 miles per hour "when the territory contiguous thereto is closely built up." The jury was then told that it was for them to decide whether at the locality where the collision occurred it was closely built up at the time of the accident. In another instruction given at the request of the defendants the jury was instructed that the defendants were permitted under the law to operate an automobile at a reasonable rate of speed, having regard to the traffic on and the use of the highway, but not in excess of 30 miles an hour, and it is contended that these two instructions were conflicting. The jury could not have been misled by these instructions.

[10] The jury was instructed that if the injury had impaired the plaintiff's power to earn money in the future "such sum as *will* compensate him for such loss of power" should be included in damages, if the jury should find the plaintiff was entitled to recover damages. It is contended that this instruction was contrary to the rule announced in Melone v. Sierra Ry. Co., 151 Cal. 116, 91 Pac. 522. In the Melone Case the instruction was that the jury might include as damages an amount to cover everything which the plaintiff *may* suffer in the future. The difference between the instructions in the Melone Case and in this case has heretofore been pointed out, and disposed of adversely to the contention of the appellants. Scally v. Garratt, 11 Cal. App. 138, 104 Pac. 325; Walker v. S. P. Co., 162 Cal, 121, 121 Pac. 369. None of the other contentions on behalf of the appellants in regard to the instructions is worthy of consideration.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 205

TROPICAL INV. CO. v. BROWN.
(Civ. 3083.)

(District Court of Appeal, First District, Division 1, California. Dec. 22, 1919. Hearing Denied by Supreme Court Feb. 19, 1920.)

1. APPEARANCE ⊂⊃24(4) — DEFENDANT, HAVING APPEARED GENERALLY, CANNOT COMPLAIN OF DEFECTIVE SUMMONS.

Defendant, after having appeared generally and submitted to the jurisdiction of the court without objection, cannot, on appeal, claim the fact the summons served was insufficient as to the time therein given her to appear.

2. LANDLORD AND TENANT ⊂⊃291(8) — COMPLAINT IN UNLAWFUL DETAINER NOT BASED ON OVERDUE RENT NOT REQUIRED TO ALLEGE AMOUNT.

Under Code Civ. Proc. § 1166, complaint in unlawful detainer action, not based upon overdue rent, was not required to allege amount of rent due; such allegation being necessary only where unlawful detainer charged is for default in payment of rent.

3. APPEAL AND ERROR ⊂⊃1039(13)—VARIANCE AS TO STATE IN WHICH PLAINTIFF WAS INCORPORATED NOT REVERSIBLE ERROR.

Variance between complaint in unlawful detainer action, alleging plaintiff to have been incorporated under the laws of California, and proof of incorporation under laws of another state, was not ground for reversal; it being immaterial whether plaintiff was incorporated under the laws of the one or the other of the states.

4. MORTGAGES ⊂⊃497(2) — FORECLOSURE OF TRUST DEED TAKEN WITHOUT NOTICE OF LEASE FORECLOSES LESSEE'S INTEREST.

Where trust deed to secure loan was taken without notice of lease of premises, lessee's interest was foreclosed by foreclosure of trust deed.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. APPEAL AND ERROR ⊂=1011(1) — FINDING ON CONFLICTING EVIDENCE NOT DISTURBED.

Appellate court cannot disturb finding based upon conflicting evidence.

6. LANDLORD AND TENANT ⊂=213(1)—LESSEE ESTOPPED FROM ASSERTING RECEIPT FOR RENT AS AGAINST LIEN OF TRUST DEED.

Lessee, having accepted lessor's order on lessee for rent payable to lessor's creditor secured by trust deed, without disclosing fact that she had received receipt for such rent, could not assert such receipt for more than the rent she had actually paid, as against the lien of the trust deed.

7. LANDLORD AND TENANT ⊂=213(1)—LESSEE ESTOPPED FROM ASSERTING RECEIPT FOR RENT AS AGAINST LIEN OF TRUST DEED.

Lessee, having signed agreement, subsequent to lessor's execution of trust deed to secure loan, to which lender was a party, waiving damages for delay in construction of building and all claims of any sort under the lease to date of agreement, could not assert, as against lien of the trust deed, a receipt for more rent than she actually paid, previously given her by lessor, without knowledge of lender, for rent for some months subsequent to date of agreement.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action in ejectment and unlawful detainer by the Tropical Investment Company against Edna A. Brown. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur C. Vaughan, of Los Angeles, for appellant.

Milton K. Young, of Los Angeles, for respondent.

BEASLY, Presiding Judge pro tem. We are constrained to open this opinion with the statement that, after patiently examining the 176 pages of the appellant's brief, we are unable to form a clear idea therefrom of the essential facts of this case, or the legal points upon which the appellant relies for a reversal of the judgment. We have therefore gone directly to the record, and from an examination of the pleadings, findings, judgment, and the evidence we have abstracted the complicated facts upon which the cause must be determined, and endeavored to clear up the legal questions which seem to arise therefrom.

The purpose of the action is to obtain possession of the Morris Hotel property of the city of Los Angeles. The complaint contains two counts: The first, in ejectment; the second, upon an unlawful detainer. From the elaborate findings in the case, it appears that the trial court based its judgment upon the following facts:

Plaintiff is a corporation organized under the laws of the state of Utah.

On October 30, 1914, defendant, Edna A. Brown, and one Howard, entered into an agreement, in writing, by which Howard purported to lease to the defendant, Brown, a certain hotel building to be erected on a lot described in the complaint, and situated in the city of Los Angeles, and this building was, when completed, to be called the Morris Hotel.

The lease was to run for 10 years, and to begin December 1, 1915; the term of the lease being orally agreed to be from December 1, 1915, to November 30, 1925. These dates were left blank in the lease, which was signed by the parties, and were inserted later by some unidentified third party, without authority from either party to the lease. The lump rent was to be $98,820, payable in monthly installments of $823.50, in advance, on the 1st day of each month.

The date of the payment of the rent was also left blank, and no time was fixed in the instrument for the beginning of the payment of the rent.

On November 9, 1914, the parties agreed, also in writing, that the term of the lease should commence at the date of the completion and acceptance of the building by the city building department of the city of Los Angeles, which completion, it was agreed, should be not later than February 15, 1915. Thirty days' grace for completion was allowed, but it was stipulated that, should this 30 days be exceeded, an amount equal to the rental "to accrue" until the building should be completed, and so accepted, should be forfeited to the lessee. The defendant, Brown, took possession of the hotel in October, 1915, and the building was completed on or about November 1, 1915.

On October 28, 1915, defendant, Brown, paid Howard $1,000, "pursuant to said agreement of October 30, 1914," and "as part consideration for giving said agreement," which provided that $823.50 of this $1,000 should apply to the first month's rent to be paid thereunder, and that the balance of said $1,000, to wit, $166.50, was to be applied as part payment for the second month's rent. Contemporaneously with the payment of the $1,000, on October 28, 1915, Howard gave Miss Brown a receipt, marked "B," with the O. K. of one Paden initialed thereon, which reads as follows:

"Los Angeles, Cal., Oct. 28, 1915.

"Received from Edna A. Brown four thousand seven hundred and five 75/100 dollars, in full for rent on Hotel Morris, No. 811 E. 5th St., from Nov. 11, 1915, to April 22, 1916.

"This includes the $1,000.00 paid to secure lease.

"$4,705.75. Charles Wellington Howard.

"O. K. Wm. W. Paden."

The court finds that there was no consideration for this receipt, other than the $1,000.

On October 27, 1915, Miss Brown, together with Howard and Paden, applied to the Fidel-

ity Savings & Loan Association for a loan of $1,818, with which to pay a note secured by a chattel mortgage on Miss Brown's furniture situated in the Morris Hotel. The loan was made, and Howard thereupon gave the Fidelity Savings & Loan Association an order on Miss Brown, running against her rent for this amount, which order was accepted by her, and the money was thereupon delivered by the lender to Howard, Paden, and Miss Brown, who paid the debt secured by the chattel mortgage, and obtained the release of the furniture from the lien thereof. The Fidelity Savings & Loan Association had, at no time, any knowledge of the giving of the receipt to Miss Brown for the $4,705.75. Miss Brown, in consideration of this loan, signed another agreement, the meaning of which, apparently, will be important here. It is as follows:

"As holder of lease covering premises known as lots five (5) and six (6), block eleven (11), of Wolfskill Orchard Tract, in the city of and county of Los Angeles, state of California, for and in consideration of free rental for the month of November, 1915, and other valuable considerations, including assistance in releasing mortgage on my furniture in the building on said lots, I hereby waive and declare fully satisfied all claims which I have against the lessee under said lease or against the premises, the owners of said premises, or the Fidelity Savings & Loan Association, for any damages or loss occasioned through any delay or failure of any kind resulting from delay in completion of the building on said premises, and I hereby accept said building as being fully in accordance with the terms of the lease aforesaid, and agree to enter upon possession of the same without delay, and to be bound by all the provisions of the lease from this date, *waiving all claims of every sort under said lease up to this day.*"

On June 25, 1914, Howard, to obtain money to construct the building, borrowed $50,000 of the Fidelity Savings & Loan Association, gave his promissory note therefor, and executed a trust deed on the premises to the Title Guaranty & Trust Company, as trustee, with the Fidelity Savings & Loan Association as beneficiary, to secure this note, and on June 17, 1915, to complete the building, Howard borrowed another $24,000, gave his note therefor, and executed another trust deed to the Title Guaranty & Trust Company, as trustee, and the lender as beneficiary, to secure the same This latter deed was recorded on June 29, 1915. It should be noted, in passing, that both these trust deeds were given before the $1,818 loan, and the execution of the contemporaneous instrument, above set forth. Under the latter trust deed the Fidelity Savings & Loan Association advanced further sums to Howard until the total loan amounted to $36,698.

Howard defaulted in the payment of these loans, and on December 17, 1915, the trustees sold the premises under the latter trust deed, namely, the trust deed executed on June 17, 1915. The sale took place on January 15, 1916, the purchaser being the Fidelity Savings & Loan Association, and the amount paid being $38,000, and thereupon the Title Guaranty & Trust Company, as trustee, executed a deed to the Fidelity Savings & Loan Association, as purchaser, conveying the property to it.

It is found by the trial court that this deed conveyed the property to the Fidelity Savings & Loan Association, free from the interest of Miss Brown under her lease, or the agreement dated October 30, 1914, as well as all other interests she might claim in the premises. The Fidelity Savings & Loan Association subsequently conveyed the property to one De Garmo, as trustee, and he, as such trustee, in turn, on January 22, 1916, conveyed the property to the plaintiff, Tropical Investment Company.

There are certain other claims of defendant which will be noticed:

Miss Brown claims that she did not know of the trust deed of June 17, 1915, to the Fidelity Savings & Loan Association; but it was found that she had actual knowledge of it.

The defendant averred that after the sale of January 15, 1916, under the trust deed, the purchaser conveyed the property to Howard. This is found to be untrue.

It is found that the Fidelity Savings & Loan Association and the Title Guaranty & Trust Company had no knowledge of Howard's lease to the defendant at the time of the execution of the trust deed of June 17, 1915, the deed that was foreclosed.

It is alleged by Miss Brown that plaintiff holds the property of the defendant as security for payment of her rent. This is found to be untrue, as is also the allegation that plaintiff holds an assignment of the lease. It is averred by Miss Brown that the sale of January 15, 1916, was made, to defendant, to defeat certain mechanics' liens upon the property. This is found to be untrue.

De Garmo is found to have executed a deed of trust to the Title Guaranty & Trust Company, as trustee, to secure a loan made to him by the Fidelity Savings & Loan Association, in the amount of $80,000; but it is also found that the allegation of Miss Brown that the Fidelity Savings & Loan Association is the real owner of this property is false. It is found that the plaintiff is the owner of the property; that defendant is in unlawful possession of it, and that possession was demanded before suit and refused; that defendant's possession is without the consent of plaintiff and unlawful. Rental and damages are found against the defendant in the sum of $2,808, and judgment is given for possession, and damages accordingly.

[1] The first point made grows out of the

fact that the complaint contained a count in ejectment and a count in unlawful detainer, and that the summons issued was a "three days" summons to appear. The facts are that defendant was, as stated, served with a "three days" summons. The defendant demurred to the complaint thereupon, and the demurrer was overruled, whereupon the court required an answer from defendant in four days, which answer was filed accordingly. The defendant claims that she was entitled to a ten days summons upon this complaint. Conceding that, on the count in ejectment, the defendant was entitled to ten days to appear, nevertheless, as she did appear in less time, and demurred and answered generally to the complaint, she cannot now be heard to complain of this error. She should have moved to quash the summons. Having appeared generally, and submitted to the jurisdiction of the court without objection, she cannot, at this late date, complain of the fact that the summons served was insufficient as to the time therein given her to appear.

[2] It is argued that the general demurrer to the complaint should have been sustained, because the complaint did not state the amount of rent due; but the original complaint was not based upon the fact that the rent was overdue. An amendment charging failure to pay rent was added to the complaint at some later period, as to the time of which we are not advised by the record. Probably this amendment was added at the trial. We have assumed, in this state of the record, that the court passed upon the demurrer to the complaint in its original form, and as a complaint not based upon overdue rent need not contain an allegation as to the amount of rent due, the demurrer was properly overruled. It is only in case the unlawful detainer charged is for default in payment of rent that the complaint must state the amount of such rent. Code Civ. Proc. § 1166.

[3] We are rather uncertain as to the method by which defendant makes her next point. It arises out of the fact that the complaint in the case alleged that plaintiff was incorporated under the laws of the state of California, whereas it appeared at the trial that it was incorporated under the laws of the state of Utah. The complaint was verified by Edward W. Cason, and this verification is attacked upon this ground. We are unable to see where it makes any material difference whether the company was incorporated under the laws of the state of California, or under the laws of the state of Utah; and certainly we can find no direct attack under which the court could have avoided this error, if error it was, at the trial of the case. It is too trivial, under the facts of this case, to warrant a reversal of the action anyhow.

[4] The main fact upon which this judgment rests is that the trust deed of June 17, 1915, the deed that was foreclosed, was taken by the Title Guaranty & Trust Company without knowledge or notice on its part, or on the part of the Fidelity Savings & Loan Association, of the claims of Miss Brown under her lease. The finding of the court that the Title Guaranty & Trust Company had no knowledge or notice of Miss Brown's claims, when that trust deed was executed, seems to be conclusive upon the point that Miss Brown's interest under her lease was foreclosed by the foreclosure of that instrument.

[5, 6] This, being true, ends the case apparently; but, even if it does not do so, the defendant cannot, for other reasons, prevail on this appeal. Miss Brown contends that she had paid her rent to April 27, 1916, and that therefore this action was premature; and the following facts bear on this point:

If the receipt for $4,705.75, dated October 28, 1915, was valid, this attack upon the judgment takes on apparently a serious aspect, if the fact of the superiority of the trust deed over Miss Brown's lease be, for the moment, ignored. The trial court, as heretofore stated, found this receipt invalid, and that no consideration had been paid therefor, except the $1,000, and that the receipt was without other consideration. If this be true, as Miss Brown took possession on or about November 1, 1915, the $1,000 would have paid the rent for November and a part of December, 1915, and her rent was thus about 4 months in arrears when the action was begun. Giving her the 30 days' grace provided for in the lease, she was still 3 months behindhand in her monthly payments of rent at the time the action was begun. The various papers executed on or about October 27 and 28, 1915, will bear careful study, to determine their meaning and their bearing on this question of rent. The actual completion of the building was accomplished on or about November 1, 1915, very near the time of the execution of these papers. Briefly, these instruments were: (a) A receipt for $4,705.75, above referred to, dated October 28, 1915, the amount of which included the $1,000, paid to secure the lease. (b) A paper dated October 27, 1915, above set out in full, signed by Miss Brown, reciting that in consideration of free rental for November, 1915, and other valuable considerations, including assistance in relieving the mortgage on her furniture, she waived and satisfied all claims against her landlord, the lessor, and the Fidelity Savings & Loan Association, for damages or loss occasioned by the delay in the completion of the building, and waived all claims of every sort under said lease up to that date, the giving of which receipt for $4,705.75 was

unknown to the Fidelity Savings & Loan Association, at the time it made the $1,818 loan. So the court found, and upon ample evidence, for the officers of the bank testified that they knew nothing of it—all the agents of the bank, except Wadley, who was proved, at the time of the trial, to be in Asia; and the evidence, we think, supports the finding, so far as Wadley is concerned, that he did not know of the receipt. There was a conflict upon this point, but we cannot disturb the finding based upon the conflicting evidence. (c) The Fidelity Savings & Loan Association took from Howard an order for the $1,818 against Miss Brown's rent, and she accepted this order, without disclosing the existence of the receipt for the $4,705.75, above referred to. We think that she cannot, in this state of the facts, be heard to assert her undisclosed receipt for more than the money she had paid, to wit, $1,000. To permit her to do so would be to permit a deliberate fraud upon the bank, which took the order against her rent without any knowledge whatever of this receipt.

[7] But, even conceding that the receipt for $4,705.75 was all it purported to be, it was not available as a defense against the lien of the trust deed which was foreclosed, for the following reasons: The document of October 28, 1915, executed and delivered after the date of the trust deed of June 17, 1915, (1) satisfied all claims for damages arising out of the failure to complete the building on time; (2) accepted possession of the building as completed; (3) agreed to take possession without delay; (4) waived all claims of any sort under the lease up to that date. It is contended that this document only waived damages for delay in completion; but the last clause of this instrument was unnecessary if the only intent was to waive the accrued damages, as that was specifically waived in a previous clause thereof, and we can see no other meaning which could attach to these words as between her and the Fidelity Savings & Loan Association, which was a party to the instrument, than that she took possession subject to the trust deed of June 17, 1915; in other words, that she waived all claims that her lease was not subordinate to the lien of this trust deed. She had no other claim than this to waive, except those covered by the language of other portions of this document, and, taken as a whole, we think that she took possession under the lease subject to the lien of the Fidelity Savings & Loan Association's trust deed, which was subsequently foreclosed. We regret the necessity of this lengthy discussion, and can only say, as we said at the beginning, that it has been forced upon us by the manner in which the case has been presented.

For the foregoing reasons, the judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

45 Cal. App. 218

AYER v. GRONDONI et al. (Civ. 1937.)

(District Court of Appeal, Third District, California. Dec. 23, 1919.)

1. TRIAL ⊂⊃404(1) — FINDING OF NO OWNERSHIP NOT AFFECTED BY FURTHER CLAUSE "EXCEPT AS HEREINAFTER SET FORTH," NOTHING MORE BEING SET FORTH.

Finding of no ownership in plaintiff "except as hereinafter * * * set forth" in the absence of anything more would be one to the effect that plaintiff owned no interest.

2. TRIAL ⊂⊃404(2) — FINDING APPEARING AMONG CONCLUSIONS OF LAW ONE OF FACT.

Finding that plaintiff is the owner of the ditch, subject to the rights of defendants as in the judgment set forth, though appearing in the conclusions of law, is a finding of fact.

3. TRIAL ⊂⊃404(5)—ISSUE OF OWNERSHIP OF DITCH DISPOSED OF BY FINDING.

Finding that plaintiff is the owner of the ditch, subject to the rights of defendants as in the judgment set forth, disposes of the issue of ownership; the interests of defendants being given in the findings.

4. TRIAL ⊂⊃396(7)—FINDING SHOULD BE AS BROAD AS ADMITTED ALLEGATION OF COMPLAINT.

Finding should be as broad as the allegation of the complaint admitted by failure of the answer to deny.

5. TRIAL ⊂⊃396(7)—FINDING AS TO PAYMENT OF TAXES NOT SO BROAD AS ADMITTED ALLEGATION OF COMPLAINT TO BE DISREGARDED.

Finding should be disregarded where it is not as broad as the allegation of the complaint, admitted by failure to deny, allegation being that plaintiff paid all taxes levied and assessed against the ditch and water rights, and finding being that the "rights" of plaintiff in and to the ditch and the water rights were assessed to plaintiff, and that all taxes so levied and assessed on the "rights" of plaintiff therein have been paid by him; it being also found that plaintiff owned only a certain interest in the ditch and waters.

6. APPEAL AND ERROR ⊂⊃1071(5) — FINDING AS TO PAYMENT OF TAXES BY ONE WHOSE WATER RIGHTS DEPEND ON PRIOR APPROPRIATIONS AND USE MAY BE DISREGARDED.

Finding as to plaintiff paying taxes on ditch and water rights may be disregarded, his title to both, to the extent that he had not abandoned them, depending, not on prescription, but on prior appropriation and use.

7. WATERS AND WATER COURSES ⊂=138—PAYMENT OF TAXES ASSESSED SPECIFICALLY ON WATER RIGHTS NOT NECESSARY FOR PRESCRIPTIVE RIGHT WHERE INTEREST HAD BECOME APPURTENANT TO TAXED LAND.

For defendants to acquire prescriptive rights to interests in a ditch and waters flowing therein, it is not necessary that they should pay taxes specifically assessed on the ditch and water rights, but it is enough that the interest of each in the ditch and water right had become appurtenant to his land, and that they paid all taxes levied and assessed on their lands, as such appurtenant interests must be considered as included in the assessments of the lands.

8. WATERS AND WATER COURSES ⊂=138—PRESCRIPTIVE RIGHT NOT ACQUIRED WHILE WATER IS BEING USED BY OWNER.

Plaintiff's right to the use of water being prior to that of defendants, they could not, by adverse user, acquire title to the 5 inches of water that plaintiff was all the time putting to a beneficial use.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Action by Frederick Ayer against Stephen Grondoni and others. From an adverse judgment, plaintiff appeals. Modified and affirmed.

Nilon & Nilon and Searls & Searls, all of Nevada City, for appellant.

Hennessy & Peterson, of Grass Valley, for respondents.

ELLISON, Presiding Judge pro tem. This action was brought to determine the respective rights of the parties to a certain water ditch taking water from Slate creek, in Nevada county, known as the Texas ditch, and to determine their respective rights to the waters flowing in said ditch.

The complaint alleges that the plaintiff and his predecessors in interest have been the owners of the ditch for more than 40 years, and during all that time have been in open, notorious, continuous, and adverse possession of both ditch and water, and during said 40 years have paid all taxes levied and assessed on said ditch and water right, "said ditch having its head in Slate creek where said creek is crossed by a manzanita flume, and extending thence to the Texas mine, a distance of one mile, more or less, together with the first right to divert one hundred and seventy-five inches of water of said Slate creek at the head of said ditch and carry the same by ditch and flume to the Texas mine and intermediate points."

The complaint alleges that the defendants have wrongfully and unlawfully conspired to interfere with plaintiff's ditch and water rights, and have at divers times entered upon said ditch and trespassed upon the same. In specifying the wrongful acts of the defendants, the plaintiff recites several instances, all alike in character. A summary of one instance, as alleged in the complaint, will be sufficient for the purposes of the decision. It is alleged that on February 6th the plaintiff turned the water out of said Texas ditch at its head on Slate creek, and placed in the head of said ditch a gate, with padlock and chain thereon, to prevent the running of water into said ditch or raising said gate; that thereafter, on February 7th, the defendants wrongfully broke and removed said headgate of said Texas ditch.

The defendants deny the plaintiff's ownership of either ditch or the right to flow water therein. They deny that the plaintiff, or his predecessors in interest, have been in possession continuously, or otherwise, for 40 years, or for any length of time, of the Texas ditch, and deny that he, or his predecessors in interest, have been the owners, or in the possession continuously, or otherwise, in the use of 175 inches of the water of said creek, or the first right to divert any of the waters of said creek.

The defendants deny that the plaintiff, or his predecessors in interest, have used the ditch or water right for any period of time, or at all, for irrigation or motive power or steam, "except as in this answer hereinafter alleged." It is then alleged that at a time about 12 years before the commencement of this action the plaintiff and his predecessors in interest ceased to use, and have not since put to a beneficial use, 175 inches of water taken from Slate creek, save and except three inches of water used by one Edminster, the agent of plaintiff; that the plaintiff and his predecessors in interest abandoned and lost all water right that they might have had in the waters of said creek except said 3 inches; that said 3 inches of water used by plaintiff was only that portion of the water of Slate creek which the defendants and their predecessors and others permitted to flow past their respective intakes, and that plaintiff did not use continuously, or at all, said 3 inches of water for a regular period, but through his agent used through said ditch said 3 inches of water at such times and on such occasions as the defendants and others voluntarily and gratuitously permitted plaintiff to use it, and during the dry season plaintiff did not at any time receive more than 3 inches of water through said Texas ditch.

We have thus deemed it necessary to state with some fullness some of the issues raised by the pleadings, because the main contention of appellant is that there are not findings of the court upon some of them, and that the findings upon others are either contrary to the pleadings or not sustained by the evidence.

[1-3] I. The plaintiff complains that the court failed to find on the issue raised as to

the ownership of the Texas ditch. The finding of the court is, in effect, that neither the plaintiff, nor his predecessors in interest, have for 40 years, or for any time, been the owners of the Texas ditch, or been in the exclusive open possession of it, or in adverse possession of it, or any possession of it at all, "except as hereinafter in these findings set forth." It is stated by counsel for plaintiff that he was entitled to a specific finding as to the ownership of the ditch, and that the exceptions referred to nowhere appear in the findings. If this were all that appeared in the record, the finding (no exceptions being stated afterwards) would be one to the effect that plaintiff was not the owner of any interest in the ditch at all. There is, however, a finding of fact "that plaintiff is the owner of the Texas ditch, subject to the rights of the defendants Grondoni and Hecker as in this judgment set forth." While this finding appears in the conclusions of law, and is, perhaps, misplaced, it is nevertheless a finding of fact, and disposes of the issue as to the ownership of the ditch, because in the findings the interests of both Grondoni and Hecker are found, and the findings altogether are to the effect that the plaintiff is the owner of the ditch, except as limited by the rights declared to exist in the above two defendants. We think this is a sufficient finding upon the ownership of the ditch.

[4-6] II. The complaint alleges that the plaintiff and his predecessors in interest for 40 years have paid all taxes levied and assessed against said ditch and water rights. The answer admits this by a failure to deny. The finding should have been as broad as the allegation. There is a finding, however, and it is not as broad. It is to the effect that the rights of plaintiff in and to the Texas ditch and in and to the water rights in said Slate creek were regularly assessed by the assessor for 40 years last past to the plaintiff and his predecessors in interest, and that all taxes so levied and assessed upon the rights of the plaintiff and his predecessors in interest have been paid by the plaintiff and his predecessors in interest. The court found that plaintiff owns a certain interest in the ditch and waters of Slate creek, and that the defendants Grondoni and Hecker each owns a certain interest in the ditch and water right, and the finding, in effect, is not, as alleged in the complaint, that the plaintiff has paid all taxes levied and assessed on said ditch and water right, but that plaintiff has only paid taxes on whatever rights he may own in the ditch and water, leaving an inference that a part of the ditch and water and an interest in both were not assessed to plaintiff, and that he has not paid taxes on all of the ditch and water. This finding is contrary to the admission of the pleadings. But we are of the opinion that it may be disregarded. The plaintiff's title to both ditch and water right to the extent that he has not abandoned the same does not depend upon prescription, but upon prior appropriation and use, and, as we shall see further, may safely rest upon such prior use and appropriation.

[7] III. The plaintiff complains of the court's finding that the defendants have acquired a prescriptive right to a certain interest in said ditch and the waters flowing therein, and claims that the same is not supported by the evidence, because the evidence fails to show that the defendants have paid the taxes upon said ditch and water right, or any part thereof. The evidence shows that each of the defendants owns a piece of land near the ditch, and that he has been taking the waters from said ditch by other ditches upon his land and using it there, and that said interest in the ditch and water right has become appurtenant to their land. And the evidence further shows that they have paid all taxes that have been levied and assessed upon their lands. The decisions seem to hold that under such conditions no separate payment of taxes on the ditch involved here, or of the water right claimed by the defendants, is necessary to give them a prescriptive right. In Gartlan v. Hooper, 177 Cal. at page 428, 170 Pac. 1121, it is said:

"The appellant urges, however, that the plaintiff's adverse user and claim of these waters did not otherwise satisfy the requirements of the statute because he paid no taxes upon the easement claimed; but in this behalf the evidence shows that no taxes were separately assessed upon such easement, but that the plaintiff paid all of the taxes which were assessed against tract No. 1, since his acquisition of title thereto. This court has held that where the use of water is appurtenant to a tract of land and contributes to its value, it must be considered as included in the assessment of such land without a separate specification" (citing Coonradt v. Hill, 79 Cal. 593, 21 Pac. 1099; Frederick v. Dickey, 91 Cal. 358, 27 Pac. 742).

On the authority of these decisions, we hold that no other payment of taxes than that proved on behalf of the defendants was required in order to enable them to claim title by prescription.

[8] IV. The court found that the plaintiff was at the time of the commencement of this action the owner of a right in said Texas ditch to have flow through or cause to flow through said ditch 5 inches of the water of said creek, but that said right to said 5 inches of water was subject to and subordinate to the right of Grondoni to have flow upon his land 3 inches and the said Hecker 1¼ inches, and subordinated the plaintiff's right to their claims to that extent.

The pleadings and the evidence sufficiently show that up to a period of about 12 years ago the plaintiff and his predecessors in interest were using at said Texas mine through said ditch 175 inches of water; that said mine ceased operations about that time, and

the plaintiff ceased to use 175 inches of water, but continued to use some of the water, the answer alleging only 3 inches. The court in its findings finds, however, that he has continued to use since said time 5 inches of water. There is nothing in the evidence to show that the use of these 5 inches of water since the Texas mine ceased to run has been used by the consent of the defendants, or either of them.

We have then a case where the plaintiff and his predecessors in interest were using 175 inches of water, and then ceased to use any of it, except 5 inches of water, and have continued to use said 5 inches of water down to the present time. Their right to the use of the water was prior to the rights of the defendants, and it is obvious that the defendants have not and could not by adverse user acquire title to the very 5 inches of water that the plaintiff was all the time putting to a beneficial use. As to the 5 inches of water, it seems clear that the plaintiff's rights are superior to any rights of the defendants.

The amount of the water involved is exceedingly small, and we deem it unnecessary to reverse the case and send it back for a new trial, believing that substantial justice can be done by ordering a modification of the judgment.

The judgment of this court will be that the superior court be directed to modify its decree by allowing the plaintiff the first right to 5 inches continuous flow of the waters through said ditch, and granting to the defendants, subject to the plaintiff's first right to 5 inches, 3 inches continuous flow to the defendant Grondoni and $1^4/_{10}$ inches to the defendant Hecker, and, as so modified, the judgment will be affirmed.

It is proper to add that the respondent has filed no brief in this case, and we have had no assistance from him in arriving at a conclusion.

We concur: HART, J.; BURNETT, J.

44 Cal. App. 735

SECURITY TRUST & SAVINGS BANK v. CLAUSSEN. (Civ. 3073.)

(District Court of Appeal, Second District, Division 1, California. Dec. 11, 1919.)

1. LANDLORD AND TENANT ⟸134(3)—PROVISION OF LEASE FOR USE OF PREMISES FOR RETAIL LIQUOR BUSINESS NOT RESTRICTIVE.

Under a lease providing the premises were to be used for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment, defendant was not limited to conducting a liquor business, but might carry on any lawful business, for which the premises might have been of equal or greater value; the provision being permissive rather than restrictive.

2. LANDLORD AND TENANT ⟸199½ — PROHIBITION ORDINANCE NOT AN EVICTION OF TENANT ALLOWED TO USE PREMISES FOR RETAIL LIQUOR BUSINESS.

There was no eviction of tenant under a lease providing he might carry on a general retail liquor business, a permissive rather than a restrictive provision, by an ordinance of the city rendering it impossible for the tenant to conduct a liquor business; he not being restricted in the use of the premises for other businesses.

3. LANDLORD AND TENANT ⟸230(9)—IN ACTION FOR RENT, TESTIMONY OF REASONABLE RENTAL VALUE INADMISSIBLE, IN ABSENCE OF ISSUE AS TO REDUCTION BY CITY HAVING GONE DRY.

In an action for rent by the lessor of premises for use in the retail liquor business, where the lease provided that if the city voted dry, and by reason of such fact the rental value of the premises was impaired, the amount of rent should be reduced, but defendant did not allege that by reason of the city having voted dry the rental value was less than the amount stated in the lease and sued for, testimony as to the reasonable rental value of the property was inadmissible; there being no issue thereon.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Security Trust & Savings Bank against H. M. Claussen. From judgment for defendant, plaintiff appeals. Reversed.

Newlin & Ashburn, of Los Angeles, for appellant.

Randall, Bartlett & White, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sought to recover rent of $150 per month, alleged to be due for the months of April to October, 1918, inclusive, under the terms of a written lease made by its assignor to defendant herein. The court found that plaintiff was entitled to $40 per month for the period in question, and gave judgment accordingly, from which plaintiff appeals.

The lease, the execution of which defendant admits, provided that the demised premises, situated in the city of Los Angeles, were to be "used for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment" for a period of five years from February 7, 1916. Among other provisions contained in the lease was a covenant on the part of the lessor:

"That should the city of Los Angeles be voted dry and all retail liquor establishments be abolished, and should the within premises thereby become worth less rent per month than the amount above stated ($150 per month), that she will grant such reduction on said rent as she may deem proper at that time."

In his answer defendant, admitting that no payments had been made on account of the rent accruing for said months under the terms of the lease, denied that any sum whatsoever was due thereon, and as an affirmative defense alleged the adoption of an ordinance by the city of Los Angeles, which went into effect April 1, 1918, the provisions of which made it unlawful to use the demised premises for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment. He did not, however, allege that by reason of the provisions of such ordinance the premises had become worth less per month than the amount specified in the lease. Without objection defendant introduced in evidence an ordinance entitled "An ordinance prohibiting saloons, and prohibiting the sale of distilled alcoholic liquors, and regulating the sale and service of vinous and malt alcoholic liquors, within the city of Los Angeles," which as provided therein, became effective at midnight, March 31, 1918, and whereby it was declared to be unlawful "to sell, serve, or give away any alcoholic liquor within the city of Los Angeles," except as otherwise provided therein. Without quoting the exceptions, suffice it to say that the conducting and carrying on of a retail liquor establishment is not included within the exceptions found in the ordinance; indeed, the very purpose of the ordinance was to prohibit the conduct of such business. This was followed by testimony, received over plaintiff's objection that, since not pertinent to any issue raised, it was incompetent, to the effect that the reasonable rental value of the premises for the months in question was $30 per month.

Upon this evidence the court found that by reason of the passage of said ordinance it became impossible for defendant to use the premises for the purpose of conducting the business pertaining to a general retail liquor establishment, and that the reasonable rental value of the premises for the months of April to October, 1918, inclusive, was the sum of $40 per month.

[1, 2] While the lease provided that the premises were to be "used for the purpose of conducting and carrying on the business pertaining to a general retail liquor establishment," such provision as to use is permissive rather than restrictive. Defendant was not limited in the use thereof to conducting a liquor business, but might carry on any lawful business therein (Hyatt v. Grand Rapids Brewing Co., 168 Mich. 360, 134 N. W. 22; Lawrence v. White, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. [N. S.] 966, 15 Ann. Cas. 1097; McLarren v. Spalding, 2 Cal. 510), for which the premises might have been of equal or greater value. The fact that the ordinance rendered it impossible for the tenant to conduct a liquor business, since he was not restricted in the use of the premises for other kinds of business, did not constitute an eviction.

[3] If defendant desired to protect himself against a change of the law, the operation of which would prevent him from conducting the liquor business, then it was his duty to so stipulate in the contract. It is apparent the parties so understood the law with respect to the provision as to the purpose for which the premises were leased, and to cover such contingency inserted a clause "that should the city of Los Angeles be voted dry and all retail liquor establishments be abolished," and further that, if by reason of such fact the rental value of the premises should be impaired, the amount of the rent specified in the lease should be reduced. While the adoption of the ordinance, and the fact that by reason thereof it was impossible for defendant to conduct the liquor business, is alleged, nowhere in the answer is it claimed or alleged that, due to the effect of such ordinance, the rental value of the property was less than the amount of the rent specified in the lease; hence, conceding the effect of the ordinance was to prohibit defendant's use of the premises for the vending of liquor, nevertheless, since it was not alleged that by reason of such fact the rental value was less than $150 per month, there was no issue under which testimony as to the reasonable rental value of the property was admissible. The court erred in overruling plaintiff's objection to the same. In the absence of such allegation, no facts were stated constituting a defense and no evidence admissible thereunder.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 730

SECURITY TRUST & SAVINGS BANK v. CLAUSSEN. (Civ. 3105.)

(District Court of Appeal, Second District, Division 1, California. Dec. 11, 1919.)

1. ABATEMENT AND REVIVAL ⟸16—TENANT SUED FOR RENT NOT ENTITLED TO ABATEMENT PENDING APPEAL IN OTHER ACTION BY LANDLORD FOR RENT FOR PRIOR MONTHS.

In a landlord's action for rent due under a lease, tenant was not entitled to abatement of action pending determination of landlord's appeal from judgment in a former action against tenant to recover rent for prior months, where such judgment did not pass on validity of lease, but merely found the reasonable rental value of the premises to be less than rent provided for by lease under provision of lease providing for reduction in rent under certain conditions, and did not purport to fix the rental value for the subsequent months of the term.

2. ABATEMENT AND REVIVAL ⟸8(1)—PENDENCY OF OTHER ACTION WILL SUSTAIN PLEA IN ABATEMENT ONLY IF JUDGMENT IN FIRST ACTION COULD BE PLEADED AS A FORMER ADJUDICATION.

A plea in abatement, based on the fact that another action is pending, is open only when the identity of the matters involved in the second action is such that the judgment in the first, if final, could be pleaded as a former adjudication.

3. LANDLORD AND TENANT ⟸200(2)—RENTAL VALUE TO BE FIXED BY COURT, ON THE INABILITY OF PARTIES TO AGREE UNDER PROVISION OF LEASE ENTITLING LESSOR TO FIX AMOUNT; "INTERESTED PARTY."

Under Civ. Code, § 1611, providing that the consideration, where amount thereof is left to discretion of "interested parties," must be reasonable, where lease required lessor to make reduction in rent on enactment of law prohibiting sale of liquor on the premises, the reasonable rental value of the premises for the remainder of the term on the enactment of such law, if the parties were unable to agree on a proper reduction, should be submitted to the court, and its determination will constitute the lessee's liability as though originally written in the lease; the lessor being an "interested party," within such statute.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Security Trust & Savings Bank against H. M. Claussen. Judgment for plaintiff, and defendant appeals. Affirmed.

Randall, Bartlett & White, of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles, for respondent.

SHAW, J. In this action plaintiff sued for rent of $150 a month, alleged to have accrued under the terms of a written lease for the months of November and December, 1918, and January and February, 1919. As prayed for, the court gave judgment in favor of plaintiff for $600, from which defendant appeals.

As shown by the complaint and answer, the facts presented, other than the months for which the recovery of rent is sought, are identical with those involved in same title, No. 3073 in this court, wherein an opinion was this day filed. 187 Pac. 140. As in that case, this action is based upon a lease, the execution of which and nonpayment of any sum whatsoever as rent for the months of November, December, January, and February is admitted. The facts set forth in defense of plaintiff's right to recover are identical with those contained in the answer in the former case. Defendant offered evidence as to the reasonable rental value of the premises for the months specified in the complaint, to which plaintiff's objection was, for the reasons given in the opinion in No. 3073, properly sustained.

In addition to the matters there set up as a defense, the defendant in this action alleged—for what purpose it is not made to appear—that the former suit involved the same cause of action as that set forth in the complaint herein, and that judgment therein was duly given and made against the defendant, "declaring that the lease upon which plaintiff sues herein had been modified, and that plaintiff was entitled to recover from the defendant the reasonable rental value of said premises only, and that the reasonable rental value thereof was $40 per month," in support of which the judgment roll in No. 3073 was introduced in evidence. As to this allegation the court, upon sufficient evidence, made an adverse finding to the effect that the causes of action were different; that while it was true that a judgment was rendered therein against defendant (from which an appeal by plaintiff is pending), wherein it was adjudged that the reasonable rental value of the property for the months named in that action was $40 per month, for which judgment was rendered against defendant, it was not adjudged that the lease upon which plaintiff sues herein was modified or changed in any respect.

[1] As stated, the record fails to disclose the purpose for which the allegation as to the former adjudication was inserted in the answer. However this may be, and conceding that, since an appeal therein was pending, it could not be pleaded as a bar, appellant, without showing that such relief was asked for in the trial court, now insists that there should have been an abatement of this action pending the determination of the former case on appeal. We perceive no merit in the contention. As appears from the judgment roll introduced in evidence, the question as to the modification of the lease was not

involved in the action. Neither party asked that the terms of the lease be modified. In its complaint plaintiff stood thereon. All the findings, except as to the amount of rent due for the months named in the complaint, as to which the court found the reasonable rental value therefor was $40 per month, were adverse to defendant, as to whom, since he did not appeal therefrom, the judgment was final and binding. The judgment did not, as claimed by appellant, purport to fix the rental value of the premises for subsequent months of the demised term, the reasonable value of which, owing to fluctuation and change of conditions, might be more or less. Moreover, accepting appellant's theory that the judgment should be construed as fixing the value of the lease for the balance of the term at $40 per month, he nevertheless admits that he neither paid nor tendered anything on account thereof. Then why should plaintiff be compelled to forego the right to enforce payment of what concededly was due?

[2] A plea in abatement, based upon the fact that another action is pending, is open only when the identity of the matters involved in the second action is such that the judgment in the first, if final, could be pleaded as a former adjudication. Baker v. Eilers Music Co., 175 Cal. 652, 166 Pac. 1006.

"This rule is based upon the supposition that the first suit was effective, and afforded an ample remedy to the party, and hence that the second was unnecessary, and as a consequence vexatious." Dyer v. Scalmanini, 69 Cal. 637, 11 Pac. 327.

There is nothing in the judgment rendered in the former suit which affects the existence or integrity of the lease. Assuming the judgment to be a final determination of the subject of that action, the lease would constitute the basis of subsequent actions by plaintiff upon which to assert its right to recovery of rent for subsequent months of the term. In support of his contention, appellant has cited Baker v. Eilers Music Co., 175 Cal. 657, 166 Pac. 1008, Williams v. Hawkins, 34 Cal. App. 146, 166 Pac. 869, and Wiese v. San Francisco Musical Soc., 82 Cal. 645, 23 Pac. 212, 7 L. R. A. 577, none of which, however, are applicable to the facts in this case, for the reason that the judgments therein rendered were in favor of the defendants, and the effect thereof was to destroy and nullify plaintiffs' right to recover in the subsequent actions. If final, the judgment could be interposed as a plea in bar, and if pending on appeal therefrom by plaintiff, then as a plea in abatement, for the reason that if affirmed it would operate as a final determination of the subject of the subsequent action, and hence there would be nothing to litigate. Assuming, therefore, the sufficiency of the allegation of the answer herein as a plea in abatement, and, though not appearing in the record, that defendant did ask the trial court for such relief, the finding, which, as shown, is supported by the evidence, is such as to warrant the court in denying the same.

At the risk of being criticized for indulging in dictum, we deem it not improper to state that by the terms of the lease the parties thereto contemplated that a law prohibiting the retail sale of liquor upon the premises might be enacted, by reason whereof the rental value of the property might be impaired, in which case the lessor undertook and agreed that she would make such reduction of rent as she might deem proper at the time. In other words, when the contingency arose she would, for the remainder of the term, reduce the amount of the monthly installments of rent to such sum as would, under the circumstances, be reasonable, such reduction to be fixed and continue as the measure of defendant's obligation throughout the remainder of the term. It was not contemplated, in the absence of an agreement therefor, that a different rental, due to periodical fluctuations in value, should be exacted from month to month, depending upon what the court in such actions deemed reasonable.

[3] While the undertaking of the lessor was to make such reduction as she deemed proper "at that time," nevertheless she was an interested party. Section 1611 of the Civil Code provides:

"When a contract does not determine the amount of the consideration, nor the method by which it is to be ascertained, or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth."

The object of the contract was the rental value of the premises, and the consideration of the tenancy when impaired by the passage of the liquor ordinance was not determined by the contract, nor any method specified therein by which it was to be ascertained, other than leaving it to the discretion of the lessor, who was an interested party; hence, under this provision of the Code, if the parties were unable to agree upon the reduction proper to be made, the subject, under proper allegations in the nature of an equitable action, should be submitted to the court in an action to have it determine the reasonable rental value of the premises for the remainder of the term, and such determination would constitute the defendant's liability under the terms of the lease, as though originally written therein.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

44 Cal. App. 750

HAMMOND et al. v. SAN MATEO PLANING MILL CO. (Civ. 2971.)

(District Court of Appeal, First District, Division 1, California. Dec. 12, 1919. On Petition for Rehearing, Jan. 10, 1920. Hearing Denied by Supreme Court Feb. 9, 1920.)

1. EVIDENCE ⟸442(6)—PAROL EVIDENCE ADMISSIBLE TO COMPLETE CONTRACT OF SALE.

Where a contract for the sale of lumber provided that the lumber should be inspected by the Pacific Coast Lumber Surveyors, and the evidence showed that such surveyors had no separate entity as a corporation or partnership, but were merely a voluntary association, parol evidence was admissible to show that it was understood that the inspectors should be selected by a representative of defendant; the contract being silent as to such matter.

2. ESTOPPEL ⟸90(2)—ACQUIESCENCE IN ACTS UNDER CONTRACT NOT ESTOPPEL IN VIEW OF PREVIOUS OBJECTIONS.

Where defendant's representative, as soon as advised that the inspection of lumber was to be made by inspectors not selected by him, vigorously objected, the fact that he later visited the place of inspection, where he did not renew his objection, does not estop defendant from relying on plaintiff's breach of that part of the contract allowing its representative to select inspectors.

3. TRIAL ⟸395(1)—RECITALS OF JUDGMENT HELD TO SHOW SUFFICIENT FINDING THAT CONTRACT SHOULD BE REFORMED.

Where the trial court found that a contract for the sale of lumber should be reformed, so as to include an agreement between the parties that inspectors should be selected by defendant's representative, and directed that the written agreement should be reformed, there was a sufficient finding on that issue.

On Petition for Rehearing.

4. APPEAL AND ERROR ⟸835(2) — POINTS MADE BY APPELLANT FOR FIRST TIME ON REHEARING CANNOT BE CONSIDERED.

Points raised by appellant for the first time on rehearing cannot be considered.

5. APPEAL AND ERROR ⟸835(2)—SUBMISSION WITHOUT ARGUMENT NO EXCUSE FOR APPELLANT'S FAILURE TO RAISE POINTS UNTIL REHEARING.

Where cause was submitted without argument, yet where at the time of submission respondent was granted further time to file supplemental brief, and appellant was given time to reply, appellant cannot be excused for its failure to raise points until rehearing on the ground that the cause was submitted without argument.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by William Albert Hammond and Thomas George Atkinson, copartners doing business under the firm name and style of W. A. Hammond Company, against the San Mateo Planing Mill Company, which counterclaimed. From a judgment for defendant on its counterclaim, plaintiffs appeal. Affirmed.

Mastick & Partridge and H. F. Chadbourne, all of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Kirkbride & Gordon, of San Mateo, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of defendant, rendered and entered upon the verdict of a jury. The action was instituted by the plaintiffs to recover from the defendant the sum of $4,296.38 as the purchase price of a cargo of lumber claimed to have been sold and delivered by the plaintiffs to the defendant on or about the 25th day of May, 1914. The contract under which said lumber was sold was in the form of a written memorandum of such sale, specifying the amount, quality, price, and place of delivery of said lumber, which was to be shipped from San Francisco and delivered on the levee at San Mateo. The contract contained this clause:

"San Francisco tally and inspection by Pacific Coast Lumber Surveyors to govern and be final."

The complaint was in the form of the common counts for goods, wares, and merchandise sold and delivered. The answer of the defendant, after denying the allegations of the complaint, set up the contract in writing between the parties, and included the same in its answer in the form of an exhibit. The answer then proceeded to state that an alleged tally and inspection of the lumber attempted to be delivered to the defendant under the terms of said contract was made and had at San Francisco, but that the same was conducted by persons unknown to the defendant, and was, in fact, no tally or inspection at all, because so unskillfully, carelessly, negligently, and speedily conducted as to render it impossible for the same to be a true or sufficient tally and inspection of said lumber, and that as a matter of fact the lumber so purporting to be inspected did not comply, either in the amount of feet or amount of pieces or in its quality, with the requirements of said contract, and that the attempted delivery of such lumber did not constitute a performance on the part of the plaintiffs of their said contract, but, on the contrary, constituted a breach thereof, from the effect of which the defendant suffered damage in the sum of $3,000, for which it prayed judgment in its favor. The defendant subsequently filed an amendment to its said answer, wherein it was alleged as a separate defense, and also by way of cross-complaint, that the written contract between the parties did not set forth the true agreement be-

tween them in the particular respect that at the time said contract was prepared it was understood and agreed that the persons to be selected as the tallymen and inspectors of said lumber by virtue of the concluding clause in said writing were to be appointed by one Walter Anderson, the authorized representative of the defendant. At the trial of the cause a second amendment to the defendant's answer and cross-complaint was presented, and permitted by the court to be filed, wherein it was averred that the understanding and agreement between the parties by which the tallymen and inspectors of said lumber were to be appointed by said Walter Anderson was omitted from said written contract by the mutual mistake of the parties.

Upon the trial and submission of the cause, the jury rendered its verdict in the defendant's favor, awarding it damages in the sum of $350, and upon the coming in of such verdict, the court adopted the same, and thereupon proceeded to make findings to the effect that the written instrument embracing the contract between the parties did not contain the true agreement between them in the respect that it was agreed between the said parties that the defendant should have the privilege of appointing tallymen from the Pacific Coast Lumber Surveyors to tally and inspect said lumber, and that this provision of their said agreement was omitted by the mutual mistake of the parties from said writing. Having made these findings, the court entered its judgment reforming said written contract in the above respect, and awarding the defendant judgment for the amount of damages fixed by the verdict of the jury. The plaintiffs appeal from such judgment.

[1] The first contention which the appellants make upon such appeal is that the trial court erred in the admission of oral evidence offered on behalf of the defendant for the purpose of showing that there was an oral understanding and agreement between the parties, contemporaneous with the making of the written agreement between them, to the effect that the tallymen and the inspectors from the Pacific Coast Lumber Surveyors, who were, by the terms of said writing, to inspect said lumber, and whose tally and inspection thereof was to be final, were to be selected by Walter Anderson, the authorized representative of the defendant in the matter of the purchase of said lumber. The appellants' claim in support of their contention is that such oral evidence was inadmissible for the reason that it varied the terms of the written agreement between the parties. We are unable to sustain this claim. The clause in the said written agreement, providing that the tally and inspection of the lumber to be furnished by the plaintiffs to the defendant under the terms of said writing was to be made by the Pacific Coast Lumber Surveyors, is silent as to which of the parties to said writing should select the persons from said Pacific Coast Lumber Surveyors who were actually to make such tally and inspection. The evidence in the case showed that the Pacific Coast Lumber Surveyors, referred to in said writing, had no separate entity as a corporation or partnership, but were merely a voluntary association of inspectors calling themselves by such name. This being so, it is evident that the individuals to be selected from among their number to make the tally and inspection required by the terms of this written agreement must have been chosen by one or other of the parties to this contract; and, the contract being entirely silent as to who should make such choice and selection, oral evidence offered for the purpose of showing that such choice and selection was to be made by one or other of the parties to said agreement would in no wise vary or contradict its terms; and, this being so, the admission of such evidence on the part of the trial court could not constitute a violation of the well-known rule of law forbidding the introduction of oral evidence, the effect of which would be to vary or contradict the terms of a written instrument. The testimony which was thus offered and admitted fully sustained the defendant's claim as to the existence of such oral understanding at the time of the execution of the written contract between the parties, and also was quite sufficient to support the findings of the trial court, later made in that respect, to the effect that such oral understanding as to the party by whom the tallymen and inspectors of said lumber were to be chosen was omitted from said writing by mutual mistake.

[2] The claim of the appellants that the defendant was estopped to set up and prove the existence of such agreement by reason of the fact, attempted to be shown upon the trial, that said Anderson was present at the time such tally and inspection was being made by the inspectors selected by the plaintiff, and that he made no objection thereto, is not supported by the record before us, since the evidence therein discloses that said Anderson, as soon as he was advised that such tally and inspection was about to be made by tallymen and inspectors of the plaintiffs' choosing, vigorously objected to the same, and insisted upon the existence of the oral understanding that he was to choose such inspectors; and while it is true that said Anderson not long thereafter went to the vessel upon which said lumber had been loaded and saw some sort of inspection or tally going on, the mere fact that he did not repeat his protest thereto in the presence of such inspectors, would not, in our opinion, estop the defendant from urging at

the trial, not only that such inspection was undertaken in violation of the oral understanding between the parties, but that the same was so carelessly and inefficiently made as to constitute no real or bona fide inspection of what the evidence in the case discloses to be a lot of lumber so far below the standard of quality prescribed in the contract for its purchase as to justify the defendant in refusing to receive or pay for the same.

[3] The only other contention of the appellants requiring consideration is the claim that the court failed to make a sufficient finding upon the issue as to whether or not the contract should be reformed by the inclusion therein of the oral understanding between the parties as to the tally and inspection of said lumber. The record in that regard shows that the trial court did include in its judgment an express finding as to the existence of such understanding between the parties, and of the fact that the same was omitted from the writing entered into between them by the mutual mistake of the parties, and that the trial court further and by the express terms of its judgment directed that the written agreement between the parties be reformed by the insertion of the words "to be appointed by Walter Anderson" after the words "Pacific Coast Lumber Surveyors" in the concluding clause of such instrument. This would seem to fully answer the said objection.

As to the criticism which the appellants make of the several instructions of the trial court, we are satisfied, upon an examination of the entire body of the court's instructions, that they are neither erroneous nor contradictory, and that the jury was fairly and properly instructed as to the law of the case.

No other error appearing in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

On Petition for Rehearing.

PER CURIAM. The petition for rehearing is denied.

[4, 5] Aside from our conclusion that the points made upon the petition are without merit, we think that they are not entitled to consideration, because urged for the first time upon the petition for rehearing. The petitioner urges that this reason should not prevail, in view of the fact that the cause, at the request of respondent, was submitted without oral argument. The record, however, shows that at the time of such submission the respondent was granted further time to file a supplemental brief, and the appellant was given the right to reply thereto. These supplemental briefs took the place of an oral argument in the case, and the points now urged by appellant should then have been advanced, and, this not having been done, either in its original or reply briefs, it is now too late to urge these points for the first time upon a petition for rehearing of the case.

44 Cal. App. 703

RUSSELL v. HAWXHURST et al.

(Civ. 2043.)

(District Court of Appeal, Third District, California. Dec. 10, 1919. Hearing Denied by Supreme Court Feb. 5, 1920.)

1. VENDOR AND PURCHASER ⊂⊃191—VENDEE CANNOT RETAIN POSSESSION AND REFUSE TO PAY INSTALLMENTS.

A vendee in a contract of sale of property which is to be paid for by installments, upon default in the payment of any of which the vendor has, as authorized by the contract, elected to treat and declare the contract null and void and the rights of the vendee forfeited, cannot retain possession of the property and at the same time refuse to pay the installment or installments past due.

2. VENDOR AND PURCHASER ⊂⊃117—DEFECT OF TITLE NOT DEFENSE IN ACTION BY VENDOR TO RECOVER POSSESSION ON FAILURE TO PAY INSTALLMENT.

A vendee under a contract for sale of land cannot retain possession of the property and refuse or fail to comply with the terms of the contract of sale as to the payment of the purchase price, as specified and stipulated in such contract, and then, in an action by the plaintiff to recover possession, set up as a defense the fact that the title of the vendor is defective or not satisfactory in certain respects.

3. VENDOR AND PURCHASER ⊂⊃117, 334(5)—VENDEE IN CONTRACT CANNOT RESCIND AND RECOVER MONEY PAID AFTER ACTION BROUGHT BY VENDOR FOR POSSESSION.

The filing of a cross-complaint, asking that a contract of sale of land be annulled, for fraud and by reason of defect in vendor's title, in an action by vendor to recover the land, after having declared the contract null and void, after notice according to the contract, did not amount to a rescission, where vendee retained possession of the land, and vendee could not recover back money paid on the contract.

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action of ejectment by James F. Russell against Elmeda Hawxhurst and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Thomas Drake, of Klamath Falls, Or., and Collier & McNamara and Tapscott & Tapscott, all of Yreka, for appellants.

C. J. Luttrell and Taylor & Tebbe, all of Yreka, for respondent.

HART, J. Plaintiff brought the action for the purpose of having declared null and

void a certain agreement between plaintiff and defendant John W. Hawxhurst, and for restoration to him of the possession of the real property described therein. Practically the action is in ejectment. The trial was before the court, sitting without a jury. Judgment was in favor of plaintiff, from which judgment defendants prosecute this appeal.

The agreement in question was dated June 20, 1912. By its terms the party of the first part (plaintiff) agreed to sell and convey to the party of the second part (defendant John W. Hawxhurst), and the second party agreed to buy, 640 acres of land in Siskiyou county, "horses, cattle, farm tools, and implements, and a 320-inch water right." Two hundred dollars was paid the party of the first part on the execution of the agreement; $800 and a mortgage of $2,000 on 320 acres of timber land in Klamath county, Or., to be paid on or before July 6, 1912; $1,200 to be paid on or before December 20, 1912; and other payments, aggregating $17,000, to be paid before June 20, 1917, deferred payments to bear interest at the rate of 6 per cent. per annum. The second party agreed to pay all taxes, beginning with the year 1912. It was agreed that the second party should enter into possession of the premises upon the payment of said $800 on or before July 6, 1912, and upon the giving of said mortgage for $2,000, which was to be executed to one J. F. Maguire, by Elmeda Hawxhurst, the wife, and Ethel Hawxhurst, the daughter, of John W. Hawxhurst. "The party of the second part agrees to convey a first water right of 20 inches and after a second water right of 1,000 inches is taken out by the Churchill Company, a third water right of 300 more or less inches free and clear of the waters of Butte creek, Siskiyou county, California." The first party agreed, upon the payment of $1,200, on December 30, 1912, and $1,000 on June 20, 1913, to give a clear bill of sale to certain personal property, consisting of horses, cattle, farm implements, etc. It was agreed that water from Butte creek should be used by the Pollock Lumber Company to be used in their boiler on the premises described, and the mill to be allowed free use of land occupied by them as long as they should operate the mill. Time was made of the essence of the contract, and in case of default of the second party in any of its covenants, at the option of the first party, the contract should become null and void, and all payments made by the second party were to be retained by the first party as reasonable rent of the premises, first party to take immediate possession of said premises.

The complaint alleged that the second party to said contract paid plaintiff $1,000 and caused to be executed and delivered to J. F. Maguire a mortgage for $2,000 on the timber lands mentioned in the contract, and that second party went into possession of said real estate and personal property on the 5th day of July, 1912; that on or about the 9th of October, 1912, defendant John W. Hawxhurst sold and assigned to the defendants, Elmeda, Ethel, and Walter R. Hawxhurst (the latter his son) all his right, title, and interest in and to said agreement; that defendants failed to pay the sum of $1,200, due under said contract on the 20th of December, 1912, and failed and refused to pay the state and county taxes levied against the property for the year 1912; that on the 24th of January, 1913, plaintiff went to the premises described in the agreement and informed defendant Walter R. Hawxhurst, who was then in possession of said lands and personal property, that by reason of the failure of said defendants to carry out the provisions of said agreement plaintiff desired the return of said property and demanded the same, but that defendants refused to permit plaintiff to retake possession of said property.

Defendants demurred to the complaint, upon various grounds, but the court overruled the demurrer, and defendants answered, and also filed a cross-complaint. Therein they pleaded certain fraudulent transactions on the part of plaintiff and his agent, J. F. Maguire, which induced defendant John W. Hawxhurst to enter into said agreement; that during a large part of the irrigating season of 1912 there was not to exceed 15 inches of water available; that plaintiff and his agent, Maguire, knew their representations with regard to said water rights were incorrect; that 320 inches of water were necessary to obtain satisfactory results in cultivating said property; that during the fall and winter of 1912 and the early part of 1913 negotiations were in progress between defendants and plaintiff for an amicable adjustment of all matters pending under said agreement; that plaintiff took forcible possession of the property on or about May 7, 1913.

It was further alleged, both in the answer and the cross-complaint, that the plaintiff and said Maguire accompanied said John W. Hawxhurst on a visit to the property in question and inspected the same, and that the former, in referring to the character and the value of the land, placed special emphasis on the value of the "saw timber" upon a portion of said premises, "and upon the fact that there was sufficient saw timber then growing thereon to enable said defendant, John W. Hawxhurst, to obtain from the sale thereof sufficient funds from which to make the $1,000 payment referred to in said agreement * * * as maturing on June 20, 1913"; that, relying upon the truth of the several representations made by the plaintiff and said Maguire, said Hawxhurst entered into the said agreement, made the

$200 payment referred to, and caused the mortgage for $2,000 mentioned in said agreement to be executed and delivered, and thereupon entered into the possession of said real estate mentioned in the agreement of sale, "saving and excepting the aforesaid water rights and the rights theretofore conveyed by said plaintiff to one Elmer Pollock, by an instrument dated February 1, 1910, and recorded in the office of the county recorder of Siskiyou county, Cal., on February 10, 1913."

As to this charge in the answer, the cross-complaint was more explicit, and said that the plaintiff, previous to the time at which the agreement for the sale of the land was entered into between him and John W. Hawxhurst, entered into an agreement with said Pollock whereby the plaintiff agreed to sell to Pollock all of the merchantable saw timber situated upon a portion of the land described in the agreement with Hawxhurst, and that said Pollock or his assigns should have the right to occupy such portion of the real estate in question for a mill site so long as said Pollock or his assigns desired to operate a sawmill thereon and that said Pollock should have immediate possession of said land, with the right to take and remove therefrom all merchantable timber over 12 inches in diameter at the stump; that thereafter the rights acquired by said Elmer Pollock, under and by virtue of his said agreement with plaintiff, were sold, assigned, and transferred to Johnson Pollock Lumber Company, a corporation; "and that subsequent to the execution of the last-mentioned agreement merchantable lumber over 12 inches in diameter at stump was removed from the aforesaid land thereunder."

The defendants, in neither their answer nor their cross-complaint, directly charge that the plaintiff was guilty of fraud, or that he was himself in any way in default as to his obligation. It is, as above shown, merely alleged, as to the water rights, that the representations made by plaintiff as to the extent thereof were "incorrect." As to the agreement between plaintiff and Pollock, which was entered into more than two years prior to the date of the agreement between plaintiff and John W. Hawxhurst, it is manifest that said Hawxhurst was fully informed of the same, since the agreement between him and plaintiff contained this provision:

"Also agreed between the parties hereto that water from Butte creek through pipe now laid in the ditch is to be allowed to the Pollock Lumber Company to be used at the boiler in their mill on the premises above described. Said mill to be allowed free use of land now occupied by them as long as they operate the mill."

The defendants, both in their answer and cross-complaint, admit that they knew of the above provision in the agreement, but in neither of those pleadings do they say that John W. Hawxhurst was not familiar with the full terms of the Pollock agreement, nor is it charged in either of said pleadings that there was any misrepresentation by plaintiff as to said Pollock agreement, or the character or quantity of timber the Pollock Company was thus authorized to take from the premises.

It is manifest that the fact of the Pollock transaction, as it was explained in the pleadings of the defendants, constituted neither a defense to plaintiff's action nor, as we shall later see, a ground for the relief prayed for in the cross-complaint. Indeed, even if the averments as to that matter were in all respects sufficient in stating legal or equitable reasons for the annulment of the contract, they would not disclose a defense to this action, in the absence of averments showing a rescission or an offer to rescind the contract by the defendants on the ground that they entered into the agreement under a misrepresentation by the plaintiff that the premises were entirely free from any burden. The averments as to the Pollock matter were properly stricken both from the answer and the cross-complaint.

Reverting to the matter of the water rights which the plaintiff agreed to convey to the defendants with the land, we will more specifically consider whether the averments as to the water rights would or would not constitute a defense to plaintiff's cause of action. Both pleadings of the defendants expressly admit that John W. Hawxhurst entered into the possession and occupancy of the premises described in the contract of sale immediately upon the execution of said contract, and remained in such possession and occupancy from the 5th day of July, 1912, down to the 12th day of October, 1912, when he sold and transferred the contract and delivered possession of the property to the other defendants. If, as their pleadings as they stood before the matter referred to was stricken therefrom, show to be true, the defendants discovered that the plaintiff did not own and could not convey all the water rights which, by the contract, he agreed to convey to John W. Hawxhurst, or if in any other particular the representations by plaintiff, as evidenced by his agreement as to the property, were by them discovered to be untrue or incorrect, and the defendants by reason thereof would not secure what the plaintiff agreed to convey to them, then, upon the discovery of the fact, if they desired for that reason to withdraw from the agreement, they should have rescinded the contract, or offered to do so, by tendering back to plaintiff possession of the property, and demanding a return to them by plaintiff of the money they had already paid on the transaction. But this was not done, so far as we are advised, by either of the pleadings of the defendants. To the

contrary, those pleadings themselves show, as seen, that John W. Hawxhurst held onto the possession of the property until he transferred the contract and his rights thereunder to the other defendants, neither rescinding nor offering to rescind the contract or making objections to it in any form.

Nor did the other defendants, to whom John W. assigned the contract, rescind or offer to rescind, but kept possession of the property, and refused to surrender possession thereof to plaintiff, or to pay him the installment then past due under the contract, when the latter, having declared their rights forfeited, or elected to retake possession for default in the payment of the installment referred to, demanded a redelivery to him of such possession. There is nothing in the answer, or, indeed, in the cross-complaint, to the effect that any objection was ever made by any of the defendants to or against the contract upon any ground or for any reason until they were called upon to answer the plaintiff's complaint. It is true, as we have seen, that the answer contains this averment:

"That during the irrigating season of 1912 said plaintiff, James F. Russell, was at all times informed as to the condition of the water for irrigation purposes on the aforesaid premises, and of the consequent loss of crops resulting from lack of irrigation water thereon; that from time to time during the fall and winter of 1912, and the early part of 1913, negotiations were in progress between said defendants and said plaintiff, James F. Russell, looking to an amicable adjustment of the matters pending under said agreement of June 20, 1912"

—the agreement in question. What the particular matters were that were the subject of the negotiations and in process of amicable adjustment between the parties, thus referred to, is not explained in the pleadings of the defendants. They might have involved, so far as we can know from anything set forth in said pleadings, the proposed adjustment of differences as to the payment, as specified in the agreement, of the installments on the purchase price. But, whatever might have been the matter so referred to in the answer, we are not justified in inferring from that paragraph in the answer that a rescission of the agreement had been made or proposed by the defendants, or any of them. On the contrary, reading it in connection with the admission in the answer that defendants, to whom John W. Hawxhurst transferred the agreement and his rights thereunder, refused to redeliver possession of the premises to the plaintiff on his demand for such possession because of the default of the defendants in the payment of the installment on the purchase price which was then past due, the inference seems to be irresistible that the defendants did not intend to say by said averment that they had rescinded or offered to rescind the contract.

[1, 2] A vendee in a contract of sale of property which is to be paid for by installments, upon default in the payment of any of which the vendor has, as authorized by the contract, elected to treat and declare the contract null and void and the rights of the vendee forfeited, cannot retain possession of the property and at the same time refuse to pay the installment or installments past due. Nor can the vendee retain possession of the property and refuse or fail to comply with the terms of the contract of sale as to the payment of the purchase price as specified and stipulated in such contract, and then, in an action by the plaintiff to recover possession, set up as a defense the fact, if it be a fact, that the title of the vendor is defective or not satisfactory in certain respects. Garvey v. Lashells, 151 Cal. 526, 531, 91 Pac. 498, 500. In that case, one of the defenses set up as against the plaintiff's action in an action in ejectment against the vendees in possession under such a contract as the one involved herein, was that the title of the vendors to the property which was the subject of the contract was not good. Chief Justice Angellotti (then Associate Justice), the author of the opinion in that case, said:

"If a perfect title was to be conveyed, and the vendor is unable to give such a title, the vendee has appropriate remedies, but he cannot keep both the property and the purchase money. The rule applicable, as stated in the syllabus to Worley v. Nethercott, 91 Cal. 512 [27 Pac. 767, 25 Am. St. Rep. 209], which has since been declared to be a correct summary of the decision (Haile v. Smith, 128 Cal. 415 [60 Pac. 1032]), is as follows: 'A purchaser of land, in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property, conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive such title as the vendor is able to give, if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor, and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor.'"

See other cases cited in Garvey v. Lashells, 151 Cal. on page 531, 91 Pac. 501; Francis v. Shrader, 177 Pac. 168, 169.

As stated in Garvey v. Lashells supra, the defendants here had available to them remedies peculiarly appropriate to the correction of difficulties arising from any defectiveness in the title to the water rights, or to have the contract annulled on that ground;

but, as that case and all the authorities declare, they cannot breach their contract by noncompliance with the covenant therein as to the payment of the purchase price of the property upon the ground that the title is defective or in an unsatisfactory condition, and then set up the fact of the defectiveness of the title as a defense in an action by the vendor to recover possession for default in the payment of the purchase price, unless they can also show that they either rescinded or offered to rescind the contract, and offered to return to the vendor the possession of the property which is in them.

[3] What we have said above as addressed more to the answer, and the order of the court striking therefrom the averments referred to, is equally applicable to the cross-complaint, and the action of the court in striking therefrom like averments. While the cross-complaint asks for an annulment of the contract on the grounds already stated, it does not allege that, before the filing of that pleading, the defendants rescinded the contract or offered in the requisite way to do so. Indeed, as we have before declared, there is no showing in the cross-complaint that the defendants ever offered any objection to the contract on any ground, but still maintained and insisted on their right to maintain, after they had breached the contract, possession of the property down to the date of the commencement of plaintiff's action. We can perceive no principle upon which they may, under such circumstances, maintain the action which is the basis of their complaint. The filing of the cross-complaint did not amount to a rescission under the circumstances as disclosed by the pleadings. It would be strange, if it were true, that, having defaulted in the payment of an installment due on the purchase price, and not having rescinded or offered to rescind after their discovery of the defect in the title of the vendor to the water rights which the latter agreed to convey, and insisting on holding possession of the property, notwithstanding that they had lost their rights under the contract by their default in complying with its terms, the defendants could claim that by the act of filing, in an action by the plaintiff to recover possession of the property for such default, a cross-complaint for the money they had already paid to the vendor, a rescission of the contract had been worked, and they therefore entitled to a return of the money they had paid on the purchase price. Of course, they would thus rescind the contract, if it could be done in that way—that is to say, they would thus rescind the contract if, having violated its terms as to payments on the purchase price, for which default they had lost their rights thereunder, if they thought that the act of filing a cross-complaint, stating a ground for rescission, if timely or reasonably made, would itself work a rescission, and they could then recover back the money which they had already paid under the contract, and which they expressly agreed should be retained by the vendor as rental for the occupancy and use of the property in case they defaulted in such payments. They do not even say in their cross-complaint that they were ready and willing to pay the installment past due, if the vendor would make satisfactory arrangements relative to the water rights, or would perfect his title thereto, assuming that his title was not perfect, or was defective, or the quantity of water which he agreed to convey was not to be had.

As stated above in considering the order striking out as applied to the answer, so we repeat here in reference to the order as applied to the cross-complaint, that the duty of the defendants was upon discovering the defectiveness of the vendor's title to the water rights described in the contract, or any other matter in the transaction which was misrepresented in the agreement by the vendor, to have rescinded the agreement at once, and offered to restore possession of the property to the vendor, and demanded a return of the money already paid by them on the purchase price, if they desired to go no further with the transaction. In that case, if the vendor had refused to accept the offer of rescission and the possession of the property and to return the money, then there would have accrued to them a right of action for an annulment of the contract and for the recovery back of the money which they had paid the vendor under the agreement. So long as they refused to make the payment due or past due on the purchase price, and at the same time insisted on holding possession of the property, they had no right of action for a rescission, or ground for a rescission, and their answer and cross-complaint did not have the effect of changing their position as taken by them, when refusing to comply with the terms of their agreement with plaintiff and their failure to rescind and offer to return possession of the property to the latter.

Having thus considered and disposed of the questions arising from the action of the court in striking from the answer and the cross-complaint the matters of special defense and for affirmative relief, the next consideration is as to the question whether the findings of fact are supported. The evidence refers principally, of course, to the question whether the defendants were guilty of noncompliance with the contract as to the payments to be made by them on the purchase price of the property. The only evidence presented on behalf of the plaintiff was his own testimony. He testified that defendant John W. Hawxhurst went into possession of the property in the forepart of the month of July, 1912; that the sum of

$1,200, to be paid, according to the terms of the agreement, before the 20th day of December, 1912, was not paid; that he (plaintiff) paid the taxes for the year 1912; that on the 24th day of January, 1913—over a month after the $1,200 installment just referred to fell due and became payable—he went to the premises, found Walter Hawxhurst and his younger brother there and in possession thereof, and demanded possession of the property, which said Walter Hawxhurst refused to deliver over to him.

Plaintiff, after giving said testimony, rested his case, and thereupon the defendants moved for a nonsuit, which motion was denied. John W. Hawxhurst was then sworn as a witness on behalf of the defendants. By him the defendants attempted or offered to prove the affirmative allegations of the answer, which had been stricken out, and the allegations of the cross-complaint, also stricken out, and the court properly sustained plaintiff's objection to the offer. Thereupon counsel for the plaintiff stated to the court that the defendants were entitled to introduce proof in support of the denials in their answer of the allegations of the complaint that the plaintiff paid the taxes on the premises for the year 1912, and that defendants failed to pay the plaintiff the sum of $1,200 before the 20th of December, 1912, as called for by the contract. The defendants, however, made no effort to make such proof and rested their case upon the refusal by the court to allow them to offer proof in support of the expunged allegations of the answer and the cross-complaint.

As above shown, the contract whereby plaintiff agreed to sell and the defendant, John W. Hawxhurst, agreed to purchase the property contained this covenant:

"Time is of the essence of this contract, and in case the second party shall fail to make payments as above named, and each and every one of them punctually, or within 30 days limited therefor, or failure to keep engagement herein contained, then this contract shall, at the option of the said first party, become null and void and in case of such default, all payments hereinbefore made on this contract are to be retained by and belong to said party of the first part as the agreed reasonable rent of the said premises up to the time of such default, and the first party shall, in case of such default, have the right immediately to enter upon the land aforesaid without any process of law, and take immediate possession thereof, together with the improvements and appurtenances thereon and thereto belonging."

Thus it is readily perceivable the evidence and the findings present this situation: The defendants agreed to purchase the property in question for a sum certain, payable, a certain specified amount on the execution of the agreement, and the balance in certain specified installments at specified intervals of time, and agreed that, if they defaulted in any such payments or failed to keep any of the other vital covenants of the contract, the vendor might, within a specified time thereafter, at his option, and without the necessity of invoking any legal process for that purpose, retake possession of the premises and treat and retain as reasonable rent for the occupation and use of the property any moneys already paid under the contract. The defendants were guilty of a default in failing to pay at the time stipulated a certain amount of money on the contract, and the plaintiff, on the expiration of the time after which he was entitled, by the terms of the contract, to retake possession of the premises, if he so elected, made a demand on the defendants (assigns of the original vendee), who were then in possession of said premises, for a return of the possession of said premises to him, and that said defendants, although in default in a payment required by the contract, refused to surrender the possession of the property to the plaintiff.

The case, as so stated, clearly falls within those cases in which it is held that the vendee in possession cannot hold such possession and at the same time refuse to pay the purchase price, or, in other words, that the vendee under such a contract as the one here cannot retain both the possession and the purchase price, when the latter is due and payable. The law applicable to the facts of this case is stated, upon the authority of numerous previously adjudicated cases, in Francis v. Shrader, 177 Pac. 168, 170, 171, as follows:

"It is now the settled law of this state that a vendee under a contract for the purchase of real property cannot continue to hold the possession thereof after making default in the payments as therein provided, regardless of whether the vendor has title or not, and that the vendee cannot refrain from making payments as by the contract provided, and also continue to hold possession of the land; nor can the vendee under any circumstances, be entitled to the return of the money by him theretofore paid thereunder while he continues to hold possession of the land; nor can the vendee after making default in his payments without legal excuse ever recover the return of any of the money he may have paid thereon when the vendor was not in default of anything on his part to be kept and performed, except when there has been mutual rescission—citing Glock v. Howard, 123 Cal. 10 et seq. 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Haile v. Smith, 128 Cal. 419, 60 Pac. 1032; Bruschi v. Quail Mining, etc., Co., 147 Cal. 120, 123, 81 Pac. 404; Garvey v. Lashells, 151 Cal. 526, 531, 91 Pac. 498; Oursler v. Thacher, 152 Cal. 739, 745, 93 Pac. 1007; Gervaise v. Brookins, 156 Cal. 103, 108, 103 Pac. 329; List v. Moore, 20 Cal. App. 616, 129 Pac. 962; Skookum Oil Co. v. Thomas, 162 Cal. 539, 123 Pac. 363; Champion Min. Co. v. Champion Mines, 164 Cal. 205, 213, 128 Pac. 315."

And, as is said in Francis v. Shrader, supra, so it is true here, that there is no showing that the plaintiff repudiated or

abandoned the contract either expressly or by conduct, or that he consented to a rescission thereof. The fact that he demanded possession of the property after 30 days had elapsed after the failure to pay the installment of $1,200 to be paid before the 20th day of December, 1912, shows that he stood squarely upon the terms of the contract.

The very recent case of Gaume v. Sheets (Cal.) 183 Pac. 535, cited by the appellants here, has no application to the facts of this case. There, while the contract provided that time was of its essence, it also provided that, if default by the vendees in any of the payments which were to be made at certain specified times on the purchase price of the land occurred, then, upon 60 days' notice by the vendor to the vendees, the vendor "shall be released from all obligations in law and in equity to convey said property," etc. There was default in a payment, and the vendor gave the vendees written notice, in which he declared that he, by reason of said default, "has elected and does hereby elect to declare said agreement null and void, and all rights which you have acquired thereunder forfeited," further stating in the notice that, unless the vendees surrendered possession of the property to the vendor or his attorney "on or before 60 days from the date hereof, he will commence an action against you to quiet title to said above described premises," etc. The notice contained no statement that the vendees, by paying the installments of the purchase price then due within the period of 60 days, could retain their rights in the property and in the contract. Mr. Justice Wilbur, speaking for the court, said that the evident purpose of the provision in the contract requiring 60 days' notice of the default by the vendor to the vendees "was to give 60 days' grace, after notice to the vendees, in which to comply with the contract," but "that the notification given by the vendor that the contract was already null and void and that the possession should be surrendered within 60 days was in effect a repudiation of the contract by the vendor and justified a rescission by the vendees."

The impregnability of that conclusion in that case by the Supreme Court cannot for a moment be questioned; but here, as has been shown, the contract required no notice of the default to be given. It merely provided that, after the expiration of 30 days after the default, the vendor may, without resorting to legal process of any character for that purpose, himself enter upon the premises and retake possession thereof. The moment, therefore, the 30 days' period after the default expired the obligation of the vendor both in law and in equity to convey the property to the vendees ipso facto ceased, and there then accrued to the vendor the right to retain the moneys then already paid by the vendees under the contract as the liquidated or stipulated amount equal to the reasonable value of the use of the premises by the vendees; or, to put the latter proposition in another form, the defendants, by their default, forfeited, in accordance with their express agreement, the right to recover back the moneys they had already paid under the contract of sale, they having agreed that the moneys so paid would be equal only to reasonable rental for the occupation and use of the premises.

We have not regarded it necessary to consider specifically the point made by the defendants that the plaintiff's complaint is amenable to objections made against it by the demurrer thereto of the defendants. It is, we think, sufficient to say that we are convinced that the complaint states, in a clear, direct, and intelligible manner, a cause of action for the relief sought by it.

The judgment is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

44 Cal. App. 667

CITY OF RED BLUFF v. SOUTHERN PAC. CO. (Civ. 2027.)

(District Court of Appeal, Third District, California. Dec. 9, 1919. Hearing Denied by Supreme Court Feb. 5, 1920.)

1. PLEADING ⊂=125—DENIAL OF UNLAWFUL OBSTRUCTION OF STREET INSUFFICIENT TO RAISE ISSUE OF FACT.

In city's action against railroad to require removal of embankment in street, answer denying that embankment complained of constituted "an unlawful obstruction," or an "unlawful interference with the use of the street by the public," *held* insufficient to raise an issue of fact; the only denial being the legal conclusion that the obstruction and interference are unlawful.

2. RAILROADS ⊂=78—PERMISSION FOR TEMPORARY OBSTRUCTION OF STREET GRANTED.

A resolution granting permission to close and use a street for railroad purposes on condition that the title shall remain in the public, and that no permanent rights therein are granted, does not cause the street to cease as a highway, and does not give any right to obstruct the street any longer than the city sees fit to permit it.

3. RAILROADS ⊂=9(1)—RAILROAD COMMISSION WITHOUT JURISDICTION TO PERMIT OBSTRUCTION OF STREET.

In the absence of law conferring jurisdiction on the Railroad Commission to permit a railroad to obstruct a city street, the city, by its assent to proceedings before the commission, cannot give jurisdiction.

4. MUNICIPAL CORPORATIONS ⊂=696 — CITY WITHOUT POWER TO CONFER JURISDICTION ON RAILROAD COMMISSION TO PERMIT OBSTRUCTION OF STREET BY RAILROAD.

Under St. 1915, p. 1273, §§ 1 and 2, providing for submitting to the voters the question of surrendering control over public utilities to the railroad commission, neither the board of trustees of a city nor its electors can submit to the State Railroad Commission the question of whether a railroad is required to remove an embankment constituting an unlawful obstruction of a street, and thereby estop the city from maintaining a suit to compel removal of the obstruction.

5. RAILROADS ⊂=79—COURT CAN DETERMINE CONTRACTUAL RIGHTS OF PARTIES IN ACTION FOR REMOVAL OF EMBANKMENT OBSTRUCTING STREET.

In a city's action to compel the removal of a railroad embankment as constituting an unlawful obstruction of a street, the court has the right to determine the question of whether the railroad, in obstructing street after city's permission has been withdrawn, was violating its agreement, evidenced by a resolution granting a permit to obstruct the street.

6. RAILROADS ⊂=79—OBSTRUCTION BY RAILROAD EMBANKMENT OF CITY STREET MAY BE ABATED AS NUISANCE.

A railroad embankment which obstructs and prevents the use of a street in the accustomed way by the public constitutes a nuisance which the superior court has jurisdiction to abate.

Plummer, Presiding Judge pro tem., dissenting.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action to abate a nuisance by the City of Red Bluff against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Freeman and George Freeman, both of Willows, for appellant.

McCoy & Gans, of Red Bluff, for respondent.

BURNETT, J. This cause was tried in the superior court of Tehama county before Hon. John F. Ellison, judge thereof, who rendered a decision in favor of plaintiff. The facts of the case and the reasons for his conclusion are clearly set forth in an opinion filed in said superior court by Judge Ellison, and, as I am in accord with the views therein expressed, I take the liberty of quoting said opinion as follows:

"The plaintiff brings this action to obtain a decree for the removal of certain obstructions to travel placed in Cedar street, in the city of Red Bluff, by the defendant corporation.

"Paragraph II of the complaint alleges that during all times since 1876 there has existed and does now exist within said plaintiff, and running through the entire width thereof from east to west, a certain public street and highway known as Cedar street; that during all of said time said Cedar street has had a width of 80 feet; and that during all of said time said street has been and is now a regularly and legally established and existing public street and highway of the said city of Red Bluff for the use and convenience of the citizens of Red Bluff and of the public generally for all kinds of travel and use.

"The complaint then alleges that the defendant is a railroad corporation and maintains a line of railroad across the streets of Red Bluff, including Cedar Street, over which it operates trains and cars.

"Paragraph VI alleges: 'That the said tracks of defendant within and across the said Cedar street are so constructed and do now so exist that the rails of said tracks are a considerable distance above the level of the ground and surface of the street, and in such condition as to obstruct and prevent entirely the use of said street by vehicles and teams and other conveyances at the places where said tracks cross the said street; that defendant has also made and now maintains an embankment within said street of such size and condition as to prevent the use of said street by vehicles and teams and other conveyances at said point and place in said street.'

"The complaint alleges that plaintiff has demanded of defendant that it so construct its tracks and property that the street may be used by vehicles and teams across said tracks, but defendant has neglected and refuses to do so, and threatens to keep said tracks and property in such condition that said street cannot be used by teams and vehicles.

"The prayer of the complaint is that said tracks and property of defendant in the condition they now are be declared a public nuisance, and that the defendant be required to abate the same, and to put its property in such condition that Cedar street may be traveled by teams and vehicles as a public street and highway.

"The answer of the defendant consists of: (1) Denials of certain allegations of the complaint; (2) it sets up a certain resolution of the board of trustees of the plaintiff city made May 13, 1902, and claims that this resolution closes Cedar street for all time as a public highway; and (3) it sets up certain proceedings before the State Railroad Commission as an estoppel against the plaintiff's maintaining this action.

"The plaintiff has filed a general demurrer to the whole answer; a general demurrer to the 'First Answer,' and also a general demurrer to the 'Second Answer.' The plaintiff has also made a motion to strike out what is designated as the 'Second Answer to the Complaint.'

"Taking up the demurrer to the 'First Answer to the Complaint': This consists entirely of denials, and the question to be determined is, Are the denials sufficient to raise a material issue?

"The first paragraph of the 'First Answer' denies that the embankment or tracks is or are an unlawful obstruction of Cedar street, or an unlawful interference with the use of the street by the public.

[1] "These denials so far are clearly insufficient to raise an issue of fact. The obstruction

of the street and the interference with travel are admitted, as is also the allegation of the complaint that defendant threatens to keep said street in such condition that it cannot be traveled by vehicles. The only denial is of the legal conclusion that the obstruction and interference are unlawful.

"The complaint alleges that since 1876 there has existed and does now exist in said city a highway known as Cedar street. This allegation of the complaint is not denied. The complaint further alleges that Cedar street has been and is now a regularly and legally established and existing highway.

"The answer denies that since May 13, 1902, Cedar street has been or that it now is a regularly or a legally established and existing street and highway of Red Bluff, and denies that it has since that date been open to the use of the public. This is the only denial, and it is very doubtful whether it raises an issue. It does seem to deny that Cedar street is an existing highway, and, perhaps, this raises a triable issue.

"The demurrer to the first defense will be overruled.

[2] "As to the second defense and the demurrer thereto: The first part of it consists of a copy of a resolution passed by the board of trustees of the city of Red Bluff May 13, 1902. This resolution, after certain recitals, was as follows:

"'It is therefore ordered that said Cedar street between Madison street and Monroe street in the city of Red Bluff be and the same is hereby temporarily closed to public travel, and that the S. P. Company be granted permission to complete and occupy said boiler house, and that said company be permitted to also occupy and use said Cedar street so closed for the purpose of carrying on its railroad business, and until the further order of this or some future board of trustees of the said town; provided that this permission and use shall be and they are upon the express condition that the title of the said street thus closed to public travel shall be and remain in the public as a street and highway, and that no permanent rights herein are hereby granted to the said Southern Pacific Company or its successors in interest, and that said company or its successors in interest shall not by user or adverse possession acquire any title thereto as against the public or the town of Red Bluff.'

"The answer then alleges that since the passage of said resolution Cedar street has been closed to travel.

"The resolution speaks for itself, and it needs no argument to reach the conclusion that such permit to use Cedar street temporarily did not cause it to cease to be a highway, and did not give the S. P. Company any right to obstruct any longer than the city saw fit to permit such obstruction. The resolution expressly provides: 'That no permanent rights therein are hereby granted.' It is conclusive that this resolution gives to the railroad company no justification to obstruct said street at this time against the wishes and will of the city.

"The second part of this 'Second Defense' sets up certain proceedings had before the Railroad Commission as a bar to this action. This part of the answer alleges that the city trustees made application to the Railroad Commission to compel the railroad company to repair its tracks and place the same in such condition that Cedar street could be traveled by vehicles, and that after a hearing the Railroad Commission denied the petition of the city.

"From this the answer draws the conclusion: (1) That by making said application to the Railroad Commission the city acknowledged and assented to the jurisdiction of the Railroad Commission to make an order denying the right of the plaintiff to remove the obstructions to travel placed thereon by the defendant; and (2) That under the Constitution and laws of this state the Railroad Commission had exclusive jurisdiction to entertain an application to remove unlawful obstructions placed in a street and interfering with its use.

[3] "As to the first part of this claim it is sufficient to say that consent never confers jurisdiction of the subject-matter. If the Constitution and laws of the state do not confer jurisdiction upon the Railroad Commission to permit the railroad company to obstruct the streets of a city to the extent of preventing travel thereon, then it has no such jurisdiction, and parties by appearing before it cannot give it jurisdiction.

[4] "That the board of trustees could not bind the city by any act of it submitting the question of the use or removal of unlawful obstructions from its streets to the Railroad Commission is apparent. Not only is the board of trustees of a city without power to submit the use and repair of its streets to the Railroad Commission, but even the electors of such city cannot, by an affirmative vote at an election, submit such matters to the commission.

"Section 1 of an act approved June 7, 1915 (Statutes 1915, p. 1273), provides that a city may surrender its powers to supervise and regulate public utilities to the Railroad Commission, but: 'This act shall not be construed to authorize any city * * * to surrender to the Railroad Commission, its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience and safety of the general public, including matters such as the use and repair of public streets by any public utility,' etc.

"Section 2 of the act provides for an election to submit the question of surrender of control over public utilities to the Railroad Commission, but contains the same proviso as section 1 above quoted.

"The situation is that in 1902 the S. P. Company accepted from the city of Red Bluff a permit to temporarily use one of its streets so as to obstruct travel thereon, and until the further order of the board of trustees, and that the permit should not confer on the railroad any permanent right, and said railroad company should not by use or adverse possession acquire any title to the street.

[5] "The company by accepting this permit assented to all its terms and conditions. It agreed that it would only claim the right to use the street in a manner to obstruct the travel only so long as the city did not cancel the permit.

"This is a suit to enforce such contractual obligation, and we are met with the proposition that the courts are without jurisdiction to determine the contractual rights of the parties and decide whether or not the railroad company

is complying with its part of the agreement. I cannot assent to this view.

"Counsel for defendant in his brief says: 'We do not contend and never have contended that the city has not the right to maintain an action against one who obstructs its streets.' It seems to me this concession puts an end to the defense set up.

"The complaint alleges that the company is obstructing the street. This is admitted, and this suit is to remove the obstruction.

"A temporary permit to one who is building a house on the side of a street to pile building material in the street to the extent of stopping travel until it can be worked into the building does not cause the street to cease to be a public highway.

"The temporary permit granted to the railroad company in this case and the temporary cessation of travel thereon did not destroy its character as a public street and highway, and when the railroad company continued to obstruct it after the permit was withdrawn it became a trespasser, to all intents and purposes, as it would have been if it had in the first instance obstructed the street without permission of the trustees.

"It is an astonishing condition of the law in this state, if true, that if a railroad company puts a fence across one of the streets of a city without permission, no court can entertain a suit to have it removed, but the city must let it remain there until the Railroad Commission in its discretion orders it removed. Of course, in fairness to counsel it is proper to say that he would not and does not make such a claim, but it seems to the court that the position taken when pushed to its logical results leads to the above.

"In Civic Center v. R. R. Com'n, 175 Cal. 453, 166 Pac. 356, the following language is used, which I think is the law controlling the point now under discussion in this case: 'The city of Los Angeles has the power to open, widen, extend, and improve streets, and to regulate the ordinary uses thereof. The Railroad Commission * * * has the power to make orders which are binding upon the railroad companies under its supervision, to abolish grade crossings of the public streets of a city, and to order a separation of grades, so that railroads and streets shall not be upon the same level. * * * It cannot vacate the streets or direct a cessation of the public use thereof.'

"This decision was rendered after the action of the commission as set forth in the answer, and is in conflict with its views upon the matter under consideration.

"The court is of the opinion that the 'Second Defense' set forth in the answer does not state a defense to the action."

To the quotation from Civic Center v. R. R. Com'n, 175 Cal. 441, 166 Pac. 355, may be added the following from City of Los Angeles v. Central Trust Co., 173 Cal. 327, 159 Pac. 1170:

"The opening, laying out, and improvement of streets within a city and the regulation of the manner of their use are matters of much greater concern to its inhabitants than to the people of the state at large, and they are clearly municipal affairs, the control of which has always been deemed within the proper scope of municipal powers."

It was further held therein that this power "includes the power to open a street across an existing railroad as well as anywhere else within the city, and to regulate the operations of the railroad at such crossing as well as elsewhere," and, also, that in reference to these matters—being a municipal affair—the provisions of the charter on the subject are "paramount and supersede general laws which would otherwise apply thereto, so far as operations within the city are concerned." It is true that the city of Los Angeles operates under a freeholders' charter, but the corresponding provisions in the municipal act governing the city of Red Bluff in relation to the streets are of similar import to those affecting Los Angeles, and they should be subject to the same interpretation and application.

[6] But, after all, as I view it, the case is substantially the same as though appellant had constructed its tracks across an existing street, so as to obstruct and prevent the use of said street in the accustomed way by the public. Said contract with the city does not affect the situation. It may be doubted whether the trustees could enter into such a contract, so as to bind the public, but, assuming its validity, it operated to grant only a temporary privilege, and it was subject to withdrawal at any time. We have, therefore, essentially an obstruction to an established highway; in other words, a public nuisance, and there is no doubt of the jurisdiction of the superior court to abate such a nuisance. The situation does not involve such regulation of a crossing as the law has delegated to the cognizance and authority of the Railroad Commission. It may be granted that, if said commission had found upon conflicting evidence that no such obstruction existed, the courts would be bound by such finding, but that situation is not presented. Indeed, the conclusion of the commission goes upon the assumption that by reason of said tracks the street was rendered impassable to ordinary vehicles.

Attention is called to certain decisions from other jurisdictions seemingly holding to a contrary view to that of the trial judge herein, but the facts therein clearly distinguish them from this case.

In New York & N. E. R. v. City of Waterbury, 55 Conn. 19, 10 Atl. 162, the highway was not constructed and the defendant undertook to complete it across the plaintiff's railway at grade. This was in 1886, and it was in direct violation of the statute passed by the Legislature in 1883 (Laws 1883, c. 107, § 2), providing that hereafter no new highway shall be constructed across any railroad at grade. No question of an obstruction of a highway already constructed was involved. In referring to the statute the court said:

"It means that although a highway may have been previously laid out, partially constructed, and even built upon, if it has not actually been completed for public use across the rails of the railway, such crossing shall not thereafter be made."

In Paterson & R. R. Co. v. Mayor, etc., of City of Paterson, 81 N. J. Eq. 124, 86 Atl. 68, the highway had not been constructed, but simply "laid out on paper," and the principal question to be determined by the court was whether this amounted to a construction of the highway within the contemplation of the statute (Laws 1911, p. 383, § 21), providing that "no highway shall be constructed across the tracks of any railroad company at grade * * * without first obtaining therefor permission from the board" of public utility commissioners. The court very properly held that the highway was not constructed and that the case fell within the provisions of said law.

New York Cent. & H. R. R. Co. v. City of Buffalo, 200 N. Y. 113, 93 N. E. 520, involved also the construction of a new street across a railroad track already built, and the court held that the case was governed by the statute (Laws 1897, c. 754, § 1) providing that when a new street shall be constructed across a steam surface railroad, the street shall pass over or under the railroad or at grade as the board of railroad commissioners shall direct.

I think the judgment should be affirmed; and it is so ordered.

I concur: HART, J.

PLUMMER, Presiding Judge pro tem. (dissenting). As I have not reached the conclusions expressed in the majority opinion of the court, and the questions involved being close and not heretofore definitely settled, I herewith state the case as it appears to me.

On the 13th day of May, 1902, the town, now the city, of Red Bluff, a city of the sixth class, upon the request of the division superintendent of the Southern Pacific Company, adopted a resolution closing Cedar street in the town of Red Bluff, the material portions of which resolution are as follows:

"Whereas, it appears to this board that the use of said Cedar street at the place mentioned in said communication is rendered dangerous and unsafe for public use and travel by reason of the great use thereof by the engines and trains of the Southern Pacific Company; and whereas it further appears to this board that the temporary closing of said street would not be detrimental to the best interests of the town of Red Bluff and of the citizens thereof; and whereas it further appears * * * that it is now quite important for said company to complete the building now in course of construction and mentioned in said communication as the boiler house, it is therefore hereby ordered that the said Cedar street, between Madison street and Monroe street, in the town of Red Bluff be, and the same is hereby, temporarily closed to public travel, and that the Southern Pacific Company be granted permission to complete and occupy the said boiler house, and that said company be permitted also to occupy and use the said Cedar street, so closed as aforesaid, for the purpose of carrying on its railroad business, and until the further order of this or some future board of trustees of the town of Red Bluff; provided, and this permission and use shall be and they are upon the express condition that the title to the said street thus closed to public travel shall be and remain in the public as a street and highway, and that no permanent rights therein are hereby granted, and the said Southern Pacific Company or its successors in interest shall not by use or adverse possession acquire any title thereto as against the public or the town of Red Bluff."

It appears from the transcript that after the passage of this resolution the crossing over the railroad tracks of the defendant company on said street were torn out, the building mentioned as the boiler house completed and used for a number of years, and that prior to the institution of proceedings for the reopening of said street a number of additional tracks were constructed by the defendant company across said street, and that at the time of the trial herein there were existing and being maintained and used by the defendant company eight different tracks across Cedar street, two of which were and are used as switching leads to an additional number of tracks not mentioned.

It also appears that the boiler house has been removed, but that since said 13th day of May, 1902, no crossing has existed on said street over the tracks of the defendant company, and the same are not so constructed as to permit the passage of vehicles or ordinary traffic.

It further appears that on or about the 2d day of March, 1917, the city of Red Bluff filed with the Railroad Commission of the state of California an application praying for the reopening of said street to public travel, and for an order requiring the railroad company to repair its tracks and place the same in condition, to the intent that they might be crossed by vehicles, persons, etc.; that thereafter a hearing was had before the Railroad Commission, which commission, after due investigation, came to the conclusion that while the opening of said street across said railroad would afford convenience to some traffic, it was not great enough to offset the hazard that would be incurred by the construction of a crossing over said defendant company's tracks. Said commission also found that there was no crossing over the tracks of said defendant company at Cedar street, and that there had not been any such crossing for many years, and at no time since the passing of the Public Utilities Act by the Legislature of the state of California in 1911 (St. Extra Sess. 1911, p. 40), and that sec-

tion 43 of said act applies to this case, wherein it provides that "no public road, highway or street shall hereafter be constructed across the track of any railroad corporation at grade * * * without having first secured the permission of the commission;" and thereupon entered its judgment denying the petition of the plaintiff, and declining to order the defendant company to construct a crossing across its tracks on said Cedar street. No rehearing was asked for before the commission, and the matter was not carried to the Supreme Court by writ of review or other proceeding. Following the conclusion of the proceedings above referred to, this action was begun to obtain a judgment for the removal of the tracks of the defendant company across said street, on the ground that they constituted an unlawful obstruction and a public nuisance. The trial court adjudged the tracks belonging to the defendant, as they are now constructed and maintained across Cedar street, to be a public nuisance, ordered the nuisance abated, and also ordered the defendant to so construct and maintain its said tracks across said Cedar street that the same may be used by vehicles and teams, conveyances, and by the public generally as a public street and highway.

The question tendered for decision is one purely of jurisdiction. If the Railroad Commission had jurisdiction, its judgment is conclusive and final under the provisions of section 65 of the Public Utilities Act. If it had no such jurisdiction, then the superior court had a right to maintain the action which is now before this court upon appeal.

At all the times herein mentioned the plaintiff was, and now is, a municipal corporation of the sixth class, subject to the general laws of the state of California, and is not exercising any powers or authority under a freeholders' charter, as provided by sections 6 and 8 of article 11 of the state Constitution, and may exercise only the powers reserved to cities and towns by section 23 of article 12 of said Constitution, as follows: The enforcement of local, police, sanitary, and other regulations, other than the fixing of rates ordinarily vested in cities and incorporated towns. Upon this provision of the Constitution, section 2694 of the Political Code, and the case of the City of Los Angeles v. Central Trust Co., 173 Cal. 323, 159 Pac. 1169, and Civic Center Association of Los Angeles v. Railroad Commission, 175 Cal. 441, 166 Pac. 351, the plaintiff bases its argument for the court's jurisdiction.

In the former of these cases it is held that the laying out and improvement of streets within a city are matters of much greater concern to its inhabitants than to the people of the state at large, and are municipal affairs, the control of which has always been deemed within the proper scope of municipal powers. An examination of that case shows that the municipal charter of Los Angeles, adopted in accordance with section 6 of article 11 of the state Constitution, controlled the decision, as it was held that the city charter of said city was paramount to general laws in respect to municipal affairs. The concurring opinion in that case foreshadowed the development of the law touching the question of what was and what was not a municipal matter, and so in the case of the Civic Center Association we find the Supreme Court holding that the matter of railroad crossings in cities, the building of viaducts or subways, etc., are not municipal affairs, but are matters of general state concern, the language of the court being:

> "We are of the opinion that they come within the latter designation (matters of general state concern); that they are not properly municipal affairs, but always have been and still are affairs properly to be controlled and regulated by state authority within, as well as without, any particular municipality."

It is further held that where the railroad is entirely within the city, then such matters are purely municipal. But where the railroad in question is a part of a system connecting distant cities and states, then it does not come within such designation, because they serve the people at large, and are the means of communication between distant centers, and that it is not to the best interest of the state to leave them subject to the exclusive and unlimited control of every city through which they may pass, with respect to construction, maintenance, and operation of the lines lying within such city, the conclusion being reached in that case that it was the right of the Legislature, under the Constitution, to commit the regulation of such railroads, so far as they operate within cities, to the exclusive control of the Railroad Commission; that such matters cannot be classed as a municipal affair, but as matters of general concern, and the legislative declarations on that subject are paramount to any city charter. This conclusion, as stated in that case, leaves the cities free to lay out streets and regulate the ordinary uses thereof, but instead of leaving cities free to exercise control when it comes to the railroad crossing of any street as urged by counsel in this case, it seems to us to expressly limit the power of the city to opening and controlling streets in the ordinary use thereof, except where they cross a railroad system such as is involved in this action.

In the case at bar it is proposed to construct a crossing where there now exists eight railroad tracks, including a main line upon which overland trains are operated, which certainly involves a matter of much concern to the entire state, in this, as stated in the resolution closing the street in the first instance, and as found by the Railroad Com-

mission in the second, it would involve a matter of much hazard and seriously interfere with the operation of trains. The ability to handle cars quickly and without delay at switching centers is a facility of utmost importance to the uninterrupted transportation of freight and passengers. It may be stated that the increased hazards where so many tracks are involved, and the question of settling damages for accidents occurring at such places, are matters of general state concern, as such items must necessarily enter into the question of fixing freight tariffs and passenger fares.

Section 2694 of the Political Code, referred to in the second subdivision of section 43 of the Public Utilities Act, and incorporated therein so far as applicable, is a provision relating to procedure, and is not a limitation upon the power of the Railroad Commission granted in the first subdivision of that section. When the permission of the Railroad Commission has been granted to construct a crossing over a railroad, then the procedure set out in the section of the Political Code referred to is to be applied.

It is not necessary to express any opinion as to the validity or regularity of the resolution passed by the board of trustees of the town of Red Bluff, but it seems to me, from a careful study of its entire context, that the word "temporary," therein used, was not intended to be used in the limited sense, and should not be held to have been used in the sense in which that word is ordinarily employed when granting a permit to use a portion of a street for building purposes. In such instances, when the purpose for which the grant is made has ceased to exist, the grant itself may properly be held to have expired. The whole resolution seems to show that the purpose and intent of the board of trustees was an indefinite abandonment or relinquishment of a portion of Cedar street for railroad purposes, saving and reserving to the city simply the legal title to a right of way across the premises involved for street or highway purposes. The thought seems to have been to exclude the idea only of a perpetual grant; the draftsman of the resolution apparently having overlooked the fact that as against the police powers of the state the railroad company could not have acquired any legal title by any adverse claim.

It may be further stated that the very nature of the use contemplated a considerable period of time, and was to reach over and extend into the future until the growth of the city created a necessity for a public crossing. It is thus apparent that while a highway as a fiction of law has existed over the tracks of the company, no highway and no crossing have been there since 1902, and did not exist as a fact in 1911, when the Public Utilities Act was passed by the Legislature.

It also appears from the transcript that a number of tracks have been laid across Cedar street over which no crossing has ever existed. Under these circumstances, I think that the holding of the Railroad Commission that section 43 of the Public Utilities Act, immediately applied upon its enactment, was correct. Over all the tracks laid since 1902 it is unquestionably the construction of a new crossing, and over the tracks that existed on and prior to 1902 it is the construction of a new crossing on the old site. Nothing in the Public Utilities Act limits the right of a town or city to lay out, ordain, and establish streets and highways, so far as all the legal steps leading up thereto are necessary to be taken. But when this has been done, section 43 of the act lays hold upon the physical property and gives to the Railroad Commission jurisdiction to manage, direct, and control, through its orders to the railroad company, as to what shall be done with the physical properties. The city exercises its legal prerogatives; the Railroad Commission directs the exercise of the physical activities; and this, I think, is what the word "constructed" means as used in the Public Utilities Act.

While no California cases upon the precise questions here involved have been called to our attention, in the states of New Jersey, Connecticut, and New York, having a Public Utilities Act of like wording with our own, we find decisions directly in point.

In Paterson & R. R. Co. v. Mayor, etc., of City of Paterson, 81 N. J. Eq. 124, 86 Atl. 68, the Court of Chancery holds that—

> "The 'construction of a highway' within the act of April 21, 1911, * * * providing that no highway shall be constructed across railroad tracks at grade without first obtaining permission therefor from the board of public utility commissioners, contemplates such grading, curbing, flagging, planking, or other physical alteration or addition as may be necessary to prepare it for use, and the highway is not constructed by simply laying it out on paper and filing a map, since 'construction' implies performance of work; the fitting of an object for use or occupation in the usual way, and for some distinct purpose; to put together the constituent parts; to build; to fabricate; to form and to make; and hence that section applies to a railway crossing laid out by ordinance, but not physically constructed prior to its enactment."

In the Paterson Case a street had been opened some time prior to May 20, 1908, in the city of Paterson, extending to the line of the Erie Railroad Company; a right of way had been acquired across the railroad premises, but no crossing had been constructed as a physical fact when the Public Utilities Act went into effect. The act there, as here, provided that no highway shall be constructed across the tracks of any railroad company at grade without first obtaining therefor permission from the board. The question to be decided was, Did the act apply

under such circumstances? The court answered in the affirmative, holding that the construction meant the physical work and was under the jurisdiction of the utility commission, the consent of which must first be had, even though the highway had theretofore been created as a matter of law.

In the case of N. Y. & N. E. R. Co. v. Waterbury, 55 Conn. 19, 10 Atl. 162, having a similar act, the court held that the statute "renders the construction of a grade crossing illegal, although the highway * * * was laid out and partially constructed before the passage of the act." In considering the statute the court said:

"It means that although a highway may have been previously laid out, partially constructed, and even built upon, if it has not actually been completed for public use across the rails of the railway, such crossing shall not thereafter be made."

The court further said:

"This peremptory arrest of the completion of a highway lawfully commenced is a seeming interference with the rights of individuals and of the public, but only is seeming. In fact, such crossings are public nuisances, dangerous to human life; and no man has a vested interest in the creation or continuance of such a nuisance."

In Railroad Co. v. Buffalo, 200 N. Y. 113, 93 N. E. 520, the court of appeals, in an action brought to enjoin the city of Buffalo from the physical construction of a crossing over a railroad which had been laid out, and the right to construct the crossing having been obtained some years before the passage of the utility act, but the work not having been in fact done, held that the city should be enjoined from extending the street or avenue across the tracks of the railway company until it had secured the determination by the Public Service Commission as to whether such avenue should be constructed over or under said railroad or at grade, and the manner in which such crossing should be constructed, thus declaring the paramount jurisdiction of the Public Service Commission over a situation which had been created before its establishment, and holding that the municipal corporation had not acquired any vested right as against the subsequently declared public policy of the state.

In the state of Pennsylvania, where the Public Utilities Act reads, "All crossings hereafter established," etc., a different ruling has been made. In L. V. Railroad Co. v. Latrobe, 216 Pa. 221, 65 Atl. 548, the court held that inasmuch as the highway, including the crossing, had been laid out and established before the statute of 1901 was passed, the statute did not apply.

In speaking of this case, the New Jersey court expressly disavowed the reasoning of the Pennsylvania court unless there was a clear distinction between the word "construct" and the word "establish."

An examination of the definitions of the word "establish," as found in 16 Cyc. 591, shows that this distinction may very properly be drawn, as the words "construct" and "establish" are much different in their applications. The word "establish" includes the idea to institute; to ordain; to pass; to decree; to enact; to enact or decree by authority, etc. It is also there further stated, after giving a number of additional definitions, that there are few words which furnish more room for argument than the word "establish." The word "construct" or "constructed," as found in the New Jersey, Connecticut, New York, and California statutes, has a definite and distinct meaning, and, as stated by the New Jersey court, refers specifically to the putting together of the materials or constituent elements constituting the physical crossing itself.

In line with the decisions of the courts which I have cited, I think it should be held that the Public Utilities Act laid hold upon the physical properties belonging to the railroad companies just as it found them on the day the act became effective, and that jurisdiction then vested exclusively in the Railroad Commission over all questions involved in this action.

45 Cal. App. 29

STRONG v. SHATTO. (Civ. 3045.)

(District Court of Appeal, Second District, Division 2, California. Dec. 15, 1919. Hearing Denied by Supreme Court Feb. 13, 1920.)

1. PERPETUITIES ⟸4(4) — CONDITION RESTRICTING USE OF LAND, WITH PROVISION FOR REVERTER, NOT VOID FOR REMOTENESS.

Condition in a deed, restricting the use of the land and providing for forfeiture and a reverter to the grantor and his heirs in case of breach, was not void as creating a contingent estate, which might vest beyond the limitations of the rule against perpetuities, either under the common law, adopted by Pol. Code, § 4468, or under Civ. Code, §§ 715–717, 772–778.

2. COMMON LAW ⟸17—DECISIONS OF COURTS OF UNITED STATES MAY BE LOOKED TO.

In determining the doctrines of the common law, the court may properly look to the decisions of the courts of the United States, as well as to those of England.

3. PERPETUITIES ⟸4(4)—ESTATE IN LAND TO REVERT FOR BREACH OF CONDITION IS VESTED "REVERSION," AND NOT WITHIN RULE.

Under Civ. Code, § 768, defining reversions, the right of the grantee, under a deed providing for forfeiture and reverter for breach of conditions restricting the use of the land, is in the nature of a "reversion," and hence a vest-

ed interest, not within the rule against perpetuities.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reversion.]

4 COVENANTS ⊜103(1) — CHANGED CONDITIONS MERELY DEFEAT EQUITABLE RELIEF AND DO NOT DESTROY COVENANT.

A change in the character of the property, subject to restrictive covenants, merely defeats the granting of equitable relief for the enforcement of the covenants, and does not destroy the contractual obligation, or entitle the owner of the land to have his title quieted against the covenants.

5. COVENANTS ⊜103(1) — DESIRABILITY OF PROPERTY FOR BUSINESS PURPOSES DOES NOT DEFEAT EQUITABLE ENFORCEMENT OR RESTRICTIVE COVENANTS.

That property subject to restrictive covenants has become more desirable or valuable for business than for residence purposes will not necessarily defeat equitable relief, where the restriction, notwithstanding the change of conditions, is still of substantial advantage to the dominant property.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by W. A. Strong against Clara R. Shatto. From a judgment for plaintiff, defendant appeals. Reversed.

Anderson & Anderson, of Los Angeles, for appellant.

Bradner W. Lee and W. A. Strong, both of Los Angeles, for respondent.

SLOANE, J. This action was brought to quiet title as against certain conditions subsequent contained in a deed through which plaintiff's title is deraigned.

[1] Without setting forth the conditions in extenso, it is sufficient for the discussion of the issues presented on this appeal to state that they limit the use of the premises to residence purposes only, prescribe the nature, quality, and cost of buildings to be erected thereon, and provide that—

"As to the grantor herein, the breach of any of the foregoing conditions shall cause said premises, together with the appurtenances, to be forfeited to and to revert to the said grantor, his heirs, successors, and assigns, each of whom shall have the right of immediate entry upon said premises in the event of any such breach."

Judgment was for plaintiff, and defendant appeals.

The question presented in the trial court, and decided against, was whether or not the conditions subsequent, created in the deed of a grantor, upon the breach of which the grantor reserves to himself and his heirs the right of re-entry forever, are valid and enforceable against the grantee's successors.

Respondent's counsel concede, as we understand their argument, that the conditions and reservations are precisely such as have been upheld by the courts of this state in numerous decisions, notably in the cases of Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912D, 1190, Quatman v. McCray, 128 Cal. 285, 60 Pac. 855, Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047, and Southern Pacific R. R. Co. v. Blaisdell, 33 Cal. App. 239, 164 Pac. 804. These authorities establish the doctrine that such conditions of forfeiture are not against public policy or violative of the rule against restraints upon alienation. But respondent raises the point, which his counsel claim has never been presented or passed upon by the courts of this state, that such conditions and limitations are obnoxious to the rule against perpetuities; that is, as we understand the application of the doctrine, that there is an attempt here to create an estate the vesting of which depends upon what may be a very remote contingency, far beyond the limitations of the rule against perpetuities. If such is the case, and the question is a new one, the doctrine of stare decisis does not apply, and we are at liberty to consider the point on its merits; but, in view of the many decisions in this state, and in other jurisdictions of this country where forfeitures have been upheld under building restrictions of this character, there should be very convincing authority to justify the disturbance of the established reliance upon such contracts throughout the business world.

Respondent rests his contention for this application of the rule against perpetuities upon the authority of certain comparatively recent English cases, which seem to hold that reservation of such restrictive limitations in deeds, or so-called building restrictions, is an attempt to create a contingent estate, which may vest in the grantor or his successors at an indefinite period beyond that permitted by the rule against perpetuities. Dunn v. Flood, 25 Ch. D. 629, 28 Ch. D. 586; In re Hollis Hospital, 2 Ch. 540; In re De Costa, 1 Ch. 337. The English doctrine is recognized in Lewis on Perpetuities, §§ 616, 617, and Gray on Rule Against Perpetuities, (3d Ed.) §§ 299 to 305. The learned author of the latter work approves the application of the rule to the class of conditions involved here, as made by the English cases cited, but at the same time says:

"The great concensus of authority, although without any consideration of the question involved, may perhaps be held to settle the law in the United States, and to create in this country an exception, arbitrary though it be, to the rule against perpetuities."

While it is true that in the great majority of decisions upholding conditions of this character, where the forfeiture falls beyond the limits of the rule against perpetuities, the ap-

plication of the rule was not discussed, yet it is not the fact that the application of the rule has been entirely unconsidered in the courts of this country. In French v. Old South Soc., 106 Mass. 479, where a pew was sold on condition that the grantee and his representatives should pay a tax assessed on the pew, and if they should leave the meeting house they would offer the pew to the grantor, the court held that the condition in the conveyance was not void for remoteness. In Tobey v. Moore, 130 Mass. 448, and Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451, it is held, by way of dicta, however, that conditions are not within the rule against perpetuities. In Giles v. Boston Society, 10 Allen (Mass.) 355, where the property was given on condition that the grantee should keep testator's tomb in repair, the court held that no breach of the condition had been shown, but expressed the opinion that, if there had been a breach, such condition would not be void for remoteness, and further said that conditions generally are exempt from the operation of the rule against perpetuities. In Canal Co. v. Methodist Rel. Soc., 13 Metc. (Mass.) 335, Sharon I. Co. v. Erie, 41 Pa. 341, Indian O. Co. v. Sikes, 8 Gray (Mass.) 562, and Lawe v. Hyde, 39 Wis. 345, the question of remoteness was raised and argued by counsel, but the courts disregarded the point and rendered decisions upholding the conditions. In Wakefield v. Van Tassell, 202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207, involving a forfeiture of title on breach of building condition, the court says:

"Nor do we think the contention of counsel for appellants that the condition violates the spirit of the rule of perpetuities can be sustained. In Gray v. Chicago, etc., R. Co., 189 Ill. 400, 59 N. E. 950, where one of the conditions of the deed in question was that appellee should maintain a passenger depot at a certain place and stop thereat all its accommodation trains to take and leave passengers, it was contended by appellee that the condition, being perpetual, was illegal and void, and that the appellee held the land free from such invalid condition; but this contention we refuse to uphold, and we think that case decisive of the one at bar as to appellants' objection that the condition violates the spirit of the rule of perpetuities."

Brattle Square Church v. Grant, 3 Gray (Mass.) 142, 63 Am. Dec. 725, Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739, and First Universalist Soc. v. Boland, 155 Mass. 177, 29 N. E. 524, 15 L. R. A. 231, are to similar effect.

[2] There are other decisions where the rule against perpetuities is referred to, and, as has been pointed out, numerous cases where conditional reservations of this kind are involved and upheld; but in no instance to which our attention has been called has the rule against perpetuities or remoteness been applied by our domestic courts against this class of cases. See 49 Am. St. Rep. 135. In determining the doctrines of the common law, we may properly look to the decisions of the courts of the United States, as well as to those of England, for their interpretation.

It may be conceded that the state of the law in this country, as thus pointed out, is not conclusive, or even authoritative, against respondent's contention; but it suggests a very tangible ground for doubting its soundness. It is true that the common-law rules governing real estate titles prevail in this state, so far as not repugnant to or inconsistent with the Constitution or laws of this state. Pol. Code, § 4468. But for the very purpose of avoiding the subtleties and technicalities of the common law as to real property there has been enacted into our Civil Code what appears to be intended as a complete scheme or system on the subject. Blakeman v. Miller, 136 Cal. 138, 68 Pac. 587, 89 Am. St. Rep. 120. It ought not, therefore, to be the policy of the courts to tack on any restrictions in the free control and disposal of real property by contract or conveyance not inconsistent with the provisions of the Code on that subject. Sections 715, 716, and 717 of the Civil Code state the limitations upon the power of suspension of alienation. There is no express statement of the rule against perpetuities.

Counsel for respondent rely upon sections 772–778 of the Civil Code to supply the rule as invoked on this appeal. These sections apply to future estates in remainder (section 769), created and limited by deed or devise upon a precedent estate. We question if any of these contemplates or includes the reservation by a grantor of a reversion of the estate to himself or his heirs in case of condition broken. For instance, the nearest thing to it is under section 778, which provides that—

"A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation."

In the present case, if the remainder of the estate, after forfeiture of the precedent estate by condition broken, was to vest in a third person, this would be an attempt to create a conditional limitation, and, under our statute and under the decisions in Brattle Square Church v. Grant, supra, and Hopkins v. Grimshaw, supra, might be within the rule against perpetuities. Under the deed in question here there is no attempt to create a contingent estate in a third party, but there is a reservation in the deed itself of a conditional reversion of the title to the grantor, his heirs or assigns. As is said in Parker v. Nightingale, 6 Allen (Mass.) 341, 346, 83 Am. Dec. 632, 635:

"By the deed under which the defendants claim title, the entire and absolute interest in the estate did not pass to the grantee. The restriction on the use of the premises * * * operated as a qualification of the fee, and was in the nature of a reservation or exemption out

of the estate granted. Thus there was an interest or right created by the deed itself."

[3] The estate reserved under the deed here is in the nature of a reversion. Civ. Code, § 768.

"The right which a conditional grantor of an estate has to regain the estate upon a breach of the condition is a present and vested interest of the nature of a reversion." Washburn on Real Property (6th Ed.) § 968.

The same author says (section 969):

"Nor is the right to re-enter for condition broken subject to any objection on the ground of its coming within the limitation of a perpetuity which the law does not allow, although it may not take effect by the event which is to defeat the estate to which the condition is annexed within the period of time beyond which an estate may not be originally limited to take effect."

In Johnston v. City of Los Angeles, supra, it is held that such an interest is a contingent interest, and not the mere possibility of a future right, and therefore is a species of property capable of passing by transfer, under sections 699 and 1046 of the Civil Code. All reversions are vested interests. Gray, Rule on Perpetuities (2d Ed.) § 113; 30 Cyc. 1473. Vested interests are not within the rule against perpetuities. Gray, Rule on Perpetuities, §§ 99, 205; 30 Cyc. 1422, 1473.

We recognize the distinction which counsel for respondent have so clearly pointed out between a perpetuity resulting from suspension of the power of alienation and remoteness of time for the vesting of estates, as contemplated by the rule against perpetuities, as well as the confusion that has resulted in the decisions by failure to distinguish between the two doctrines. It may be said, nevertheless, that fundamentally the object of both rules is to prevent perpetuities, the tieing up of estates, and the suspension of their free and full conveyance for long and indefinite periods of time, by directly suspending the power to alienate, in the one instance, and by holding up the investure of a future estate in real property, in the other. 21 R. C. L. 288; Barnum v. Barnum, 26 Md. 119, 90 Am. Dec. 88; Gates v. Seibert, 157 Mo. 254, 57 S. W. 1065; Hunt v. Wright, 47 N. H. 396, 93 Am. Dec. 451. If the reservation of a conditional future estate by such limitations in a deed as here are involved operated as a sequestration of such future interest, with no vested right in any person in being capable of conveying it, it might well be claimed that the spirit of the rule against perpetuities was violated. But in this state, at least under our Code and the decisions of our courts, such is not the case. Civ. Code, § 1046; Johnston v. City of Los Angeles, supra.

There may be strong grounds in public policy against arbitrarily limiting and restricting the manner of use of real property for indefinite periods, which may extend far beyond the existing conditions which make such limitations reasonable and justifiable when created; but our courts have held that such limitations are not void, as against public policy, so long as there are parties in being capable of passing a complete and unlimited title, and not obnoxious to the rule against suspending the power of alienation. For the reasons stated, and without reviewing, or, perhaps, comprehending, all the nice distinctions of the common law suggested by the decisions cited in the able and exhaustive review of the subject by all parties here, we conclude that the conditional forfeiture reserved in this deed is not void for remoteness.

It is further suggested by appellant that, if the conditions in this deed were insufficient to divest respondent's title, they at least create covenants or reservations which give rise to equitable rights that would defeat respondent's claim to have his title quieted. In view of the conclusions already reached, we will not go further into this question than to say that this contention seems to find support in the authorities on the theory that the conditions in the deeds are reservations in the nature of easements or servitudes for the benefit of the remaining lands of the grantor. Whitney v. Union Ry. Co., 11 Gray (Mass.) 359, 71 Am. Dec. 715; Parker v. Nightingale, supra; Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171; Dawson v. Western Co., 107 Md. 70, 68 Atl. 301, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

[4, 5] In further support of the judgment, respondent calls attention to the stipulation of facts on which the case was tried, wherein it is admitted that the character of the property has changed since the creation of the conditions and conveyance by appellant, so that it has become more valuable for business purposes than for residence purposes, and argues that under such changed conditions equity will not enforce a covenant or condition for forfeiture of title. No authorities are cited by respondent in support of this contention. The doctrine that equity will not enforce restrictions on the use of property, we think, only applies to cases where it is sought to enforce such restrictions by equitable proceedings, where the reason and justification for them has failed through changed conditions. In other words, under such circumstances a court of equity may deny the relief sought. But the rule does not go to the extent of permitting parties whose land is subject to the legal restraint of such limitations to bring action to quiet their title against such contractual obligations, because of changed conditions. Contractual obligations do not disappear as

circumstances change. It is only the granting of equitable relief, and not the binding force of the restrictive covenant, that is affected by a change in the conditions.

"A change of circumstances cannot be considered, on a petition at law to ascertain the limits of a restriction in a deed, as equitable grounds for not enforcing it;" and "the covenant will not for that reason, and in advance of a breach, be declared a nullity in a suit instituted by the covenantor." Brown v. Huber, 28 L. R. A. (N. S.) 707, note; Welch v. Austin, 187 Mass. 256, 72 N. E. 972, 68 L. R. A. 189; Coudert v. Sayre, 46 N. J. Eq. 386, 19 Atl. 190; Kountze v. Helmuth, 67 Hun, 343, 22 N. Y. Supp. 204.

The mere fact that the property has become more desirable or valuable for business than for residence purposes, where the restriction, notwithstanding the change of conditions, still is of substantial advantage to the dominant property, will not necessarily defeat application for equitable relief. Pagenstecher v. Carlson, 146 App. Div. 738, 131 N. Y. Supp. 413; Landell v. Hamilton, 175 Pa. 327, 34 Atl. 663, 34 L. R. A. 227; Spahr v. Cape, 143 Mo. App. 114, 122 S. W. 379.

As there has been no breach of the conditions here, and no attempt to enjoin such a breach or to enforce a forfeiture, we think it premature, at least, to determine the equities of the parties as they might exist at some future time in the event of such breach.

The judgment is reversed.

We concur: FINLAYSON, P. J.; THOMAS, J.

45 Cal. App. 149

GAMEWELL FIRE ALARM TELEGRAPH CO. v. CITY OF LOS ANGELES.

(Civ. 3033.)

(District Court of Appeal, Second District, Division 2, California. Dec. 19, 1919.)

1. MUNICIPAL CORPORATIONS ⊂⊃244(2)—CONTRACT FOR SUPPLIES AND MATERIALS VOID WHERE CHARTER NOT COMPLIED WITH.

Attempted purchase for city of police signal boxes, automatic storage battery, etc., aggregating in value over $14,000 must, when considered as a single contract, be treated as void, where city charter, requiring affirmative vote of council before contracting for supplies for an amount in excess of $500, competitive bidding, and a contract evidenced in writing, etc., was not complied with.

2. MUNICIPAL CORPORATIONS ⊂⊃248(1)—LIABILITY OF CITY CANNOT ARISE BY ESTOPPEL OR RATIFICATION.

Since the power of defendant city to contract for appliances for police and fire alarm electric systems is limited by charter, liability therefor cannot arise by estoppel or ratification.

3. MUNICIPAL CORPORATIONS ⊂⊃249—THERE CAN BE NO RECOVERY AGAINST CITY ON A QUANTUM MERUIT.

Where city charter expressly provides that contracts or orders for supplies are not binding unless made in accordance with provisions of charter, there can be no recovery on a quantum meruit for appliances furnished pursuant to contract not made in compliance with charter provisions.

4. MUNICIPAL CORPORATIONS ⊂⊃236 — PURCHASE OF SUPPLIES AND MATERIALS CANNOT BE UPHELD AS SERIES OF INDEPENDENT PURCHASES.

Where attempted purchase for defendant city of supplies and materials for installation of police and fire alarm electric systems, aggregating in value over $14,000, was intended as a single purchase, the transaction cannot, though orders were in installments amounting to less than $500 each, be upheld as a series of independent purchases, each in an amount less than $500; the orders being thus given in installments for purpose of evading charter provisions requiring competitive bidding, etc., in case of purchase amounting to over $500.

5. LIMITATION OF ACTIONS ⊂⊃66(3)—MUNICIPAL CORPORATIONS ⊂⊃254 — RECOVERY OF PROPERTY BARRED BY LACHES AND LIMITATIONS.

Where attempted purchase for city of materials and supplies for installation of police and fire alarm electric systems was void, and the goods were all delivered by December, 1907, *held* that right of seller to recover the property was barred by laches and limitations (Code Civ. Proc. § 338, subd. 3), where no demand was made for return until May, 1911, and suit was not begun until August, 1913.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action in replevin by the Gamewell Fire Alarm Telegraph Company against the City of Los Angeles. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank M. Parcells, of San Francisco, and Goudge, Robinson & Hughes, of Los Angeles, for appellant.

Albert Lee Stephens, City Atty., Charles S. Burnell, and William D. Spalding, all of Los Angeles, for respondent.

SLOANE, J. Plaintiff, the Gamewell Fire Alarm Telegraph Company, a corporation, engaged in the business of manufacturing and selling apparatus and appliances for police and fire alarm electric systems, brought this action in replevin on August 25, 1913, against the city of Los Angeles, to recover an equipment of fire alarm and police telephone apparatus and material, which it had furnished, and which was installed for the use of the fire and police departments of the city in the year 1907. This apparatus came into the possession of the defendant, the city of

Los Angeles, under the following circumstances:

The plaintiff company received a written communication from one F. W. Frankhauser, signing himself as superintendent of the "Bureau of Fire Alarm and Police Telegraph" for the city of Los Angeles, stating that the city was intending to make extension of its fire alarm and police telegraph system, and requesting prices and terms of delivery of the necessary equipment. Plaintiff responded by sending a written list of the various articles comprising the usual equipment, with itemized prices at which it offered to furnish any of the articles that might be required, with the proviso that "the ownership of all the apparatus and material specified herein shall remain with the Gamewell Fire Alarm Telegraph Company until all payments shall have been made in accordance with these terms; also in the event of any payment not being made in accordance with said terms, the Gamewell Fire Alarm Telegraph Company, after due notice of default, shall have the power to remove any and all of said apparatus and materials." To this written offer F. W. Frankhauser, purporting to represent the fire and police departments of the city of Los Angeles, responded by letter, acknowledging receipt of the proposal in the following language:

"I beg herewith to acknowledge the receipt of yours of September 6th, quoting us prices and terms on fire alarm and police telegraph apparatus, which is satisfactory."

Thereafter, beginning with January, 1907, requisitions were made and orders forwarded to the plaintiff company from time to time for the apparatus thereafter delivered and installed. The requisitions and orders comprised an application by the "bureau fire alarm and police telegraph" department to the city council for authority to purchase certain apparatus, approval by the supply committee, orders upon the plaintiff company to furnish the supplies indicated—signed by the council committee clerk—approval of the orders by the chief and secretary of the bureau fire alarm and police telegraph, acknowledgment of receipt by F. W. Frankhauser of the materials ordered, certificate to correctness of the bills by council committee clerk, and approval of the bills for the goods furnished by the city council. Without following the details of the transaction, it is sufficient to say that the respective orders passed through the various departments of the city government in a manner that would be binding upon a party with ordinary contractual powers. Ultimately, however, after full delivery had been made, the city auditor held up the bills presented by the plaintiff company on the ground that the attempted purchase by the city was in violation of the city charter, ultra vires, and void, and payment was finally refused.

The materials furnished under this transaction consisted of 70 police signal boxes at $150 each, an automatic storage battery at $495, a police desk table with switchboard instruments and attachments at $2,354.00, and various other articles, aggregating the value of $14,859.45. The record discloses that of these goods, articles to the amount of $10,636.60 were delivered on May 20, 1907, and to the amount of $3,030 on April 30, 1907.

The validity of the transaction was called in question by the city auditor as early as June 5, 1907, by his return of the bills therefor to the city council without his approval and with his protest that the transaction was in violation of the city charter and void. The council at this time overruled the auditor's objections and approved the claims. Payments, however, were withheld, and the legality thereof was under dispute thereafter until about December 21, 1909, when the council rejected all of the plaintiff company's demands. On March 1, 1910, the plaintiff company, in a communication to the city council, called attention to its unpaid demands, and asked to be given another hearing. On September 20, 1910, the city council attempted, in part, to reconsider its rejection of the claims, and ordered $3,871.70 of the amount paid; but, as we understand the record, no payment was made. On May 16, 1911, a demand for possession of the articles involved in the transaction was served by plaintiff upon the city council, and thereafter, on August 25, 1913, this action to recover possession of the property was begun. Judgment was for the defendant.

Respondent claims that the judgment must be upheld on the ground that the attempted contract was void, the city's possession of the goods without right, and that plaintiff's cause of action accrued without demand; and, further, that the action, having been commenced 6 or 7 years after possession was taken, is barred by the statute of limitations, and that even if a demand were necessary to put the statute in motion, plaintiff failed to make such a demand within a reasonable period, and that the statute of limitations had run after the expiration of such reasonable period and before action was commenced. In order to determine the rights and obligations of plaintiff in the matter of demanding possession and bringing action for the recovery of this property, it becomes necessary to determine the nature of the city's possession and the validity of the alleged contract of sale to the city.

During all this period the charter of the city of Los Angeles provided that there could be no contract or order for supplies, or other act involving the payment of money or incurring of any debt by the city, for an amount in excess of $500, unless two-thirds of the city council should vote in favor there-

of; that such vote should be entered on the minutes, notice inviting proposals published in the daily papers, the contract let to the lowest bidder, the contract evidenced in writing, approval by the city attorney indorsed on the contract, the draft of the contract approved by the city council, and contract signed by the mayor or some other person authorized by resolution. The charter specifically provided that the city should not be bound by any contract unless these things were done. An exception was made in the case of contracts for purchases involving not to exceed $500, but even in such cases a resolution of the council was required, authorizing some officer, committee, or agent of the city to act in the matter; such resolution requiring the favorable vote of two-thirds of the members of the council.

[1] So far as concerns this attempted purchase, considered as a single contract we must unquestionably treat it as void. The court so found, and the evidence is conclusive upon such finding. There is no serious pretense that there was any attempt to comply with the requirements of the city charter for making such a purchase. In the first place, no bids were advertised for or received. There was no formal written contract. Even if authority to make a contract existed in those purporting to represent the city of Los Angeles in obtaining and accepting the proffered prices and terms of the plaintiff company, the writings which passed between them would not have constituted such a contract as the city charter directs. They might have constituted a sufficient memorandum in writing to cover the statute of frauds, if that had been involved; but in their form or execution they in no essential conformed to the charter requirements. It is equally evident that there was no authorization, as prescribed by the charter, for any one to enter into such a contract. We think this point so clearly obvious that it is unnecessary to more than call attention to a few of the numerous authorities of our own courts dealing with such charter limitations upon the power of a municipality to make contracts and assume liabilities. McCoy v. Briant, 53 Cal. 247; Santa Cruz R. P. Co. v. Broderick, 113 Cal. 628, 45 Pac. 863; Frick v. City of Los Angeles, 115 Cal. 512, 47 Pac. 250; Shaw v. San Francisco, 13 Cal. App. 547, 110 Pac. 149; Zottman v. San Francisco, 20 Cal. 97, 81 Am. Dec. 96; Foxen v. City of Santa Barbara, 166 Cal. 77, 134 Pac. 1142.

[2] It is equally clear, on the same authorities, that where the power to contract is thus limited, liability cannot arise by estoppel or ratification.

[3] Nor can recovery be had in such a case as this on a quantum meruit. Such a result would in effect nullify the protection intended to be afforded by the restrictions of the charter, by permitting liabilities to be created indirectly under conditions which are prohibited by express agreement. Counsel for appellant, in fact, in their closing brief, abandon any right to recovery by virtue of an implied contract, in the event their claim of a valid express contract is not maintained, accepting the doctrine of Zottman v. San Francisco, supra, and Reams v. Cooley, 171 Cal. 150, 152 Pac. 293, Ann. Cas. 1917A, 1260. They argue, however, that the charter requirement for advertising for bids could not apply in this case because of the fact that the goods and appliances were patented articles of which plaintiff had a monopoly, that they could not be acquired by competitive bidding, and that, as the court found, the prices agreed upon were no more than the reasonable value of the goods. If this contention could be maintained, it would not excuse the failure to comply with the other charter requirements for entering into a contract, which were ignored in this case. It is, moreover, a matter of dispute, under the evidence, that the requirements of the city could not have been met from other sources; and the findings of the court are against appellant's contention.

[4] The question next arises as to whether the validity of all or part of the transaction can be upheld as a series of independent purchases, each in an amount less than $500. The trial court found on this point that the pretended purchase and sale was intended by all parties thereto to be a purchase of supplies and materials in an amount exceeding in the aggregate $500, to wit, over $14,000; that the purchase of all of the supplies and materials, excepting articles not exceeding $20 in value, was intended as a single purchase, and that the orders in installments, amounting to less than $500 each, were so split up "for the express purpose of evading the law and the provisions of the charter of the city of Los Angeles," and "for the purpose of preventing competition." We think the evidence supports the finding, at least as to an intent to evade the law, whatever the purpose. Even plaintiff's complaint bears out the finding that the transaction was intended, between the parties, as a single purchase. It is alleged in paragraph 3 of the complaint that on or about the 6th day of September, plaintiff offered in writing to furnish defendant certain fire alarm and police telegraph apparatus, the same to be delivered to defendant by plaintiff at the city of Los Angeles at the prices named in said writing, and subject to the terms, conditions, and provisions thereof; that said offer was made by plaintiff at the special instance and request of defendant; that thereafter defendant acknowledged in writing the receipt of plaintiff's written order, and notified plaintiff that the prices quoted and terms given were satisfactory; that thereafter, in pursuance of said written offer, and not otherwise, defend-

ant ordered of plaintiff all of the material and apparatus; and that plaintiff delivered the same, with the exception of a few small items, during the months from January, 1907, to December, 1907. The entire transaction is treated by plaintiff as a single contract, and, indeed, plaintiff still insists that it was a single, binding, and enforceable contract.

The letter from the superintendent of the bureau fire alarm and police telegraph department of Los Angeles, which opened negotiations, announced the intention of the city to make extensions to the fire alarm and police telegraph systems, and asked for prices so that they could make up their estimate. That the orders were actually made in a manner to show intent to evade the law as to purchases above $500, is shown by the schedule placed in evidence. The 70 police boxes at $150 each were ordered two or three at a time, thus aggregating $300 or $450 for each order. Such orders were sent in separately on numerous successive days, and, finally, on December 10, 1906, 18 separate orders, for 3 police boxes each, are shown, with 2 orders on December 12th, 1 for 3 boxes and the other for 2—thus making up the entire 70. Another series of items went to make up what is referred to as the "police desk equipment." This consisted of numerous parts and equipments, aggregating a cost of $2,354. These were split up into orders for articles which, for the most part, would have been useless by themselves, each of which orders approximated something less than $500. The very fact that these orders were made in this manner on the part of the city officials, and so filled by the plaintiff company, is sufficient evidence that both parties were aware of an attempt to split up the purchase into separate amounts of less than $500 each. There were a few items which by themselves give no indication that they were not separate and independent purchases for less than $500; but they were part of the whole equipment, and the entire purchase was tainted with the same purpose to evade the law. As separate purchases, under $500, these transactions were not had in compliance with the charter; but it is quite possible that the manner in which these various requisitions went through the departments of the city government, with the knowledge and acquiescence of the city officers, might have created a binding obligation on the city to pay for them if they had been bona fide purchases within the $500 limit. But, as the court found, they were not bona fide separate purchases, but part of a single, unlawful, and unauthorized contract; and, as the finding has sufficent support in the evidence, the plaintiff can base no claim upon this phase of the transaction. The alleged contractual relations in this matter between the plaintiff corporation and the city of Los Angeles were void, and neither party acquired any rights thereby. In fact, it may be said that the city, as a municipal corporation, was not a party to the transaction at all, the acts of its officers in the matter being without authority, and ultra vires.

[5] This brings us to the question of the right of plaintiff to a recovery of the property itself. The bar of the statute of limitations and laches in making demand for return of the property was pleaded, and by the court sustained. It is respondent's contention that the possession of the goods by the city was wrongful from the beginning; that plaintiff's right of action at once accrued, without demand; that if a demand was necessary it could have been made at any time, and that, unless made within a reasonable time, not exceeding the period of the statute of limitations, the action would be barred by such laches.

The goods were all delivered by the last of December, 1907. No demand for their return was made until May 16, 1911, over 3 years later, and suit was not begun until August 25, 1913, 2½ years after demand. The period of the statute of limitations applicable is 3 years, under subdivision 3 of section 338, Code of Civil Procedure. If the attempted contract, with reservation of title and right to recover possession on failure to make payment, had any validity, or even if the contract had been merely voidable or subject to subsequent ratification by the city of Los Angeles, plaintiff might have been entitled to defer his election to recover the property until the conclusion of the protracted controversy over these claims and their rejection by the city council, which was not until December, 1909, and perhaps not finally until March 1, 1910. Under such conditions demand and suit would have been in time. But this contract was void, and, perhaps, fraudulent. The delivery of this equipment and apparatus by plaintiff was voluntary and without consideration, and the city acquired no title or right of possession thereunder. The possession, as against the plaintiff, was perhaps not wrongful, and we are not prepared to say that a demand was not necessary before bringing suit; but such demand could have been made at any time after delivery was made. Plaintiff was charged with knowledge that there had been no valid sale or contract for sale, and that there could be no establishment of a claim against the city by ratification, estoppel, or laches of its officers. There was no occasion to await developments. At best, plaintiff's expectations could only have been to "put over" an illegal and unauthorized settlement.

It was not such a case as was involved in Strauss v. Schwab, 104 Ala. 669, 16 South. 692, cited by appellant, or such as would arise in any transaction with a natural person, or even with a corporation having general powers to contract and therefore to rati-

fy. The plaintiff, from the beginning, was charged with notice that it was consigning its property to the possession of a party under conditions which would confer title by adverse possession, or bar relief by the running of the statute of limitations. It was clearly its duty to make demand for a return of possession at least within the statutory period. This is particularly true in a case like this, where the demand was not a condition precedent to the right to a return of the property, but merely a preliminary requirement to bringing suit. A distinction may well be made, as is recognized by many decisions of the courts, in this respect. In Wittman v. Board of Police Commissioners, 19 Cal. App. 229, 125 Pac. 265, it is said:

"These considerations bring the case within the rule, followed and recognized in many cases, that where a right has fully accrued except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running. Palmer v. Palmer, 36 Mich. 487 (24 Am. Rep. 605); Harrigan v. Home Life Co., 128 Cal. 531, 548 (58 Pac. 180, 61 Pac. 99); Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696 (79 Pac. 441); San Luis Obispo v. Gage, 139 Cal. 398 (73 Pac. 174); Barnes v. Glide, 117 Cal. 1 (59 Am. St. Rep. 153, 48 Pac. 804)."

Assuming, without deciding, that a demand was necessary before bringing suit, and that there was no such participation in an attempted fraud upon the city as would bar the plaintiff corporation from any recovery, we are satisfied that there was shown such a delay in making demand and commencing suit as to justify the finding of the court of such laches, and that the statute of limitations had run before suit was begun. In fact, as to all but a few hundred dollars in value of the items, over 6 years had run from the date of delivery before suit was commenced.

It presents hard lines for appellant here that the city of Los Angeles should not only escape liability to pay for this police and fire equipment, of which it has had the use and benefit, but be permitted to retain the goods. We would be disposed to hold with the trial court that plaintiff would be entitled to recover possession but for its laches in delaying action. It may be borne in mind, however, that the city, as a municipality, was at no time a party to this transaction. Its officers were acting outside the scope of their authority in taking over this property. The city, as such, is not a participant in this illegal deal. The charter provisions which prohibited the purchase as attempted was made for the benefit of the municipal public, and there is no reason for scruple in enforcing full protection of the law, as might have existed had the officials themselves been the defendants.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; THOMAS, J.

44 Cal. App. 539

MILES v. HOLLINGSWORTH et al.

MILES (HOLLINGSWORTH et al., Interveners) v. CLARK et al.

(Civ. 2979; L. A. 5087.)

(District Court of Appeal, First District, Division 1, California. Dec. 2, 1919. Opinion of Supreme Court, in Bank, Denying Hearing, Jan. 29, 1920.)

1. COVENANTS ⊜51(1) — GENERAL BUILDING SCHEME ESTABLISHED THOUGH SOME LOTS WERE CONVEYED WITH DIFFERENT OR WITH NO RESTRICTIONS.

A general building scheme for an entire tract was sufficiently established by a contract of sale and five deeds of different lots, each containing the same conditions and restrictions, with a provision for reverter on breach of any of the restrictions and a clause making the restrictive covenants binding upon each lot in the tract for the benefit of each owner, especially where other evidence tended to establish such scheme, though some other lots were conveyed with radically different restrictions and others without restrictions.

2. COVENANTS ⊜69(2) — BUILDING RESTRICTIONS RUN WITH THE LAND AND BENEFIT OTHER LOTS SUBJECT TO THE BUILDING SCHEME.

Restrictive covenants inserted in deeds as part of a building scheme and expressly made binding on every lot in the tract for the benefit of every owner run with the land for the benefit of other lots in the tract.

3. COVENANTS ⊜20 — PURCHASER CHARGED WITH NOTICE OF RESTRICTIVE COVENANTS THOUGH NOT WITHIN LINE OF TITLE.

Purchasers of lots in a tract subject to a general building scheme were charged with notice of the existence of such scheme and easements in favor of other lot owners resulting therefrom, though they did not deraign title through a deed containing the restrictions where they purchased by reference to a map indicating the existence of the scheme and the deeds executed by their grantors containing such restrictions were of record, especially where the general appearance and character of the tract was that of a handsome and exclusive subdivision devoted to costly and palatial residences.

4. COVENANTS ⊜108(1)—INCREASE IN VALUE FOR BUSINESS PURPOSES IS NOT SUCH CHANGE AS WILL DEFEAT ENFORCEMENT OF BUILDING RESTRICTION.

Though a change in the uses of property in the neighborhood may render it oppressive and inequitable to give effect to building restrictions, the fact that business has grown up around a restricted tract, and that the proper-

ty has become more valuable for business purposes, does not defeat enforcement of the restrictions; the property in question having improved and not deteriorated.

Opinion of Supreme Court in Bank Denying Hearing.

5. APPEAL AND ERROR ⊂⊃1082(2) — SUPREME COURT WILL NOT PASS ON MATTERS NOT COMPLAINED OF IN COURT OF APPEAL.

The Supreme Court will not consider the action of the District Court of Appeal in modifying the judgment appealed from, where no complaint is made in regard thereto in the petition to the Supreme Court.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by J. H. Miles against W. I. Hollingsworth and others. From a judgment in favor of plaintiff, the defendants Wesley Clark and others appeal. Modified and affirmed.

Edwin A. Meserve and Shirley E. Meserve, of Los Angeles (Gibson, Dunn & Crutcher, Hunsaker, Britt & Edwards, and W. E. Mitchell, all of Los Angeles, of counsel), for appellants.

Leon F. Moss, of Los Angeles, for plaintiff and respondent.

Leon F. Moss and Gray, Barker & Bowen, all of Los Angeles, for interveners and respondents.

Frank J. Thomas, of Los Angeles, for respondent Young.

E. W. Miller, of Los Angeles, for respondent Wells.

KERRIGAN, J. This is an action brought under the provisions of section 738 of the Code of Civil Procedure to establish an estate or easement claimed to be owned by plaintiff and interveners in all the property embraced within a certain tract of land situated in the city of Los Angeles and known as Westmoreland Place. The claim is made by virtue of and to the extent of certain building restrictions alleged to have been established by defendants Wesley Clark, E. P. Bryan, and the Huntington Land & Improvement Company, which restrictions, it is claimed, were made binding on and appurtenant to every lot in said tract. Injunctive relief was also sought to restrain the defendants from maintaining on said tract certain structures consisting of large signboards which, it is alleged, are greatly offensive to the sight, and the maintenance of which constitutes a breach of the claimed restrictions.

The record in the case is voluminous, the pleadings alone occupying more than 400 pages of the transcript. Such of the facts as are necessary for a discussion of the case are, in substance, as follows:

In 1894 defendants Wesley Clark and E. P. Bryan were partners in the real estate business in the city of Los Angeles. About that time one Ballerino owned a quarter section of land adjoining the then Los Angeles city limits, and Clark and Bryan purchased 50 acres of this property, which they subdivided and platted as Clark & Bryan's Lone Star Tract, and from time to time sold lots therein. They subsequently, with Henry E. Huntington, purchased the remaining 110 acres owned by Ballerino, which they divided into three additional tracts. These tracts were designated, respectively, Clark & Bryan's Westmoreland Tract, Clark & Bryan's Bungalow Row, and Clark & Bryan's Westmoreland Place. Huntington, Clark, and Bryan each owned an undivided one-third interest in the tracts, the title to which, however, stood of record in the names of Wesley Clark and E. P. Bryan. This action concerns only the tract designated as Westmoreland Place, and this subdivision contains approximately 41 acres.

Immediately after the purchase of the land, the work of grading and improving the streets and sidewalks was entered upon in all three of these subdivisions, and Clark & Bryan thereupon began an active selling campaign in disposing of the lots in the Westmoreland Tract and Bungalow Row. No special effort was made by them to effect sales in Westmoreland Place, it being their intention to reserve the lots in this tract until after they had completed the sale of the lots in the other subdivisions. A map of Westmoreland Place was, however, prepared in 1902, but it was not filed until December, 1904. This map shows a division of this tract into large lots, 65 in number, the minimum size of which is 100 feet frontage by 200 feet in depth. Two of them have frontages of 175 feet and three of 150 feet. All of the lots face on private streets within the tract. On one side thereof high and ornamental fences and walls have been constructed on the street frontages adjoining the tract, with massive, ornamental gate entrances on those streets. The roads of the tract are graded and macadamized, cement curbs and sidewalks are constructed, and an attractive lighting system has been installed; parking spaces between the curbs and sidewalks are laid out; and the lots themselves are planted with palms and ornamental trees. Private roadways are inclosed by means of chains, and altogether the tract as shown by the exhibits presents a handsome and exclusive subdivision upon which costly and palatial residences have been erected.

The complaint alleges and the court found that the defendants designed this tract and offered the same for sale in lots to be used exclusively as first-class residence property, and that certain conditions, limitations, reservations and restrictions, and covenants were established, to apply to the entire tract,

in order forever to restrict the property for and as exclusive first-class residence property, and to restrict the use thereof to and for the purpose expressed. It is also alleged and found by the court that the tract as so improved was and is of great beauty and distinction, except as the same is impaired by signboards erected thereon by defendants; that it is conveniently located in the city of Los Angeles, and well adapted to and for the purpose for which it was designed.

It is further alleged and found that immediately after the filing of the plat defendants placed the lots on the market for sale subject to certain conditions, limitations, reservations, restrictions, and covenants in, to, and concerning each and all the lots and the title thereto, and that prior to the sale of any of the lots defendants established certain restrictive covenants, and sold and conveyed lots in conformity therewith. The restrictions alleged and established by the plaintiff are as follows:

"1. That each and every lot and parcel of land included in said tract shall be used for residence purposes exclusively; that no building or structure pertaining to or for the conduct of business of any kind whatsoever shall ever be erected thereon.

"2. That no residence of less than two full stories above the basement shall ever be erected or placed upon said premises, and that no residence shall be erected or placed upon said premises that shall cost less than $15,000.

"3. That any residence to be built upon said premises shall front upon the private driveways shown upon said plat, and that the front line of such residence, including porch or piazza, but not including front steps, shall be placed on a line 60 feet from the front line of said property; that said front line of said property shall be considered to be 19 feet from the outside of the street curb; that no building shall ever be placed on said premises nearer to said front line of said property than said designated line.

"4. That no fence or wall on the side line of any lot or parcel of land situated in said tract in front of said house line shall ever be built or placed of a greater height than four feet from the ground.

"5. That no more than one residence shall ever be erected or placed or allowed to be upon any lot in said tract.

"6. That no double house or tenement house, that no flat nor any kind of a residence except a residence designed for use as a single residence, shall ever be erected or placed upon any of said lots.

"7. That no oil well shall ever be bored or operated upon any part of said premises; that no derrick nor machinery for conducting any kind of business whatever shall ever be erected or placed upon any portion of said premises.

"8. That no residence shall be erected upon any lot in said premises nearer than 15 feet to the north and south (or side) lines of said lots, not including steps and porte-cochere.

"9. That no transfer or lease of any portion of said premises shall ever be made to any one other than to a person of the Caucasian or white race.

"10. That upon a breach of either or any one of the foregoing conditions, title to any property conveyed in said tract by said defendants, and to the whole thereof, shall become at once divested from the owner thereof, his heirs or assigns, and shall revert to and revest in said defendants Wesley Clark and E. P. Bryan, their heirs and assigns.

"11. That said tract is intended to be used exclusively as a first-class residence property, and that each and every condition, limitation, reservation, restriction and covenant above set out is intended for, and is for the benefit of each and every lot in said tract, and of the owners thereof, and that a breach of any one of said conditions, limitations, reservations, restrictions and covenants may be enjoined or prevented by any person owning any property in said tract."

The first sale of any lot in the tract was made to the respondent George P. Thresher in 1904. At the time of this transaction, no map of Westmoreland Place was recorded. The map having subsequently been filed, a deed was executed with reference thereto in January, 1905, and it contained the restrictions above recited. Thresher expended $55,000 on the lot and in building and furnishing his home. The next sale was made to the Los Angeles Building Company, of which Thresher was vice president. This deed, although dated October, 1904, was not executed until January, 1905. Defendants Clark and Bryan inserted in this deed the same restrictions, as conditions subsequent, which appear in the Thresher deed, except that by the conditions in the Thresher deed no residence could be built on the property costing less than $15,000, while by the conditions in the Los Angeles Building Company's deed the limit of cost was raised to $25,000. Plaintiff Miles has succeeded to this property.

In 1904, both Clark and Bryan were engaged in the erection of residences for themselves in Westmoreland Place.

By two deeds dated and recorded in December, 1904, Bryan and wife conveyed to Clark, and by deed dated and recorded on the same day Clark and wife conveyed to Bryan, certain of the lots located in the tract. Both these deeds contained the conditions subsequent which appear in the Thresher deed.

On November 7, 1906, Clark & Bryan dissolved their partnership, and made a division between themselves of the unsold frontage in Westmoreland Place, Clark and his wife quitclaiming to Bryan, and Bryan and wife to Clark, their segregated portions. The parcels allotted to Clark included the lots Huntington was to have as his share, and by the latter's direction Clark and his wife conveyed this property to the Huntington Land & Improvement Company.

The next conveyance was made by Bryan to A. P. Johnson by deed dated December 11, 1907. The conditions subsequent contained therein are limited as to time and are other-

wise at variance with those recited in the Thresher deed, under which it is claimed irrevocable servitudes were established. In 1908, Clark and his wife by deed conveyed to the Wesley Clark Investment Company the lots which were apportioned to Clark on the dissolution of the partnership above mentioned. Thereafter a conveyance was made by Bryan to intervener Hattie J. Hollingsworth. This deed contains substantially the same restrictions as the Thresher deed, but does not contain the express covenant making the restrictions binding on all the lots in the tract. The price paid for this lot was $15,625. Subsequently Bryan made another sale to defendant W. F. Young. This deed contains a condition subsequent radically different from those of the Thresher deed, and the restrictive covenants therein provided for expire in January, 1916. On February 6, 1911, an agreement was entered into by Clark, Bryan, and the Huntington Land & Improvement Company changing the restrictions with reference to the tract. The building conditions provided for by this agreement are substantially the same as those contained in the Thresher deed, except that a portion of the frontage is omitted therefrom, and they are made to expire in 1925. Subsequent to the execution of this agreement, Clark, in March, 1911, sold a lot to intervener Carr and his wife for the sum of $22,500. This deed recites that the conveyance is made subject to the agreement entered into by defendants Clark, Bryan, and the Huntington Company in 1911. Thereafter an additional small frontage was purchased for the Carr home from the Huntington Company for the sum of $2,500. This conveyance was made subject to the same restrictions imposed on the other lot and were in conformity with the agreement of 1911. A home was built by Carr and his wife upon this subdivision at an expense of $65,000, exclusive of the cost of the land and of the furnishings. In November, 1912, the Clark Investment Company sold to defendant Wells a lot in the tract upon conditions subsequent, imposing restrictions radically different from any of the other conveyances above recited, and Bryan conveyed to his daughters certain lots by way of gift, the deeds to which contained no reservations whatever.

By a contract dated November, 1912, and acknowledged and recorded, defendants Wesley Clark, E. P. Bryan, and Huntington Land & Improvement Company agreed to rescind their restriction agreement of February 11, 1911, and thereafter in April or May, 1913, Westmoreland Place was placarded with large signboards, over the name Clark, Bryan, and the Huntington Land & Improvement Company, offering the property in that tract for sale for apartment houses and hotel purposes. At the same time the Los Angeles papers contained large advertisements announcing this fact. This action was thereupon brought by plaintiff and interveners, who own and occupy expensive residences on their respective lots situated in Westmoreland Place.

Judgment went in their favor, and under its terms plaintiff recovered judgment by which all the lots in Westmoreland Place are impressed with the common form of restrictions heretofore recited, and an easement to have such restrictions observed by every lot owner in favor of every other lot owner in the tract. A different judgment, hereinafter referred to, was rendered as to interveners Carr and wife. We will first discuss the judgment in favor of plaintiff.

[1] As ground for a reversal of this judgment, it is first urged that the evidence is insufficient to sustain the finding that any general plan of restrictions was ever established or put into effect binding upon the title to all of the lots in the tract. It is not seriously contended, nor could it be, that originally it was not the intention of Clark and Bryan to create a restricted tract and to provide for high-class building restrictions therein, and to establish what courts have denominated a general building scheme. But it is claimed that such intention is insufficient to fasten such a scheme on the title to real property, and that a common form of restriction, before it can be made a part of the title to each lot, must in some way acquire a definite character; that its nature, as apart from its fixation on the lots, must have been definitely ascertained; and that when common grantors, as here, convey certain lots subject to restrictions, and certain other lots freed therefrom, such a course of conduct negatives the establishment of any general building scheme for the entire tract, and is insufficient to put subsequent purchasers upon notice, in the absence of proof, that they bought with knowledge of the restrictions and building scheme.

We are of the opinion that the evidence fully supports the judgment in this particular. The claimed restrictions were created and sufficiently established by the provisions of the covenant contained in the contract between Clark and Bryan and the Threshers, in the Thresher deed, in the deed to the Los Angeles Building Company, and in the respective deeds whereby Clark and Bryan conveyed to one another their respective home sites in the tract, and by other acts on the part of Clark and Bryan hereinafter referred to. The building scheme with reference to the tract is further established by the map thereof filed by Clark and Bryan which contains the statements that no part of the property is intended to be used or is dedicated to public use, but that the private driveways indicated on the map are reserved for the perpetual and irrevocable use of the owners of the lots, their heirs and grantees, as appurtenant to the lots, and the owners there-

of. The contract and the five deeds above referred to each sets forth in numbered paragraphs the conditions and restrictions which constitute the building scheme for the tract, followed by the provision that upon a breach of any of the restrictions title to the property shall revert to defendants; after which each instrument contains a clause expressly making the restrictive covenants binding upon every lot in the tract for the benefit of every owner.

We are referred to other evidence in the record as going to establish the existence of the building scheme. This evidence consists of statements of defendants to the purchasers; of written copies of the building restrictions delivered to them; by signboards erected on the property announcing the high-grade restrictions; by written and printed documents referring to the scheme; by an extensive line of advertisements; and also by other declarations on the part of defendants Clark & Bryan, both oral and written. We do not deem a review of this evidence necessary. It is sufficient to say that the evidence as a whole fully supports the finding of the trial court that the claimed restrictions and building scheme were fully established, and were made binding upon every lot in the tract.

[2] The principle that covenants of the character here involved operate as a covenant running with the land for the benefit of other lots in the tract is well established and recognized in this state. Los Angeles, etc., Co. v. S. P. R. R. Co., 136 Cal. 48, 68 Pac. 308; Hunt v. Jones, 149 Cal. 301, 86 Pac. 686; Firth v. Marovich, 160 Cal. 260, 116 Pac. 729, Ann. Cas. 1912D, 1190; Alderson v. Cutting, 163 Cal. 504, 126 Pac. 151, Ann. Cas. 1914A, 1; Parker v. Kenworthy (Sup.) 183 Pac. 950; Werner v. Graham (Sup.) 183 Pac. 945.

[3] Appellants further contend that the evidence fails to show that the defendants Young, Johnson, and Waldberg, to whom lots in the tract were conveyed by Clark & Bryan subsequent to the execution of the instruments relied on to establish the restrictions, had any notice thereof. Defendant Young did not complain of the existence of the restrictions, and the action as to him was dismissed. Defendant Johnson had actual notice of facts in relation thereto sufficient to put a prudent man upon inquiry. In addition thereto, both he and defendant Waldberg, in our opinion, were bound with constructive notice. The deeds executed by Clark & Bryan, whereby the restrictive covenants were made effective against every lot in the tract, limited the title of the owners to that extent, and established the restrictions set forth as appurtenant to the entire tract, and they could therefore convey no greater title than they had.

Appellants insist, however, that they were only bound with constructive notice of those things which were within the course of the title to the land. While it is true that these defendants did not deraign title through a deed containing the restrictions, they did deraign title through the same grantors, the principal defendants herein, who themselves created the conditions. The deeds executed by their grantors limiting their title were of record. Mere ordinary prudence would have dictated an examination of these deeds to ascertain if the remaining lots were affected by them. The map of the tract was on file, and the sales were made with reference thereto, and it expressly indicated the existence of a building scheme. Under these circumstances, we are of opinion that the documents of record constituted constructive notice not only of the existence of the building scheme, but also that the tract was burdened with certain easements. Holt v. Fleishman, 75 App. Div. 593, 78 N. Y. Supp. 647; King v. Union Trust Co., 226 Mo. 351, 126 S. W. 415; Smith v. Graham, 161 App. Div. 803, 147 N. Y. Supp. 773; Guaranty Realty Co. v. Recreation Gun Club, 12 Cal. App. 383, 107 Pac. 625. In addition thereto, the general appearance and character of the tract, and the nature of the improvements thereon, ought to indicate to one interested the presence of some character of restrictions. Tallmadge v. East River Bank, 26 N. Y. 111.

[4] Appellants further urge as ground for reversal that the character of the property in the neighborhood surrounding the tract has so changed since the time when plaintiff and interveners claim that a general scheme of restrictions had been established and imposed upon the land that it would be inequitable to enforce it, even assuming it to exist, and in this connection they claim that the evidence shows that many apartment houses and business establishments have been located in the vicinity of the tract, and that by reason of such change of surroundings the property is no longer valuable or available for the high-class residences of the character specified in the restrictions and erected on the property, the lots being worth five times as much for the semibusiness purpose of apartment houses and hotels.

It is undoubtedly true that the authorities support the proposition that where there has been a change in the uses to which property in the neighborhood is being put, so that such property is no longer residence property, that it would be oppressive and inequitable to give effect to restrictions where the changed condition of the locality has resulted from other causes than their breach. Los Angeles Terminal Land Co. v. S. P. R. R., 136 Cal. 36, 68 Pac. 308; Trustees of Columbia College v. Thacher, 87 N. Y. 311, 41 Am. Rep. 365; Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476. No such situation, however, is here presented. No radical change in

the tract or its vicinity is shown by the record. On the contrary, the evidence supports the finding that there has been no unfavorable change, but rather that the property has improved. The fact that apart from and surrounding the tract some business has grown up, and that the land has become more valuable in consequence, in no manner entitles defendants to be relieved of the restrictions they have created. This condition is but the natural result of the improvement of the various tracts, and the fact that the property may have become more valuable thereby for business purposes is immaterial. Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808; Evans v. Foss, 194 Mass. 513, 80 N. E. 587, 9 L. R. A. (N. S.) 1039, 11 Ann. Cas. 171; Reed v. Hazard, 187 Mo. App. 547, 174 S. W. 111. Courts in such cases are not controlled exclusively by money value, but may protect a home. Iselin v. Flynn, 90 Misc. Rep. 164, 154 N. Y. Supp. 133; Spahr v. Cape, 143 Mo. App. 114, 122 S. W. 379.

If we are correct in our conclusion concerning the establishment of the restrictive covenants, all of the property of the parties in the tract, including the interveners, is equally charged with the burdens thus imposed, and the same judgment should have been rendered against all. The judgment as rendered in favor of plaintiff and others imposes perpetual restrictions and an easement binding upon all the lots in the tract, while the judgment in favor of interveners Carr and wife simply imposes on their lots the restrictions provided for in their deeds, which are in conformity with those established by Clark, Bryan, and the Huntington Land Company under their agreement of February 6, 1911, the terms of which limited the established restrictions in the manner hereinbefore set forth.

The judgment therefore is modified so as to make the restrictions and easements as established by the original deeds as heretofore recited binding on and appurtenant to every lot in the tract.

Our attention has been called to the fact that by inadvertence the eighth restriction contained in the covenants, relating to side lines, has been incorrectly incorporated in the judgment. This is a matter that may be remedied by the trial court.

For the reasons given, the judgment as modified will stand affirmed; plaintiff and interveners other than Carr and wife to recover costs.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. [5] In denying a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, we do not wish to be considered as approving any modification of the judgment of the lower court in favor of the interveners Carr. No complaint on this point is made in the petition for hearing in this court, and for that reason we have not considered the same.

All concur, except KERRIGAN, Judge pro tem., absent.

44 Cal. App. 699

JOHNSON v. QUINBY. (Civ. 2398.)

(District Court of Appeal, Second District, Division 1, California. Dec. 10, 1919.)

1. GUARANTY ⊂⊃53(3)—GUARANTOR OF PERFORMANCE OF LEASE NOT EXCUSED BECAUSE LESSEE PURCHASED FURNITURE IN EXCESS OF AMOUNT STIPULATED.

Where a lease provided that the lessee should purchase furniture for the building at a total price not to exceed $10,000, one-half of which the lessor should pay, but in no event should the lessor be required to pay more than $5,000, a guarantor of the faithful performance of the lease cannot defeat recovery by the lessor, who had paid his $5,000 on the ground that the lessee purchased furniture in excess of $10,000.

2. GUARANTY ⊂⊃53(3)—GUARANTOR OF FAITHFUL PERFORMANCE OF LEASE NOT EXCUSED BECAUSE LESSEE PURCHASED FURNITURE IN EXCESS OF AMOUNT STIPULATED.

Where a lease of an apartment provided the lessee should buy furniture not to exceed $10,000 and the lessor should pay one-half of the amount, but not more than $5,000, and the lessee purchased furniture in excess of $10,000, and the lessor paid his $5,000, as stipulated, *held* that the fact that the lessor, some three or four months after the purchase made the payment of $5,000, knowing of the excess purchase, will not exonerate the guarantor under Civ. Code, § 2819, declaring that a guarantor is exonerated if by any act of the creditor the principal obligation is altered, such payment, taken alone, not being sufficient to show any change or alteration of the contract, and not showing that the lessor in anywise participated in the lessee's purchase of an excessive amount of furniture.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by G. Rupert Johnson against E. C. Quinby. From judgment for defendant, plaintiff appeals. Reversed.

Taylor & Forgy, of Los Angeles, for appellant.

Eugene D. Williams and Allen W. Ashburn, both of Los Angeles, for respondent.

SHAW, J. This action involves plaintiff's right to recover $680 from defendant upon his written guaranty that Mrs. Church, as

lessee of an apartment house owned by plaintiff, would pay the rental reserved in the lease. Judgment was rendered in favor of defendant, from which plaintiff appeals.

It appears that at the time of the execution of the lease to Mrs. Church the defendant executed a written instrument whereby he guaranteed the performance on her part of all the covenants contained in the lease, one of which was to pay the rent specified therein. That at the same time and in connection therewith an instrument in writing, designated as "Agreement Collateral to Lease and Guaranty," to which Mrs. Church, plaintiff, and defendant were all parties, was executed whereby, after reciting the making of the lease, execution of defendant's guaranty, and contemplation of the parties that the apartment house should at once be furnished, it was agreed that all necessary furniture should be purchased from Barker Bros. under contract of the lessee, at a total price not to exceed $10,000, one half of which, not to exceed $5,000, should be advanced and paid by the lessor for and on behalf of the lessee, who was to pay the other half of the purchase price to Barker Bros. in accordance with such mutually satisfactory agreement therefor as might be made; that when Barker Bros. were fully paid, the lessee should then commence the making of payments to the plaintiff in liquidation of the sum so advanced by him in payment for the furniture, and at the same time execute to plaintiff a chattel mortgage thereon, as security for the payment of such advancement, and also as security for the lessee's covenants in the lease, and thereupon defendant, as to any rents which might thereafter accrue, should be released from liability as guarantor. It is conceded that the written guaranty and this collateral instrument must be construed together as one agreement.

The answer set up five separate defenses, but since the court found that $680 was due as rent for the month of October, 1916, no complaint is made by appellant as to adverse findings made upon issues raised by the first, second, and fifth defenses contained in the answer.

[1] The fourth defense is based upon the theory that by the terms of the collateral agreement plaintiff was required to pay one-half the cost of the furniture, which cost, instead of $10,000, was $13,700, upon which plaintiff paid $5,000, or 36½ per cent. thereof, and hence there was imposed upon the lessee the burden of paying $8,700 to Barker Bros. before she could execute the mortgage which, as provided in the agreement, should release defendant from liability as guarantor. A general demurrer was interposed to this defense, and by the court overruled. Not only did the court err in so ruling, but likewise erred in basing a finding upon its interpretation of the contract to the effect that this act "constituted an alteration of the agreement of guaranty," in that since he paid only $5,000 upon the cost of the furniture, "the portion of the purchase price necessary to be paid to Barker Bros. by said Fannie L. Church under the terms of said collateral agreement, before defendant would be released from his said guaranty, was increased by the sum of about $1,750." By the express terms of the three-party agreement, the lessee, so far as her purchase of furniture was made the subject thereof, was restricted to a sum not exceeding $10,000, of which plaintiff was to pay in cash one-half, but in no event more than $5,000, which he paid. The terms of the agreement are plain and explicit, and there are no allegations in the pleading designated "Defendant's Fourth Defense" as to any acts committed by plaintiff, other than the fact that he complied with the agreement by paying $5,000, upon which the claim can be asserted that he did anything detrimental to the interest of the guarantor.

[2] By the third defense, after setting forth the guaranty and collateral agreement, it is alleged that after the execution thereof, "the said lessee purchased furniture at a price greatly in excess of the sum of $10,000, to wit, at a price of about $13,700, which said purchase was made without the knowledge or consent of defendant; that thereafter, within a period of some three or four months, the plaintiff, well knowing that the total purchase price of said furniture had exceeded by a large amount the sum of $10,000, to which it was limited in the agreement heretofore set forth, and consenting thereto, paid to Barker Bros. on account of the purchase price of said furniture, the sum of $5,000." That the effect of such acts on the part of plaintiff was detrimental to defendant in this, "that it became necessary for said lessee to pay to Barker Bros. the sum of about $8,700, instead of the sum of $5,000, which the agreement provided, before the defendant could be released from his obligation as guarantor under the said guaranty." A general demurrer was likewise interposed to this defense, and by the court overruled. Section 2819 of the Civil Code provides that—

"A guarantor is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect."

And in County of Glenn v. Jones, 146 Cal. 518, 80 Pac. 695, 2 Ann. Cas. 764, it is said:

"The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, release nothing which will possibly benefit the surety. * * * He must not do any act injurious to the surety or inconsistent with his rights."

Conceding that the lessee's act in buying furniture at a price in excess of that author-

ized by the agreement was a violation of its terms, nevertheless we are at a loss to perceive how plaintiff's act, in compliance with the terms of the agreement on his part, was detrimental to the interest of the defendant. There is no allegation that plaintiff aided, assisted, advised, or participated in the alleged wrongful act of the lessee. Assuming for the purpose of this case only that the recitals, "well knowing" and "consenting," are equivalent to direct allegations, the allegation is that such knowledge was not acquired and such consent given until three or four months after the purchase was made. Moreover, it is not alleged the lessee failed to pay Barker Bros. the sum of $5,000 which under the terms of the agreement she was to pay before the execution of the mortgage provided therein as a release of defendant's liability. Indeed, for aught that appears to the contrary, she may have paid the entire balance of $8,700. While a guarantor's contract must be construed strictly as against the creditor, and any agreement made by him with the principal debtor, the effect of which is to alter or change the contract, will exonerate the surety, nevertheless, in the absence of facts showing that the lessee, due to some act of plaintiff, was in default to Barker Bros., the pleading is not sufficient to constitute a defense, in that it fails to show any act of plaintiff changing or altering the contract.

The court erred in overruling the demurrer, from which it follows that it likewise erred in permitting evidence, over plaintiff's objection, tending to show that defendant did participate with the lessee in purchasing furniture in excess of the cost agreed upon.

The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

182 Cal. 115

MILLER & LUX, Inc., v. RICHARDSON, State Treasurer. (S. F. 8312.)

(Supreme Court of California. Jan. 27, 1920. Rehearing Denied Feb. 26, 1920.)

1. TAXATION ⟸49 — STATUTE AUTHORIZING DEDUCTION OF GOOD WILL IN ASSESSING FRANCHISE TAX INVALID.

Good will being part of a corporation's franchise for purpose of assessment, provision of St. 1911, p. 533, § 5, for deduction for good will in assessing the franchise of a corporation, violates Const. art. 13, § 1, and section 14, subd. "d," providing for assessment of property and a franchise at its actual cash value.

2. TAXATION ⟸376(1) — CORPORATE "FRANCHISE" MEANS CORPORATE EXCESS WHICH INCLUDES GOOD WILL.

In view of its history, Const. art. 13, § 14, subd. "d," providing for assessment and taxation of corporate franchises, means the so-called corporate excess, which includes good will, though such is not the usual or strict meaning of the word "franchise."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Franchise.]

3. TAXATION ⟸494—REVIEW BY COURT OF ASSESSMENT LIMITED TO FRAUD OR MISTAKE, IF PRESCRIBED METHOD IS PURSUED.

Courts cannot, except where there is fraud or mistake, go into the matter of an assessment being excessive and arbitrary, provided the method pursued in making the assessment is that prescribed by law, and the thing assessed is the thing required to be assessed.

4. TAXATION ⟸543(6)—ALLEGATION OF EXCESSIVE ASSESSMENT DOES NOT CHARGE "FRAUD."

Allegation that assessments are excessive and arbitrary is not equivalent to allegation that they were imposed fraudulently; it being necessary for fraud that there should have been a conscious failure by the assessing official to exercise fair and impartial judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

5. TAXATION ⟸543(6)—INQUIRY OF ASSESSING BOARD LIMITED TO METHOD OF ASSESSMENT IN ABSENCE OF CHARGE OF FRAUD.

Plaintiff, in action to recover taxes paid on assessment of its franchise, may, in the absence of allegation of fraud, make inquiries of members of assessing board only for purpose of ascertaining whether the method prescribed by the law had been pursued in making the assessment.

6. APPEAL AND ERROR ⟸1058(1)—EXCLUSION OF QUESTIONS HARMLESS WHERE THE MATTER SOUGHT OTHERWISE APPEARS.

Exclusion of questions, in action to recover back taxes, as to method pursued by assessing board, is harmless, such method being otherwise made to appear.

7. TAXATION ⟸371½—ASSESSING BOARD NOT BOUND BY REPORT OF CORPORATION FOR FRANCHISE TAX.

The Statutes of 1911, p. 530, as to assessment of corporate franchises, though requiring reports by corporations subject to the tax, does not require the assessing board to accept or follow the figures submitted by corporations, but leaves the matter of fixing values entirely to its best discretion.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Miller & Lux, Incorporated, against Friend W. Richardson, State Treasurer. Judgment for defendant, and plaintiff appeals. Affirmed.

Edward F. Treadwell, of San Francisco (Delger Trowbridge, of San Francisco, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen. (Raymond Benjamin, of San Francisco, of counsel), for respondent.

OLNEY, J. This is an action to recover taxes paid under protest by the plaintiff corporation upon alleged illegal and arbitrary assessments of its "franchise" for the years 1911 to 1915, inclusive, by the state board of equalization. The plaintiff is a foreign corporation, and possesses no special franchise or privilege within the state which the state board of equalization was attempting to assess. The only "franchise," in the strict sense of that word, which would be covered by the assessments in question, is the privilege of the plaintiff to do business as a corporation within the state. The assessments were made upon the basis of valuing thereby the so-called "corporate excess"; that is, the difference between the value of its outstanding stocks and bonds as determined by market quotations, the earnings of the company, or otherwise, and the value of its tangible or physical properties. The theory is that the value of the company's outstanding stocks and bonds represents the value of its total assets, so that the difference between this total and the value of the company's physical properties represents the value of the company's intangible assets, and an assessment of the corporate excess—that is, of this difference—is an assessment of all the company's so-called intangibles.

Although the plaintiff is a foreign corporation, no question is presented as to the allocation of its corporate excess within and without the state. In the opening brief for plaintiff the right of the board of equalization to make any general franchise assessment in the case of a foreign corporation is apparently questioned; but in its reply brief it is stated that all of the plaintiff's business

is within the state, as shown by the record, and that for all practical purposes the plaintiff is in the position of a domestic corporation, and the method of assessing the general franchises of a domestic corporation should be applied in its case. Our further discussion is upon that basis.

[1] The main point of attack upon the assessments is that the state board of equalization refused and failed to deduct from the value of the plaintiff's corporate excess the value of its good will. The plaintiff's reliance is upon section 5 of the act of 1911 (Stats. 1911, p. 530; General Laws 1915, Act 4065), the pertinent portion of which reads:

"All franchises other than those of the companies mentioned in sections 2, 3 and 4 of this act (of which plaintiff is not one) shall be assessed at their actual cash value, after making due deduction for good will. * * *"

The board of equalization, in declining to make such deduction, acted upon the advice of the Attorney General that the provision of the statute for a deduction for good will was contrary to our state Constitution and void. It requires but a very brief consideration to make it evident that this is true if, in fact, the statute means that a deduction or subtraction for good will must be made from the value of the franchise. Section 1 of article 13 of the Constitution provides, in effect, that all property, with certain exceptions not material here, shall be assessed at its actual cash value. Subdivision (d) of section 14 of the same article makes the same provision in regard to franchises in particular. There is no provision for any deduction from this value, either for good will or anything else. It is immediately evident that an assessment of a franchise made by deducting something from its value is an assessment for less than its value and in direct violation of both the constitutional provisions mentioned. This is so plain that it is hardly possible that it was what the Legislature had in mind.

A much more probable construction of the statute is that the Legislature intended that in valuing a corporate franchise good will should not be taken as an element of the franchise, and that the value of the corporation's good will should therefore not be included in the valuation placed on its franchise. This, of course, is a very different thing from making a deduction from the value of the franchise. But even with this construction the statute is yet practically meaningless. If "good will" is not a proper element of franchise as that word is used in the Constitution, then certainly its value must not be included in the valuation of the franchise, statute or no statute; and, on the other hand, if it is an element of franchise as meant by the Constitution, a statute authorizing the omission of its value from the assessment of the franchise is again simply contrary to the Constitution and void. In other words, the propriety of omitting or including anything for good will in assessing a corporate franchise is finally a question purely of constitutional construction a question as to the meaning to be given to the word "franchises" in article 13, § 14, subdivision (d), of the Constitution, which reads:

"All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state."

The question so presented is, in fact, broader than one as to the propriety of omitting or including the element of good will. The assessments in question are on the basis of valuing thereby all of the plaintiff's corporate excess. The corporate excess of necessity includes all of the plaintiff's intangibles, of which the plaintiff's good will, if it has any, is but one. The plaintiff may well have other intangibles of which it can be truly said that if good will is not a part of its franchise for purposes of assessment neither are they. The assessments in question can be justified only upon the theory that by franchise the constitutional provision under consideration means corporate excess. Whether this theory be correct or not is a matter of extreme practical importance, since for years now assessments have been made and taxes in large amounts collected by the state in reliance upon it.

If the construction of the Constitution were to be decided solely by a consideration of the natural and usual signification of the word "franchise" there could be but little doubt. It has a fairly definite and certain meaning. Without attempting a wholly accurate or comprehensive definition, it means, in general, in such connection as the present, a privilege or right granted by public authority. In the present case the only thing of this character involved is the privilege to be a corporation or to do business as a corporation. The word "franchise," in its natural and usual meaning, by no means includes such things as good will, advantageous contracts or connections, or other things or incidents having no physical existence, and yet contributing to the corporation's earning power and giving value to its stock and bonds. But the matter cannot be so simply determined. There lies behind the provision for the taxation of franchises quite a history which must of necessity be taken into consideration.

The provision in question is part of an amendment to the Constitution proposed by a special session of the Legislature in 1910 and approved by the people in the fall of that year. The amendment was the result of the labors of a tax commission appointed some years before, and its primary purpose was to effect a separation of state and county taxes, and in that behalf to set off exclusively for

taxation for state purposes certain particular subjects, consisting, in a general way, of the properties of public utility corporations other than their nonoperative properties, of the properties of insurance companies and banks other than their real estate, and of franchises. Previous to the adoption of this amendment funds for both state and county purposes were, in general, raised by a single tax assessed and collected through the instrumentalities of the counties. The assessment by which such tax was levied was required by the Constitution (article 13, § 1) to cover all forms of property not exempt from taxation, the Constitution specifying that "the word 'property' as used in this article and section is hereby declared to include moneys, credits, bonds, stocks, dues, *franchises* and all other matters and things, real, personal and mixed, capable of private ownership."

The article containing this provision was a part of the Constitution as adopted in 1879, and in 1881 in the case of Burke v. Badlam, 57 Cal. 594, this court held that under it there was properly assessed to a corporation every element of value represented by the market value of its stocks and bonds. This was followed almost immediately by the decision in San Jose Gas Co. v. January, 57 Cal. 614. There the county assessor of Santa Clara county made an assessment of the "franchise" of a gas company within the county by estimating the difference between the aggregate market value of its shares of stock and the value of its physical properties; in other words, its corporate excess. The company applied to the courts for relief against the assessment, and the assessment was upheld. So far as pertinent here the opinion of the court went off on the point that the company had a franchise which was assessable without considering particularly the question as to whether under the name of franchise there had been assessed elements which were not properly elements of franchise at all. The final fact, however, was that an assessment of the company's corporate excess under the designation "franchise" was upheld.

This decision was followed by Spring Valley Water Works v. Schottler, 62 Cal. 69, where a similar assessment upon a corporation's franchise was involved and likewise upheld. Here, again, the opinion is largely concerned with the question of whether the corporation had any franchise whatever which could be assessed. The method of making the assessment is nevertheless touched upon, and the method pursued was sustained upon the authority of the January Case, although apparently without any clear appreciation of the distinction between a franchise in the accurate sense and other intangibles which may enter into and help make up the corporate excess.

The question was again presented in Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. Rep. 130, where the county assessor had placed an assessment upon the franchise of a bank by determining the difference between the aggregate value of the stock of the bank and the value of its tangible properties. Such assessment was again upheld, and again the opinion is largely concerned with the question of whether or not the bank had any franchise at all which could be assessed. There is, however, a discussion of the contention that the method of valuation pursued involved the inclusion under the head of franchise of such elements as dividends or profits, earning power and good will, which were not elements of franchise at all. Although in a previous portion of the opinion the method of assessment pursued is clearly set out, the contention mentioned is disposed of by reference to the January Case, and by the statement that, were the court at liberty to review the judgment of the assessor, it could not say that the assessment in question included such elements as dividends or profit-earning power or good will. It is further said, in effect, that it was the intention of the laws of the state that everyhing that gives value to the shares of a corporation should be assessed as property of the corporation, and that in determining the value of such property the true value of the shares is a most important element.

In 1906 this court decided the case of Crocker v. Scott, 149 Cal. 575, 87 Pac. 102. There the plaintiff, the owner of certain shares of a national bank, brought suit to declare an assessment of those shares illegal. The assessment was made under statutes passed in 1899 (St. 1899, p. 96), requiring the assessment of shares in a national bank in accordance with their proportionate interest in the corporate excess of the bank. At the same time the statutes of the state provided that stock in corporations other than national banks should not be assessed at all, and the validity of the legislation for the assessment of stock in national banks, and therefore of the particular assessment involved, turned upon whether or not the laws of the state provided that in the case of corporations other than national banks all of the corporate excess should be assessed. It was held that our laws did so provide, and the cases of Burke v. Badlam, San Jose Gas Co. v. January, Spring Valley Water Works v. Schottler, and Bank of California v. San Francisco were all referred to and reviewed. After discussing such elements of the market value of the stock as good will, dividend or profit-earning power, etc., the main opinion says:

"The statutes expressly requiring the assessment of all the property, both tangible and intangible, to be at its full cash value, it is obvious that there is but one method by which the cash value of the intangible property can be ascertained, a method ordinarily much more certain and accurate in its results than any

method that can be devised for the ascertainment of the value of real estate and many articles of personal property. It is settled law in this state that a proper method of ascertaining the value of the franchise of a corporation is by deducting from the aggregate market value of its shares the value of its tangible property, and taking the difference as the value of the franchise."

Again the main opinion says:

"We are satisfied that under the system of taxation in this state, as construed by our decisions, all such intangible property may be properly included in the assessment of the corporate franchise of the corporation."

It is true that Justice Henshaw, in his concurring opinion, points out clearly that the word "franchise," as applied to corporate excess, is a misnomer, and concurs with the result reached by the main opinion only upon the ground that the law required that all of the corporate excess should be assessed, and that it did not affect the validity of the assessment that it was made under the wrong name. It is also true that even the main opinion, taking it as a whole, cannot be said to hold definitely and finally that corporate excess and franchise are one and the same thing. Nevertheless, as is apparent from the foregoing quotations, it is stated explicitly that the proper method of ascertaining the value of the "franchise" of a corporation, as that word is used in the Constitution as the subject of taxation, is by deducting from the aggregate value of the corporation's shares the value of its tangible properties, and that the value of all intangible properties of a corporation may be properly included in an assessment of its franchise.

Crocker v. Scott was followed by City of Los Angeles v. Western Union Oil Co., 161 Cal. 204, 118 Pac. 720. This decision was not handed down until 1911—that is, not until after the adoption of the constitutional amendment—and therefore could have no influence in the latter's preparation or adoption. Nevertheless the decision has some weight, as indicating a settled view at the time as to what was meant by a corporate franchise for the purposes of taxation. The city assessor had assessed the franchise of the defendant corporation, which had no special franchise, at the value of the defendant's corporate excess. The pertinent portions of the opinion are as follows:

"The trial court found as follows: 'In the opinion of the court the value placed thereon, to wit, the sum of $1,323,555, was grossly excessive; but the court holds that it has no jurisdiction to review the action of the board of equalization of said city of Los Angeles in fixing the value of said franchise to be a corporation at the sum of $1,323,555, and also that the method pursued by the assessor in arriving at the value of the franchise was in accordance with the rule established by the Supreme Court.'

"The trial court truly declares that the method adopted by the assessor in this instance is in accordance with the rule established by the decisions of this court. In Crocker v. Scott, 149 Cal. 575, 592, 87 Pac. 102, it is said: 'It is settled law in this state that a proper method for ascertaining the value of the franchise of a corporation is by deducting from the aggregate market value of its shares the value of its tangible property, and taking the difference as the value of the franchise. [Citing the California decisions heretofore reviewed.]

"To the argument of the appellant that the assessment in this instance is so grossly excessive as to compel the belief that it was made without the exercise of judgment and therefore carries upon it the impress of constructive fraud [citing authorities], the complete answer is that an excessive valuation by itself alone is not evidence of fraud [citing authorities], and any inference or presumption of fraud arising from merely excessive valuation is at once repelled in this case by proof that the method adopted of fixing that valuation was the method sanctioned and directed by the highest court of the state. * * *

"We have not discussed at length the proposition urged that under the Code 'each franchise must be entered in the assessment book without combining the same with other property or the valuation thereof' (Pol. Code, § 3650, subd. 15), and that in this instance, under the guise and name of assessing franchise, there has been assessed the good will, the prospective dividends, and the speculative value of the stock, for the reason that these questions must be deemed concluded by the language of Crocker v. Scott, above quoted."

At the time Crocker v. Scott was decided the state tax commission which drafted the constitutional amendment either had commenced or was about to commence its labors. The influence upon it of the decisions of this court as to the assessment of corporate franchises is evident. In the commission's report of 1905 there are numerous references to the decisions and to the fact that they authorized the assessment of corporate excess under the name of franchise. Thus, on page 268 of the report, it is said, the italics occurring in the original:

"The general method approved by the courts of California, and originally prescribed by the Code, for the determination of the value of these special franchises, rests upon the same ideas as that underlying the determination of the 'corporate excess' described in another chapter. To determine the value of these franchises the assessor is supposed to ascertain the total value of all the outstanding securities, and to deduct from that the value of any visible or tangible property which he may find in the possession of the corporation, and the difference is then assessed as the value of the franchise.

"As is explained at more length in the chapter relating to the taxation of banks, the Supreme Court of California has held that the same method may legally be used for the determination of the value of the *franchise possessed by any corporation*, whether a public-service corporation or not."

The constitutional amendment recommended by the commission in 1906 was not adopt-

ed. The commission, however, was continued in existence and recommended to the special session of the Legislature of 1910 the amendment which was adopted. Between the session of the Legislature proposing this amendment and action by the people upon it, the commission published another report for the purpose of making clear to the people of the state just what the amendment was intended to accomplish. In this report (Report of 1910, p. 28) occurs this very pointed statement:

"In the leading case of Spring Valley Water Works v. Schottler, 62 Cal. 69, and other cases following it, the Supreme Court has repeatedly approved of the following method for making a valuation of the franchises of every class of corporation for purposes of taxation. This method consists in (1) ascertaining the total market value of all outstanding securities, and (2) deducting therefrom the assessed value of any visible or tangible property which belongs to the corporation. The amendment makes no change except to transfer the administration of the law from the counties, which have not succeeded in collecting these taxes, to the state, which can do so with certainty and uniformity. The commission considers this one of the strongest features of the new plan."

In addition to the foregoing expressions by the commission there is the significant fact that two important purposes sought to be accomplished by the amendment would not be accomplished, if by franchise was meant something less or other than corporate excess. One such purpose was to prevent the escape of intangible but yet real values from assessment and taxation. The feeling was prevalent and strong that under the existing system such values were in very large part escaping. This feeling is repeatedly voiced in the reports of the commission. The other purpose was that the matters of assessment committed to the county assessors should be as simple as possible. The escape of intangibles from taxation was attributed largely to the inability of county assessors to cope with the difficulties of properly assessing them. Both these purposes would fail of accomplishment as to corporations, if franchise as applied to them were to mean anything else than corporate excess, the valuation of which was to be intrusted entirely to state officials. As pointed out in Crocker v. Scott, it is not so difficult to value corporate excess as a whole, but to divide it up and assess separately with any accuracy its various elements is well-nigh impossible. This difficulty would be intensified if the valuation of a part, that of franchises in the strict sense, were to be left to one set of officials, the state board of equalization, and the valuation of the remainder, including, for example the element of good will, were to be left to another set of officials, the county assessors. Such an arrangement could only increase the existing confusion and difficulty and the consequent escape of intangible personal property from taxation. This is so apparent that it is hardly conceivable that the commission and the Legislature, who were seeking to remedy these very things, could have had anything in mind, when they proposed committing to state officials exclusively the assessment of corporate franchises, other than the assessment of corporate excesses as a whole and without division.

Finally, there is the most important circumstance that, ever since the adoption of the amendment, the taxing officials of the state have proceeded consistently upon the theory that by corporate franchise was meant corporate excess. Only the clearest and most compelling reasons would now justify us in overturning the construction so placed upon the Constitution, and consistently adhered to in practical administration for many years, when such overturning would inevitably result in great embarrassment and confusion in the government of the state.

[2] To sum the matter up, it appears that, while the decisions of this court, if carefully considered, do not justify the statement that they positively hold that corporate franchise, as used by the Constitution in this connection, and corporate excess, are equivalent terms, yet the language of the decisions is sufficient to have justified a general impression at the time of the adoption of the constitutional amendment that they had so held; that the commission which drafted and recommended the amendment and the Legislature which proposed it so believed, and proceeded upon that belief; that those responsible for the amendment represented to the people in advocating its adoption that it would have the effect of taxing for state purposes all the intangibles of corporations under the name of franchises; that certain important purposes, which the amendment sought to accomplish, would be frustrated by any other construction; and, finally, that this construction has been followed in practical administration ever since the adoption of the amendment, and to hold now that it was not justified would cause very great public embarrassment and difficulty. The combined force of these facts is such as, in our judgment, to leave room for but one conclusion, and that is that when the Constitution, in article 13, § 14, subd. (d), provides for the assessment and taxation of corporate franchises it means the so-called corporate excess, although such is not the usual, nor, strictly speaking, a proper, use of the word "franchise."

It may not be amiss at this point to say, however, that the use of the word in the sense in which it is used in the Constitution is not without precedent. The statutes of Kentucky provide, or did provide, for a corporate "franchise" tax, and what was there

meant by franchise is thus stated in Adams Express Co. v. Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960:

"But taking the whole act together, and in view of the provisions of sections 4078, 4079, 4080, and 4081, we agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under these provisions."

See, also, Hager v. American Surety Co., 121 Ky. 791, 90 S. W. 550; Marion National Bank v. Burton, 121 Ky. 876, 90 S. W. 944, 10 L. R. A. (N. S.) 947.

Similarly, in the Alabama Tax Act of 1915, p. 437, the franchise and the intangible properties of a corporation are specified in the alternative as one and the same thing. See sections 119, 126, and 127.

In the Massachusetts Revised Statutes of 1902, c. 14, §§ 37 and 38, a corporation franchise tax is provided for, and it is expressly required that the assessment for it shall be made by valuing the corporate excess. See, also, Mass. Stats. of 1909, c. 490, § 39 et seq.

From the conclusion so reached, as to the true construction of our Constitution, it follows at once as to the particular assessments involved in this action that the general method pursued in making them, that of valuing the corporate excess without deduction for good will or any other element, was proper, and was, in fact, the only legal method that could be pursued.

[3, 4] What has already been said disposes in large measure of the remaining questions in the case. The plaintiff complains bitterly of the assessments as excessive and arbitrary. But this is a matter that cannot be gone into by the courts, provided the method pursued in making the assessment is that prescribed by law, except where there is fraud or mistake. If the method pursued is not that prescribed by law, or, what is much the same thing, if the thing ostensibly valued and required by law to be valued is not really the thing valued, as in this case if the thing valued as franchise be not franchise as meant by the Constitution, the matter can be gone into by the courts and the taxpayer relieved of the assessment. Coulter v. Weir, 127 Fed. 897, 62 C. C. A. 429; Louisville, etc., Co. v. Bosworth (D. C.) 230 Fed. 191; Hager v. American Surety Co., supra. But in the present case, as we have held, the method pursued of assessing the plaintiff's franchise on the basis of valuing its corporate excess was the correct one, and the thing assessed as franchise was the thing which was required to be so assessed by law as expressed in the Constitution. This being the case, the discretion of the assessing officials as to the valuation to be fixed is final in the absence of fraud or mistake. In the present case neither fraud nor mistake is alleged. It is alleged that the assessments are excessive and arbitrary. The character of the assessment in this respect may be cogent evidence of fraud, but of itself does not constitute fraud. In order that there be fraud, there must exist, on the part of the assessing official, a conscious failure to exercise that fair and impartial judgment which the law requires of him. This is both the general rule and the settled law of this state. See Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 168, 121 Pac. 384. The allegation that the assessments are excessive and arbitrary does not amount to an allegation of such conscious failure, and is not the equivalent of an allegation that the assessments were imposed fraudulently.

[5, 6] The plaintiff also complains because of the action of the trial court in sustaining objections to numerous questions asked by plaintiff's counsel of members and officers of the board of equalization as to how the assessments were made. The plaintiff had the right to inquire into the method pursued by the board for the purpose of ascertaining whether the board had pursued the method prescribed by law, that of valuing the corporate excess, but beyond this, in the absence of a charge of fraud or mistake, it could not go. Some of the questions asked were proper as going to the method pursued by the board and should have been allowed. Others went further and into the matter of fixing values, and were properly objected to. The refusal of the trial court, however, to allow questions going to the method of assessment, was not prejudicial, inasmuch as the method pursued did nevertheless appear so that the purpose of the questions, so far as such purpose was proper, was subserved.

[7] In this connection the plaintiff makes the point that the provisions of the statute requiring a report from corporations subject to the tax, setting forth the items from which the value of their corporate excesses may be deduced, is in effect a prescription of the method to be followed by the board in fixing values, and that, therefore, action of the board in fixing values is open to inquiry. It is sufficient in reply to say that the statute very clearly does not intend to bind the board to accept or follow the figures submitted to it, but leaves the matter of fixing values entirely to its best discretion. Its exercise of this discretion cannot, as we have said, be inquired into in the absence of allegations of fraud or mistake.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

182 Cal. 168

CORTELYOU et al. v. BAKER. (L. A. 5312.)

(Supreme Court of California. Feb. 2, 1920.)

1. FIXTURES ⇐5 — STATUTES RELATING TO MINE MACHINERY AS FIXTURES TO MINE DOES NOT APPLY TO OIL OPERATIONS.

Civ. Code, § 661, adopted in 1872, providing that sluice boxes, flumes, hose, pipes, and other machinery or tools used in working or developing a mine are to be deemed affixed to it, was not intended to apply to petroleum oil operations, though the development and production of such oil for some purposes is classed as mining.

2. PARTIES ⇐59(3)—RIGHT OF HEIR TO BE SUBSTITUTED IN PLACE OF EXECUTOR.

Where a decree of distribution was entered whereby a decedent's property and all rights of action growing out of its seizure by the sheriff on attachment were distributed to an executor as an heir, and the other heirs conveyed to him their claim in the property and interest in the suit against the sheriff, such heir was entitled to be substituted in place of the executors suing the sheriff by way of supplemental complaint, having sufficiently proved his ownership of the property, which had been originally acquired by decedent's heirs and executors in satisfaction of a mortgage she held upon an oil lease.

3. EXECUTORS AND ADMINISTRATORS ⇐426—MAY MAINTAIN ACTION FOR SHERIFF'S TRESPASS IN LEVY OF ATTACHMENT.

Under Code Civ. Proc. §§ 1581, 1582, executors in possession of their decedent's property wrongfully seized by a sheriff on attachment were entitled to maintain an action for the trespass committed by the sheriff.

Department 2.

Appeal from Superior Court, Kern County; Milton T. Farmer, Judge.

Action of replevin by James G. Cortelyou and Spencer V. Cortelyou, as executors of the estate of Mary V. Cortelyou, deceased, wherein Spencer V. Cortelyou was substituted as plaintiff, against T. A. Baker. From judgment for plaintiff defendant appeals. Reversed, with instructions.

Geo. E. Whitaker and T. N. Harvey, both of Bakersfield, for appellant.

W. W. Kaye, of Bakersfield, and M. M. Meyers, of Los Angeles, for respondent.

WILBUR, J. The appellant, as sheriff, attached certain property claimed by the respondent, and later sold the same on execution, on a writ issued against the property of one B. I. Potter. This property was used in the operation of two oil wells on a five-acre lease. Respondent sued for the value of the property sold and recovered judgment for $3,667 and interest. No third party claim was made by respondent, as required in the case of personal property by section 689, Code of Civil Procedure. The main difficulty in the case arises from conflicting contentions as to whether or not the property was real or personal. Section 692, subd. 2, Code Civ. Proc. If real property, it was sold without the required 20 days' notice of sale and without the right to redeem. Section 700, Code Civ. Proc. The respondent, being an aggrieved party, was therefore entitled to recover the value of the fixtures sold and removed by the purchaser as damages. Section 693, Code Civ. Proc. If it was personal property, respondent, having failed to give the notice required by section 689, is precluded from recovery by the provisions of that section which make service of a third party claim upon a sheriff a condition precedent to recovery. This section provides:

"The sheriff is not liable for damages for the taking or keeping of such property to any such third person, unless such claim is made."

As to the personal property, the wrong by the sheriff consisted in taking and keeping it. The sale thereof vested no title in the purchaser other than that of the judgment debtor. Section 708, Code Civ. Proc. Some of the property was clearly personal, and some constituted fixtures, under the usual rule for determining whether or not property is affixed to the land. Section 660, Civ. Code.

[1] Respondent contends that the property comes under section 661, Civil Code, which is as follows:

"Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine."

This section was adopted in 1872. The kind of property therein described shows that it was intended to apply to a mine in the ordinary meaning of the term, such as a quartz or placer mine. While the development and production of petroleum is, for some purposes, classed as mining (Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63), we think that the section was not intended to apply to oil operations. The property described in the testimony consisted partially of fixtures, such as houses, boilers, and engines, and partially of personal property, such as tools. As a large proportion of the total value of the property consisted of fixtures, we have examined the evidence to see if it is possible to affirm the judgment. The evidence, however, is such that we cannot do so, as there is a conflict therein as to value. Respondent insists that the complaint alleges and that the court found that the property was real property, while the appellant contends that the findings on that subject are conflicting. Without analyzing in detail the allegations of the complaint, or of the answer, or the findings of fact, it is sufficient to say that it is uncertain whether the

plaintiff intended to allege that the property was real or personal, and the allegations and admissions of the answer are equally uncertain, and while the court found that all the property described in the complaint constituted fixtures, it also incorporated portions of the answer in the findings, thus rendering the finding uncertain. The difficulty presented by the pleadings and findings can perhaps best be illustrated by stating that the complaint alleges that the plaintiff was the owner of a five-acre oil lease with improvements thereon. Immediately succeeding this sentence is a list of property which is not connected with the previous allegation in any way. To increase the uncertainty, this list of property is followed with the allegation that—

"The defendant unlawfully tore down, ripped up, disconnected the fixtures from said soil, removed the machinery and pipe line, unlawfully took all of the personal property described in paragraph 2 [which contained the above mentioned list] and carried away the same, together with all of said property so removed from the real estate."

[2, 3] Inasmuch as a new trial will be necessary, we will consider the question raised by the appellant with relation to the ownership of the property. It is claimed that the respondent did not sufficiently prove his ownership. Spencer V. Cortelyou, by supplemental complaint, was substituted in place of James G. Cortelyou and Spencer V. Cortelyou, executors of Mary V. Cortelyou's estate. At the time of the latter's death she owned a mortgage upon the five-acre lease. Subsequent to her death the executors arranged with the mortgagor to accept a conveyance of the property in satisfaction of the mortgage. The property was conveyed directly to the heirs and the executors satisfied the mortgage of record and took possession of the property. Thereafter the attachment was levied, the sale made, and this suit was brought by the executors to recover the value of the property taken by the sheriff. Subsequently a decree of distribution was entered in the estate, by which the property in question and all rights of action growing out of the seizure by the sheriff were distributed to Spencer V. Cortelyou. The other heirs also conveyed to him their claim in the property and their interest in this suit. Under these circumstances Spencer V. Cortelyou was entitled to be substituted in place of the executors by way of supplemental complaint, and at the time of the commencement of the action the executors in possession of the property were entitled to maintain an action for the trespass committed by the sheriff. Code Civ. Proc. §§ 1581, 1582. Plaintiff should have a reasonable time to amend his complaint and the defendant his answer, and a new trial should be had upon the amended pleadings.

The judgment is reversed, with instructions to the trial court to grant leave to amend the pleadings within a reasonable time, to be fixed by the court.

We concur: LENNON, J.; KERRIGAN, Judge pro tem.

182 Cal. 171

CITY OF PASADENA v. LOS ANGELES COUNTY. (L. A. 5332.)

(Supreme Court of California. Feb. 3, 1920.)

1. TAXATION ⟸204(2)—RULE AS TO STRICT CONSTRUCTION OF EXEMPTION STATUTES NOT APPLICABLE TO PUBLIC PROPERTY.

Rule that provisions exempting property from taxation are to be strictly construed applies to exemptions of property held in private ownership, but where the question is whether public property shall be taxed, the rule is that it is not to be taxed unless there is express authority therefor.

2. TAXATION ⟸234—WATER SYSTEM ACQUIRED BY CITY NOT EXEMPT AFTER ACQUISITION.

Water system, consisting of pipes and mains lying in and under roads and streets of county of Los Angeles and without the city of Pasadena, and which was subject to taxation for county purposes prior to acquisition thereof by the city, is not exempt in view of Const. art. 13, § 1, as amended November 3, 1914.

3. TAXATION ⟸204(2)—WORDS OF CONSTITUTION TO BE TAKEN IN ORDINARY SENSE.

Since Const. art. 13, § 1, as amended November 3, 1914, providing exemptions from taxation, does not define the terms "land" or "improvements," it is to be presumed that the words were used in the ordinary acceptation, and as defined by the statutes in force at the time.

4. TAXATION ⟸234—WATER SYSTEM ASSESSABLE AS "IMPROVEMENTS."

Water system, consisting of pipes and mains lying in and under roads and streets of the county of Los Angeles and without the city of Pasadena, and which was subject to taxation for county purposes prior to acquisition thereof by the city, *held* to constitute "improvements" for purposes of taxation within Pol. Code, § 3617, subd. 3, and Civ. Code, § 660.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

5. TAXATION ⟸178—POSSESSORY RIGHTS AND IMPROVEMENTS ON NONTAXABLE LAND NOT EXEMPT.

Though government land is not taxable, yet possessory rights thereon and improvements made for the convenience of such possessory rights are subject to taxation, in view of Pol. Code, § 3650, subd. 12.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the City of Pasadena against the County of Los Angeles. Judgment denying relief, and plaintiff appeals. Affirmed.

James H. Howard, of Pasadena, for appellant.

A. J. Hill, Co. Counsel, and Robert B. Murphy, Asst. Co. Counsel, both of Los Angeles, for respondent.

SHAW, J. The court below sustained a demurrer to the complaint, and thereupon gave judgment for the defendant, from which plaintiff appeals.

The object of the action was to recover taxes levied by the defendant for county purposes on certain property of the plaintiff situated outside of its corporate limits. The sole question presented for consideration is whether or not such property is subject to taxes for county purposes. The decision of the question depends on the meaning and effect of section 1, article 13, of the Constitution, as amended on November 3, 1914.

Prior to the adoption of this amendment the section expressly provided that property "such as may belong to the United States, this state, or to any county or municipal corporation within this state shall be exempt from taxation." As amended in 1914, the portion of the section which is applicable here reads as follows; the amendments being indicated by italics:

"All property in the state except as otherwise in this Constitution provided * * * shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. * * * Property * * * such as may belong to the United States, this state, or to any county, *city and county*, or municipal corporation within this state shall be exempt from taxation, *except such lands and the improvements thereon located outside of the county, city and county, or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatever constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county or municipal corporation, not exempt from taxation, shall be assessed by the assessor of the county, city and county, or municipal corporation in which said lands or improvements are located.*"

A short time prior to the adoption of this amendment the city of Pasadena acquired the property in controversy. Prior to its acquisition thereof the property had belonged to certain public utility water companies engaged in supplying water to Pasadena and its inhabitants, and was subject to taxation for county purposes. The plaintiff acquired these properties to form therewith a municipal system for the supplying of such water to its inhabitants, and has ever since used same for that purpose. The property in question consists of that portion of the system acquired from other corporations as aforesaid which lies in and under roads and streets of the county of Los Angeles and without the corporate limits of the city of Pasadena. It consists of the pipes and mains in which the water is conducted and whatever easements or rights of way may have been given or granted to the grantors of the city for laying and maintaining such pipes. In the year 1915 no county tax was levied on these properties outside of the city limits. In 1916, by reason of this omission, the county assessor assessed the properties at double their value, pursuant to section 3649 of the Political Code. The taxes were paid by the plaintiff under protest, and this action was brought for the recovery thereof.

The address to the voters printed on the ballots used at the election in 1914, at which this amendment was adopted, states that the amendment was proposed to protect from loss those counties into which municipalities might go for the purpose of constructing waterworks for supplying their inhabitants with water. It referred specifically to Los Angeles and San Francisco, which cities had already acquired large bodies of land situated in the counties of Tuolumne, Mono, and Inyo as parts of their respective water systems, the result of which, under the Constitution as it previously stood, was to exempt from taxation large and valuable properties within said counties, and thereby deplete the revenues of such counties. While this was the occasion of the amendment, its language must be interpreted in accordance with the natural and ordinary meaning thereof, having in view the mischief to be remedied. It cannot be supposed that the language used was intended to apply solely to the properties acquired by the two cities above named, or that if thereafter another city should acquire property for similar purposes situated outside of its limits or in another county, such city should not be subject to the rule fixed by the amendment.

[1] This is not a proper case for the application of the rule that provisions exempting property from taxation are to be strictly construed. That rule applies to exemptions of property held in private ownership. But where the question is whether or not public property shall be taxed, the rule is that it is not to be taxed unless there is express authority therefor. An example of this is found in the decisions to the effect that property belonging to a city was not taxable under the Constitution of 1849, although there was no express exemption thereof in that Constitution. People v. Doe, 36 Cal. 220.

[2] Stated affirmatively, the amendment authorizes the taxation of "such lands and the improvements thereon located outside of the county, city and county, or municipal

corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation," but that improvements on such property, thereafter constructed by such municipality, shall not be taxed. The property here in question includes only the property which was acquired by the city, and not any improvements thereafter constructed pertaining thereto.

[3] The Constitution does not define the terms "land" or "improvements." It is to be presumed, in the absence of anything in the context to the contrary, that the words were used in the ordinary acceptation and as defined by the statutes in force at the time. The Legislature had authority to define these terms. Miller v. County of Kern, 137 Cal. 525, 70 Pac. 549; Kern Valley, etc., Co. v. County of Kern, 137 Cal. 514, 70 Pac. 476.

[4] The Political Code declares that—

"The term 'improvements' includes: 1. All buildings, structures, fixtures, fences and improvements erected upon or affixed to the land, except telephone and telegraph lines." Pol. Code, § 3617, subd. 4.

The term "fixtures" is defined in section 660 of the Civil Code as follows:

"A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls."

The assessment in question describes the property as pipe lines existing in public streets. The complaint describes it as part of a water distributing system lying in and under public roads and streets. From these descriptions it is clear that the property consists of fixtures, as that term is defined by the statutes above cited. Stanislaus Water Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359; Rubio Canon Assoc. v. Everett, 154 Cal. 32, 96 Pac. 811; Copeland v. Fairview, etc., Co., 165 Cal. 154, 131 Pac. 119. The property, therefore, constitutes improvements for purposes of taxation.

[5] The plaintiff's argument is that, in providing that "such lands and the improvements thereon" shall be taxable, provided such lands and improvements were subject to taxation at the time of its acquisition by such city, the Constitution intended to make the improvements taxable only when the land on or in which they were situated was taxable land at the time of such acquisition, and that the improvements here in question, being situated in public roads and streets, were not on or in taxable land. This does not appear to us to be a reasonable construction of the amendment, especially in view of the reasons given for its adoption. It is extremely probable that a large portion of the properties acquired by the cities of San Francisco and Los Angeles for municipal purposes outside of the limits of such cities, respectively, were situated on land belonging to the United States, which would not be taxable by the state for any purpose. The very object sought to be attained by that amendment was to subject such property or improvements thereon to taxation if it was of a character which was taxable when acquired by the city. It is a well-known fact in the history of this state that, although government land itself is not taxable, yet possessory rights thereon and the improvements made for the convenience of such possessory rights were all subject to taxation. This condition of the law still continues. People v. Shearer, 30 Cal. 655; Bakersfield, etc., Co. v. Kern County, 144 Cal. 152, 77 Pac. 892. Such separate assessment of improvements on nontaxable land is expressly provided for by section 3650 of the Political Code, subdivision 12. Furthermore, the property here in question belonged to the private companies, which granted the same to the city and was taxable in their hands at the time of such acquisition, notwithstanding the fact that it was situated in public roads and streets. The language relied on and above quoted does not convey the meaning contended for by the appellant. It is a mere condensed form of expression, used to convey the idea that both land and improvements of the class there described shall be taxable. This is emphasized by the subsequent provision that "all lands or improvements thereon, belonging to any county, city and county, or municipal corporation, * * * shall be assessed by the assessor of the county." This contemplates an assessment of either land or improvements.

The assessments complained of were made in accordance with section 3650, and we are of the opinion that they were fully warranted by the Constitution.

The judgment is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

182 Cal. 185

MOULTON v. MOULTON (FIRST NAT. BANK OF RIVERSIDE et al., Interveners). (L. A. 5297.)

(Supreme Court of California. Feb. 3, 1920. Rehearing Denied March 4, 1920.)

1. HUSBAND AND WIFE ⟸249—MONEY BORROWED BY WIFE HER SEPARATE PROPERTY IF CREDIT WAS EXTENDED ON FAITH OF HER EXISTING SEPARATE PROPERTY.

Money borrowed by a married woman to invest in real estate is her separate property if credit was extended to her on the faith of her existing separate property; otherwise it is community property.

2. HUSBAND AND WIFE ⟸264 — MONEY SHOWN BORROWED BY WIFE NOT ON FAITH OF HER EXISTING SEPARATE PROPERTY.

Money borrowed by wife from bank, of which husband was president, and used in purchase of land taken in his name, *held* not shown borrowed on the faith of her existing separate property, and so not her separate property.

3. TRUSTS ⟸89(1)—CLEAR EVIDENCE NECESSARY TO ESTABLISH RESULTING TRUST.

One asserting a resulting trust in property must establish it by clear and convincing evidence.

Department 2.

Appeal from Superior Court, Riverside County; Hugh H. Craig, Judge.

Action by Julia F. Moulton against Ernest F. Moulton, executor of Ernest S. Moulton, deceased; the First National Bank of Riverside and another intervening. From an adverse judgment, plaintiff appeals. Affirmed.

Richard L. North, of Riverside (Oscar T. Barber, of San Francisco, of counsel), for appellant.

Purington & Adair and McFarland & Irving, all of Riverside, for respondent.

Loyal C. Kelley, of Riverside, for interveners and respondents.

KERRIGAN, Judge pro tem. This action was brought by plaintiff to impress a resulting trust in her favor upon certain real property.

Plaintiff is the surviving wife of Ernest S. Moulton, deceased, and the defendant is the administrator of his estate. The complaint alleges that decedent during his lifetime received from her a certain sum of money which was her separate property, and which, with her consent, was invested by deceased in certain business property situated in the city of Riverside, state of California, the title to which was taken in his own name, in trust, however, for plaintiff. The money so received, it is alleged, was part of the sum paid as consideration for such property, and plaintiff prays for a decree establishing her interest and requiring the executor to execute a deed for the same to her of the share claimed. By leave of court the First National Bank of Riverside, a corporation, filed its complaint in intervention, substantially denying all of plaintiff's allegations and alleging that decedent, during his lifetime and subsequent to the acquisition by him of the property, became indebted to it on five promissory notes, upon which the sum of $25,500 remained due and unpaid at the time of his death, and for which a claim was thereafter presented to and allowed by the executor of his estate. Intervener further alleges that at the time of the making of the notes and continuously up to the date of his death decedent held the legal title to the property in question and by the records of the county appeared to be the sole owner thereof, and had so appeared from the time of the acquisition by him of the property, and that at no time did intervener have notice or knowledge that any other person claimed any right or title thereto other than lien claimants, and that decedent had caused the property to be assessed to himself; that he had paid the taxes thereon, rented and leased the same, and claimed to intervener to be the owner thereof. Further allegation was made that deceased was the president of the intervener bank, and had the management of its financial affairs. A similar complaint in intervention was filed by one Hugh A. Bain, based upon a note of $5,000, which sum it is alleged was loaned to deceased with plaintiff's knowledge, and that plaintiff had never informed intervener of her asserted interest in the property until after the death of her husband.

The evidence presented at the trial was substantially without conflict, and may be stated in substance as follows: Deceased during his lifetime was the president and financial manager of the First National Bank, one of the interveners herein. Plaintiff, his wife, was possessed of a separate estate estimated by her to be of the value of about $35,000. On or about December 15, 1909, plaintiff had on deposit with the intervener bank about $1,700. On that day she applied for and received from said bank the sum of $27,500, for which she gave her promissory note. The application for the loan was received, approved, and made by her husband alone, and the entire proceeds thereof were by him credited to his own personal account. A few days prior thereto he had entered into an agreement to purchase the property in question for the sum of $31,000, subject to a mortgage of $15,000, and paid $500 as deposit and part payment thereon. It was shown that the personal account of decedent during the month of December, 1909, fluctuated considerably. On the 7th day of that month he had a balance of $2,636.55. There were several deposits made to his credit on the 15th of December, one for

$140, another for $28,750, and a third of $1,544.03. His balance at the opening of business of the bank on the last-named day was $1,729.73, and at the close thereof was $32,163.81. It also appeared that the largest deposit of the 15th was made up almost wholly from the proceeds of the note for $27,500 given on that day to the bank by plaintiff and which deceased credited to his personal account. It was stipulated that the vendor of the property received from the decedent a check for $30,500 on December 15th, and that the deed to the property was delivered the same day.

It thus appears conclusively that the funds borrowed by the wife in the manner indicated entered largely into forming the balance of the purchase price of the property. It was also shown that subsequent to acquiring the property deceased and plaintiff executed a new mortgage for the sum of $20,000, and decedent, with plaintiff's consent, satisfied the old existing mortgage from the proceeds of the new mortgage, and appropriated the balance of $5,000 to his own use, and that the new mortgage of $20,000 is now a lien against the property.

It further appears from the evidence that the ordinary method of making loans of any magnitude by intervener bank was to have a finance committee, composed of three of the directors, pass upon the advisability of making them, and, if approved by that committee, they were made and submitted at the next meeting of the board of directors for approval. The loan committee, at the time of the giving of the note in question, was composed of Ernest S. Moulton, deceased, J. A. Simms, and G. O. Evans, but the loan in question was not presented to the committee for consideration, and the members thereof, other than deceased, knew nothing of it at the time it was made. The note was not secured nor was it indorsed or guaranteed by any one. Simms and Evans both testified that unsecured loans were usually made solely upon the credit of the borrower. Aside from the fact of plaintiff's deposit in the bank above referred to, it does not appear that either of these members had any knowledge that plaintiff was possessed of any separate property. Evidence was offered to show that a part of the indebtedness to the bank was repaid by plaintiff. Objection was made to the competency of this evidence and to its relevancy and materiality, and the ruling upon the objection so made was reserved, and the evidence received subject to the right to strike it out if it should be determined that the objection was well taken. The objection was based upon the theory that, in cases where a resulting trust is sought to be established by showing that the alleged trust property was purchased with funds of the person seeking to establish the trust, it must appear that the trust was coeval with the deed for the trust property, and that all such payment relied upon must be shown to have been made at or before the date of the purchase of the property. No direct ruling was made by the court upon this evidence, but it would seem from the record that it was fully considered by the trial judge in reaching his conclusion in the case.

Under these facts the trial court found in favor of interveners, and plaintiff appeals from the judgment.

[1] The important question presented for consideration is whether or not the proceeds of the note given by plaintiff under the circumstances narrated constituted her separate property.

The question of the character of money realized from a loan made by a wife has been considered by this court in several decisions. Schuyler v. Broughton, 70 Cal. 282, 11 Pac. 719; Flourney v. Flourney, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819; Dyment v. Nelson, 166 Cal. 38, 134 Pac. 988; Nilson v. Sarment, 153 Cal. 524, 96 Pac. 315, 126 Am. St. Rep. 91. The principle established in the cases cited is to the effect that a married woman may borrow money to invest in real property, but money borrowed by her during marriage for that purpose will be regarded in law as community property, unless it be borrowed by her upon the faith of existing separate property belonging to her. If, therefore, the loan was made to plaintiff and the credit extended to her upon the faith of her existing separate property, there can be no doubt it constitutes her separate property under the rule announced by this court, and that a resulting trust was created in the property in her favor pro tanto to the extent that the portion of the consideration furnished by her bears to the whole.

[2, 3] We are of the opinion, however, that the loan was not made upon her personal credit, and that the evidence fully sustains the findings of the trial court that no part of the consideration paid by the decedent for the property was the separate property of the plaintiff. The circumstances under which the loan was made were unusual. The application was not submitted to the finance committee, as was customary, except in the case of small loans, and the members thereof, with the exception of deceased, knew nothing of the matter. The note was unsecured, and was not indorsed or guaranteed, and there is no evidence to show that the members of the committee, other than decedent, had any knowledge that plaintiff was possessed of any separate property. In addition thereto, plaintiff's testimony concerning the value of her separate estate at the time the loan was made is far from satisfactory, and there is nothing therein contained which would justify a carefully managed bank in making a loan of the amount here involved upon the

security she possessed. Nor does the fact that the loan was subsequently approved by the directors aid plaintiff in her case. When this action was taken by them the loan had already been made and the proceeds applied to the purchase of the property. The evidence as a whole indicates that the transaction was entered into by deceased for his sole benefit. Where a resulting trust in property is claimed, it is incumbent upon him who asserts that such a trust exists in his favor to establish the fact by clear and convincing evidence. We do not think that the record presents such proof.

Considering the conclusion we have reached, the question of equitable estoppel raised by the pleadings becomes unimportant.

The judgment is affirmed.

We concur: LENNON, J.; WILBUR, J.

182 Cal. 197

PEOPLE v. RODRIQUEZ. (Cr. 2272.)

(Supreme Court of California. Feb. 6, 1920.)

1. HOMICIDE ⟹151(1), 254—KILLING UNEXPLAINED BY DEFENDANT JUSTIFIES VERDICT OF SECOND DEGREE MURDER.

Where a killing by defendant was shown without explanation as to just how or why it occurred, a verdict of murder in the second degree was justified; the burden being on defendant to show circumstances of mitigation, excuse, or justification in view of Pen. Code, § 1105.

2. HOMICIDE ⟹244(2) — EVIDENCE INSUFFICIENT TO SHOW SELF-DEFENSE.

In a prosecution for murder, where the killing by defendant of decedent, a woman, was admitted, but there were no eyewitnesses, so that the immediate circumstances and acts leading up to the killing did not appear in the case for the people, and defendant himself testified to an attack by deceased upon him tending to show self-defense, evidence *held* sufficient to justify a verdict of guilty; the jury being entitled to reject defendant's explanation.

In Bank.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

S. Rodriquez was convicted of murder in the second degree, and he appeals. Affirmed.

Jas. G. Pfanstiel, of San Diego, and E. F. Du Fresne, of Manila, P. I., for appellant.

H. S. Utley, of San Diego, and U. S. Webb, Atty. Gen., Joseph L. Lewinsohn, Deputy Atty. Gen., and Jerry H. Powell, of Los Angeles, for the People.

OLNEY, J. The defendant was convicted of murder in the second degree, and appeals upon the sole ground that the jury's verdict of guilty was contrary to the evidence

[1] The killing by the defendant was clearly shown and was admitted. There were no witnesses of the occurrence, so that the immediate circumstances, the acts of the decedent and the defendant leading up to and culminating in the tragedy, did not appear in the case for the people, and, in particular, no circumstances of mitigation, excuse, or justification appeared. So far as the case for the people is concerned, it is one where the killing by the defendant is shown without explanation as to just how or why it occurred. Such a case is of itself sufficient to warrant a verdict of guilty of murder. The killing by the defendant being shown, the burden was upon him to explain how it happened that he took a human life and to show any circumstances of mitigation, excuse, or justification for his act that might exist. Unless he met this burden to the extent of raising a reasonable doubt as to his being guilty of murder as distinguished from manslaughter or justifiable homicide, the verdict was justified from the fact alone that he had taken human life. Section 1105 of the Penal Code reads:

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

This burden the defendant endeavored to meet by himself taking the stand and testifying as to how the killing had occurred. His account, if believed by the jury, would have required of them a verdict of no more than manslaughter at the most, and would have justified a verdict of not guilty. But the truth or falsity of the account was for the jury, and if it was not believed by them their duty was to return a verdict of guilty of murder, as they did. Their verdict was, in effect, a rejection of the defendant's explanation, and their action in this respect can be overturned on appeal only in case the evidence is such that the appellate court can say that the truthfulness of the explanation so strongly appears as of necessity to raise a reasonable doubt as to the defendant's guilt in the mind of any reasonable man.

The defendant's counsel contend that he was convicted upon the unsupported inferences and mere suspicions of the jury. It is plain, however, that this is not true. It appearing that the defendant did the killing, there is no want of evidence to support the verdict. The real question is not one as to a want of evidence, but one as to the verdict being against the evidence. With the question in the case so defined there can be little doubt as to its answer.

The decedent was a young married woman named Mrs Garcia, living in San Diego. She kept house for her husband, and the defendant had lived with her and her husband for some time as a boarder. He had been quite ill, but at the time of the homicide had been up and about for some days, was at least able to do light work, and had been looking for work. At the time of the trial he weighed 140 pounds, but according to his statement was considerably heavier than at the time of the homicide. Mrs. Garcia weighed about 120 pounds and was in good health.

The homicide occurred about 5 o'clock in the evening. Mrs. Garcia's husband had not yet returned from his work, and she and the defendant were alone in the house together. There was evidence of a friend of Mrs. Garcia, a woman, that shortly before the defendant had made a remark to Mrs. Garcia of a complimentary and somewhat significant character, which the latter had resented. The homicide was committed by shooting; the weapon being the defendant's revolver. Four shots were fired. There is a slight conflict as to the order of the shots, but it is fairly certain that there was one shot followed after a brief interval by three more close together. Mrs. Garcia was struck three times, once in the forearm, once in the abdomen, and once in the breast. The first would not have produced death. Either of the other two was alone sufficient. The shots were heard, people near rushed to the house, and there found Mrs. Garcia on the floor already dead. She was fully dressed as if she had been just on the point of going out. In the meantime, before any outsider reached the house, the defendant had blown out the only light in it and left, going rapidly toward the center of town. He was followed, pointed out to the police, and arrested. When asked about the killing, he replied, "I am crazy." On being arrested it was found that he, too, had been shot through the breast.

The defendant's explanation of the affair is:

"After 5 o'clock I went in, and Mrs. Garcia, deceased, was in her room, * * * and immediately she came out dressed as though she was going down town; * * * and she went to the dresser and began combing her hair; * * * and I asked her where she was going, because it was so late. She answered and said, 'I am going down town.' I told her, 'You better wait until husband come back; it is so late; you better wait until he comes back.' She answered, 'That is none of your business; I can go wherever I please.' I repeated it several times, and she answered at the same time while she was combing her hair. Suddenly she turned around and walks into my room and comes out and fires through my chest. I felt I was wounded, and I scuffled and grabbed her, and after a little scuffle I took it away from her. I then took the pistol away from her. She tried to pull away. When I took the pistol away then I put the pistol against her. I was very weak. I was afraid she would take the pistol away from me and kill me, invalid like I was. * * * I grabbed her and grabbed hold of the pistol and made an effort to take it away from her. * * * She was holding it with her hands. * * * It was loaded with six shots—shells. * * * For a minute, or a little over, I was trying to get the pistol away from her, and all the time she was trying to get the pistol away from me. * * * And when I did take it away from her she jumped on me again; that is, when I shot, because I was so weak I was afraid she would take it away from me. * * * She was very close to me, I should judge not over three or four feet, that I seen her when she was lunging towards me, that I shot. * * * It was a minute or a little more after she shot me that I shot her; I was wrestling with her during that time. I don't remember how many shots I fired. * * * I remember when I left there I had my left hand on the wound and I had the pistol in my right hand, and walking along I felt as though I needed some more weight on my wound, and I throwed my pistol down to put my other hand on the wound."

The statement of the defendant that he was first shot by Mrs. Garcia is corroborated to some extent by the order of the shots, first one, and then, after an appreciable interval, three others in close succession, and by the fact that no powder burns were observed upon his body or clothes when he was examined at the hospital immediately after being arrested. It is difficult to see how his wound could be self-inflicted without powder burns.

[2] But, assuming that the defendant was first shot by Mrs. Garcia, we still think it plain that it cannot be said that the jury was unreasonable in rejecting the defendant's explanation. The essential point of the explanation was that the defendant had acted in self-defense. But whether he actually did or not would depend very largely on whether he or Mrs. Garcia was the original aggressor. His statement is that it was Mrs. Garcia. But on this point his explanation is difficult of belief, to say the least. So far as the explanation goes, the only reason for Mrs. Garcia shooting the defendant was his remark to her, repeated several times, that it was late and she had better wait until her husband came home. It is well-nigh incredible that such a remark, no matter how often repeated, should provoke a woman to the point of endeavoring to kill. It is fairly certain that something must have occurred other than that to which the defendant testified, which caused Mrs. Garcia to shoot. This being so, the jury was justified in rejecting the explanation given by the defendant. There are also certain other circumstances which in some degree corroborate this view. The result is that there are no circumstances of mitigation, excuse, or justification which the jury was obliged in reason to accept, and their verdict of murder is not contrary to the evidence as a whole.

Defendant's counsel refer to and rely upon People v. Elmore, 167 Cal. 205, 138 Pac. 989, as a case parallel to the present. But the difference is marked. In both cases the defendant had admittedly committed the homicide. But in the Elmore Case there were eyewitnesses, and there was no room for doubt as to just how the homicide occurred and as to the incidents which led up to it. The defendant, after endeavoring to avoid a fight, had been set upon in a saloon by a half-intoxicated man, much larger and more powerful, and in the fray killed his aggressor. In the present case the incidents which led up to the homicide are known only to the defendant, and the explanation which he offers is that a woman made a well-nigh unprovoked and wholly inexplicable attempt to kill him, and that in the fray he killed her. In the one case the jury was not justified in refusing to accept the evidence as to how the homicide had occurred and such evidence showed clearly a case of manslaughter only at the worst. In the other the jury could reasonably reject the explanation in its essential particulars.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

182 Cal. 177

FLETCHER v. LOS ANGELES TRUST & SAVINGS BANK. (L. A. 4368.)

(Supreme Court of California. Feb. 3, 1920. Rehearing Denied March 4, 1920.)

1. TRUSTS ⟸61(1)—TRUST MAY BE TERMINATED BY COURT EXCEPT IN INSTANCES STATED.

Where the beneficiaries are sui juris, equity may terminate the trust before the end of the period fixed by the instrument, except where the trust is a spendthrift trust, or where the settlor has plainly declared his intention that such power should not exist, or where a discretion as to the amount of income to be devoted to beneficiaries' needs is vested in the trustee, or where effect of trust is to direct accumulations of the income until fixed time.

2. TRUSTS ⟸61(1)—DISCRETION OF TRUSTEE AS TO INVESTMENTS DOES NOT PRECLUDE TERMINATION OF TRUST.

That trustee has been given discretion to determine nature and character of the investments to be made does not in itself preclude equity from exercising discretion as to termination of the trust, where beneficiaries are sui juris and seek termination.

3. COMMON LAW ⟸8—AMERICAN DECISION CONTROLLING ON CONFLICT WITH ENGLISH DECISIONS IN DETERMINATION OF WHAT CONSTITUTES THE "COMMON LAW OF ENGLAND."

The court, in determining what is "the common law of England" within Pol. Code, § 4468, providing that the "common law of England," so far as not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the state, is the rule of decision in all courts of the state, is not required to look solely to English decisions, but should follow the law as laid down by the courts of the different states where there is a conflict between the modern English and modern American interpretation of the common law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Law.]

4. TRUSTS ⟸61(1)—PRESUMPTION AS TO CAPABILITY OF BEARING CHILDREN PREVENTS TERMINATION OF TRUST.

Equity will not terminate trust upon ground that beneficiary by reason of her age is incapable of bearing children, precluding possibility of birth of other beneficiaries, since it is a conclusive presumption that a woman is capable of bearing children as long as she lives.

5. TRUSTS ⟸61(1)—TRUSTEE NOT PRECLUDED FROM OBJECTING TO TERMINATION OF TRUST BECAUSE OF LACK OF INTEREST IN THE SUBJECT-MATTER.

Trustee is not precluded, by reason of lack of interest in the subject-matter, from objecting to termination of trust or from appealing from judgment terminating trust upon ground that the age of beneficiary does not preclude possibility of her giving birth to other beneficiaries.

In Bank.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Annie K. Fletcher and another against the Los Angeles Trust & Savings Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

Cates & Robinson, O'Melveny, Millikin & Tuller, and Hewlings Mumper, all of Los Angeles, for appellant.

Laurence Macomber, of Los Angeles, for respondent Kimball Fletcher.

Heller, Powers & Ehrman, of San Francisco (Samuel S. Stevens, of San Francisco, of counsel, amici curiæ), for Union Trust Co. of San Francisco.

WILBUR, J. This is an action in equity brought by the plaintiffs to terminate a trust. The defendant is the trustee. The theory on which the action was brought is that Annie K. Fletcher, the mother, and Kimball, the son, plaintiffs, are the sole beneficiaries of the trust, and therefore are entitled to have it terminated. A decree was rendered terminating the trust, and the defendant appeals. The trust was created by the following provision in the will of George C. Kimball, the father of Annie K. Fletcher:

"I give, devise and bequeath one of said four equal parts into which the residue and remainder of my estate shall be divided to Charles M. Wilson of the city of Grand Rapids, Michigan,

in trust, nevertheless, for the following purposes, viz.: He shall invest and keep invested the trust fund hereby created in such manner as he deems safe and desirable and pay the net income therefrom semiannually or oftener, if convenient, to my dear daughter, Annie K. Fletcher, of the city of Minneapolis, Minnesota, so long as she shall live. Upon her death, I give, devise and bequeath the trust fund created by this clause of my will with all accumulations therefrom, if any, to the children of said Annie K. Fletcher, to be equally divided among them by said trustee, share and share alike. And I hereby give full power and authority to said Charles M. Wilson to sell and convey any and all property which shall at any time constitute a part of said trust fund, the proceeds therefrom to be invested as hereinbefore directed."

Annie K. Fletcher has one child, Kimball Fletcher, and it is claimed that by reason of her age and sterility there is no possibility of her having any children other than the plaintiff Kimball Fletcher, and that therefore she and her son represent the only possible beneficiaries under the will. The finding was in accordance with this allegation.

[1, 2] Where the beneficiaries of the trust are all sui juris, and seek the termination of a trust, a court of equity may terminate the same even if the period for such termination fixed by the instrument creating the trust has not yet arrived. Eakle v. Ingram, 142 Cal. 15, 75 Pac. 566, 100 Am. St. Rep. 99, and authorities cited; Beach on Trusts, §§ 705, 761; 39 Cyc. 99; Angell v. Angell, 28 R. I. 592, 68 Atl. 583. Where the trust is a spendthrift trust (Nichols v. Eaton, 91 U. S. 716, 23 L. Ed. 254), or where the settlor made known, expressly or plainly, his intention that such power should not exist (Cowie v. Strohmeyer, 150 Wis. 401, 136 N. W. 956, 137 N. W. 778), or where discretion as to the amount of the income to be devoted to the needs of the beneficiary is vested in the trustee (Estate of Hemphill, 180 Pa. 95, 36 Atl. 409; In re Stewart's Estate, 253 Pa. 277, 98 Atl. 569, Ann. Cas. 1918E, 1216), or where the effect of the trust is to direct accumulations of the income until a fixed time (Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; Shelton v. King, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086), the trust cannot be terminated by the court during the period fixed by the trustor, even where all the beneficiaries are sui juris and consent thereto. There is nothing, however, in the trust created by the will of George C. Kimball which brings it within any of the foregoing well-recognized limitations. The only discretion vested in the trustee is as to the nature and character of the investments to be made. Such provision is insufficient to take the trust out of the general rule. Simmons v. Northwest Trust Co., 136 Minn. 357, 162 N. W. 450, L. R. A. 1917F, 736. The termination of the trust is, however, discretionary with the court. Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 306. For the purpose of invoking such discretionary power no evidence was produced and no allegations made with reference to the facts and circumstances surrounding the testator at the time of the execution of the will, or as to the circumstances of the beneficiaries or the amount of the trust property at the time of the application to the court. There is no allegation or proof of any change in conditions which require the interposition of a court of equity nor any indication that any condition has arisen which was not anticipated by the testator in drawing the will. In short, the case rested exclusively upon the theory that, the beneficiaries of the trust being sui juris and consenting thereto, the trust should be terminated as a matter of right. The only evidence adduced was to prove that all the interested parties were before the court, and this consisted of testimony as to the age and sterility of Mrs. Fletcher, for the purpose of proving the impossibility that she should bear other children. Appellant, however, contends that such evidence was inadmissible, for the reason that there is in law a conclusive presumption that a woman is capable of bearing children as long as she lives. For the purposes of the application of the rule against perpetuities it is uniformly held in England and in this country that a possibility of issue is commensurate with life. 2 Blackstone, 125; State v. Lash, 16 N. J. Law, 388, 32 Am. Dec. 397; List v. Rodney, 83 Pa. 483; In re Dawson, 39 Law Reports, Chancery Div. 155. This conclusive presumption of the possibility of issue has also been rigidly applied in equity by the courts of Georgia, Kentucky, Maryland, Rhode Island, Tennessee, and Texas as a basis of a refusal to terminate trusts where the children of persons still living were to become entitled to the corpus of the property upon its termination, as in this case. In re Dougan, 139 Ga. 351, 77 S. E. 158, 48 L. R. A. (N. S.) 868, Ann. Cas. 1914B, 868 (1913); In re Ricards, 97 Md. 608, 55 Atl. 384, 63 L. R. A. 145; Garner v. Dowling, 58 Tenn. [11 Heisk.] 49; May v. Bank of Hardinsburg, 150 Ky. 136, 150 S. W. 12, 48 L. R. A. (N. S.) 865; Quigley's Trustees v. Quigley, 161 Ky. 85, 170 S. W. 523. The foregoing cases are cited with approval in Reeves v. Simpson (Tex. Civ. App. 1915) 182 S. W. 68, a case involving a spendthrift trust for a man. In Rhode Island (Bowlin v. Rhode Island Hospital Co., 31 R. I. 289, 76 Atl. 348, 140 Am. St. Rep. 758) it has been held that evidence of the age or sterility of a woman cannot be introduced in such a case. The reasoning of these courts, which need not be here repeated, places the inadmissibility of such testimony upon grounds of public policy, applicable with full force to such equitable proceedings. These courts cite and apply the conclusive presumption stated in Blackstone (2 Black. 725) as a basis of decision in such equitable proceeding. The English decisions

have rigidly enforced this rule in cases involving perpetuities. In Re Dawson, 39 Ch. Div., supra, it was said:

"A possibility of issue is always supposed to exist in law, unless extinguished by the death of the parties, even though the donees be each of them 100 years old."

In that case, however, it was recognized that a different rule prevails with reference to the distribution of trusts in the equity court. In that regard it is there stated:

"Another argument was adduced with reference to what appears to be the practice of the Court of Chancery in former times and of the Chancery Division of the High Court in the present day with reference to payment out where there is a married woman whose children are to take and the lady has attained a certain age. Those are cases, I think, when examined from the beginning down to the present time, in which the court does not assume the impossibility of issue, but as a mere matter of convenience of administration, regards the high degree of improbability, and it has come now to be fixed somewhere about the age of 54, although the circumstances may still be inquired into. But with regard to the rule against perpetuities a high degree of probability or improbability will not do. * * * The practice of the court at one time, say about the first quarter of this century, was to require security, and that went on for some time afterwards, and in the case of Leng v. Hodges (1), mentioned by Sir Arthur Watson, money was paid out on the assumption that the lady, who was 69 years of age, would not have any issue, but security was taken. Subsequently, in 1845, I think, security was taken and the lady's age was 64. But after a time the court has thought it might dispense with security and act upon so high a degree of improbability that it did not require, as was once the practice, an undertaking—even sometimes the undertaking of the married lady—to refund. I take it if there were children afterwards born, they would still be in a position, notwithstanding the order, to claim what had been unjustly taken from them. I mention those cases in order to state my opinion that they have not established the principle of the impossibility of the lady having issue. They are only illustrations of a convenient rule of practice in the administration of justice."

Trusts have been terminated in the Chancery Courts of England upon the presumption that a woman has ceased to have the capacity of childbearing. In the recent case of White v. Edmond (1901) Law Report, Ch. Div. vol. 1, p. 570, Buckley, J., justice of the High Court, attached to the Chancery Division, held that a widow of 56 years and 3 months is to be taken as past the childbearing age, and cites cases in which a widow of 55 years and 4 months, who never had any children, and a spinster 53 years and 9 months, and a lady 49 years and 9 months, who had been married 26 years and never had a child, and a spinster 54 and another of 56, had been taken to be beyond the childbearing age. It was therefore held that the fund could be distributed. See, also, English cases cited in note to 37 N. J. Eq. 502, and note 1, 16 Cyc. 1073. We must arrive at our conclusion in view of this direct conflict between the American and English decisions on the subject of a termination of the trust by a court of equity.

[3] Section 4468 of the Political Code, enacted in 1872, re-enacting the act of April 13, 1850 (Stats. 1850, p. 219), provides that the common law of England, so far as not repugnant to or inconsistent with the Constitution of the United States or the Constitution or laws of this state, is the rule of decision in all the courts of this state. If, therefore, we should accept the modern decisions of the English courts upon this question and ignore the decisions of our sister states, we would be constrained to hold that the conclusive presumption invoked by appellant did not apply, and that the trust might be terminated whenever the court was satisfied that Mrs. Fletcher had reached a physical condition rendering it impossible for her to bear children. We are not, however, to look solely to the English decisions for the purpose of determining "the common law of England." Most of our sister states base their decisions upon that common law. Those decisions declarative of the common law are evidence of that law. As was said in Lux v. Haggin, 69 Cal. 384, 10 Pac. 749:

"The expression 'common law of England' designates the English common law as interpreted as well in the English courts as in the courts of such states of the Union as have adopted the English common law. * * * It was not the common law 'as the same was administered' at a certain date that was adopted, but the common law. Indeed, the administration of the law in particular cases may be a very different thing from the law itself. * * * The statute adopts the common law of England, except where inconsistent with the Constitutions and statutes, and there can be no good reason why, to ascertain the common law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute."

In Seymour v. McAvoy, 121 Cal. 438, 442, 53 Pac. 946, 947 (41 L. R. A. 544), the court was confronted with a situation with reference to trusts in personalty, where the American courts had departed from the doctrine of the English courts upon the rights of creditors and beneficiaries with reference to a spendthrift trust. In that action it was said:

"As there was not at the testator's death any statute in force in this state on the subject, this case must be decided in accordance with the rules of the common law; and in ascertaining those rules we may look as well to the decisions in other states of this Union possessing the common law, as to those of the English courts"—citing Lux v. Haggin, supra.

This court thereupon adopted the rule of the American courts in contradistinction to the rule in the English courts, saying:

"By the great weight of authority in America it is settled that the author of a trust to pay to or apply for the benefit of another the income of property, or a portion of such income, may lawfully provide that the interest of the beneficiary shall not be assignable, or shall not be subject to the claims of his creditors"—citing among other cases Nichols v. Eaton, 91 U. S. 716, 725, 23 L. Ed. 254, in which the Supreme Court of the United States expressly declined to follow the English Chancery Court in determining what was the common law.

In cases of a square conflict between modern English and modern American interpretation of the common law we should follow the American exposition. The enactment by our Legislature in 1850 and the re-enactment of 1872 of the statute making the common law of England the rule of interpretation in this state ought not to be taken as requiring us to follow the current decisions of English courts where these decisions differ from the American rule; for these decisions were not in contemplation by the Legislature when the statute was adopted. We should follow those rules as interpreted and applied by the American states where there is a conflict. This was the course pursued by the Supreme Court of the United States in Shelton v. King, supra. The departure of the American courts from the English rule is well recognized. In 16 Cyc. 1073, it is said:

"In England courts frequently act upon the inference that women under various circumstances of age and other conditions have become incapable of bearing children. On the other hand, in the United States a woman is assumed capable of childbearing at any age of adult life."

The American rule is thus stated in the Encyclopedia of Evidence, vol. 2, p. 848:

"On the general subject of the inheritance and devolution of estates, it is never presumed that a woman, no matter how aged, is incapable of bearing children."

[4] While we are thus at liberty to adopt either the American or the English rule, in view of the unanimity of the American decisions, and for the reasons stated, we are constrained to hold to the rule of decision of the American courts. We are the more ready to do this, as such an interpretation can wrong no one, and the result of such a rule is merely to enforce the clearly expressed intention of the trustor, and is more in accord with the American law concerning trusts in personalty. Shelton v. King, supra; Seymour v. McAvoy, supra.

[5] It follows that the decision appealed from was erroneous. The contention that the trustee cannot raise the question, or appeal, by reason of a lack of interest in the subject-matter, is not well taken. Gray v. Union Trust Co., supra; Shelton v. King, supra. Even in the case of Eakle v. Ingram, supra, relied upon by respondent for a dismissal, the appeal was not dismissed, but determined upon its merits.

Judgment reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

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In re DOL'S ESTATE.

SOCIÉTÉ FRANÇAISE DE BIENFAISANCE MUTUELLE DE LOS ANGELES v. FLINT et al. (L. A. 6059.)

(Supreme Court of California. Feb. 2, 1920. Rehearing Denied March 1, 1920.)

1. WILLS ⊂=14 — CORPORATION HELD NOT "CHARITABLE OR BENEVOLENT SOCIETY" WITHIN STATUTE RESTRICTING CHARITABLE DEVISES.

A corporation organized in 1862 under the provisions of act of April 22, 1850, p. 373, subc. 8, for the purpose of securing to its members without payment, otherwise than of dues, medical and surgical treatment, which established a hospital and employed physicians, the articles of incorporation providing "that the object of said society should be mutual assistance of the members thereof in case of sickness thereof," was not a "charitable or benevolent society" within the meaning of Civ. Code, § 1313, providing that no property shall be bequeathed or devised to such a society or corporation in trust for charitable uses except the same be done by will duly executed at least 30 days before the decease of testator, although persons not members could be admitted to the hospital on payment of such sum as the directors should exact, and although any white person of good health could be admitted into the society on payment of dues.

2. WILLS ⊂=14 — ESSENTIAL FEATURE OF "CHARITABLE USE" IS THAT IT BE FOR PUBLIC BENEFIT.

One of the essential features of a "charitable use" within such statute is that it shall be for the public benefit, either for the entire public or for some particular class of persons indefinite in number who constitute a part of the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charitable Use.]

3. WILLS ⊂=14—NO PRESUMPTION OF CHARITABLE NATURE OF CORPORATION BY REASON OF STATUTE UNDER WHICH ORGANIZED.

The language of St. 1850, p. 373, § 175, providing that it shall be lawful for all "churches, congregations, religious, moral, beneficial, literary or scientific associations or societies" to become incorporated, does not justify a con-

clusion that all corporations organized under such act are ipso facto charitable or benevolent associations or corporations.

4. WILLS ⟸14—CHARACTER OF CHARITABLE CORPORATION DETERMINED BY ARTICLES AND BY-LAWS AND CONDUCT AND NOT BY STATUTE UNDER WHICH ORGANIZED.

Even though St. 1850, p. 373, § 175, be construed not to authorize the formation of any corporation other than a charitable or benevolent one, it does not necessarily follow that a corporation organized under such statute is a charitable or benevolent corporation, since the character of the corporation, either as a de facto corporation or as a voluntary association, is to be determined by the terms of its articles and by-laws and its conduct and acts in pursuance thereof.

5. WILLS ⟸16—MOTIVE OF TESTATOR IMMATERIAL AS TO WHETHER OR NOT A GIFT WAS TO A CHARITABLE OR BENEVOLENT SOCIETY; "CHARITABLE"; "BENEVOLENT."

The fact that makes a bequest void under Civ. Code, § 1313, where made within 30 days prior to death of testator, is that it is made to a charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, and it is immaterial that a bequest is made by the testator from motives of benevolence; there being no essential difference between the words "charitable" and "benevolent."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Benevolent; Second Series, Charitable.]

6. CHARITIES ⟸35—BEQUEST HELD TO CONFER AN ABSOLUTE PROPERTY AND NOT TO CREATE A TRUST.

A bequest, "I give and bequeath unto the French Hospital of the City of Los Angeles the sum of $5,000," made the money the absolute property of such hospital and did not impose upon it any trust.

7. CORPORATIONS ⟸436—COULD ACCEPT BEQUEST IN ABSENCE OF ELECTION TO CONTINUE UNDER CODE.

A corporation organized under St. 1850, p. 373, § 175, which authorized it to take gifts of real or personal property, may still accept bequests, where it has not elected to continue under the code, under Civ. Code, §§ 287, 288, 1275.

Department 1.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Victor Dol, deceased. From an order directing distribution under the terms of the will of money to the Société Française de Bienfaisance Mutuelle de los Angeles, Frank P. Flint and others appeal. Affirmed.

Donald Barker and Flint & Jutten, all of Los Angeles, for appellants.

Carroll E. King, Henry T. Gage, and W. I. Foley, all of Los Angeles, for respondent.

SHAW, J. This is an appeal by the executors of the will of Victor Dol, deceased, and by the residuary legatees of the estate under said will, from an order distributing to the respondent the sum of $5,000 given to said respondent by the terms of said will.

The will of the decedent was executed on February 14, 1911, and he died on March 13, 1911, less than 30 days thereafter. The contention of the appellants is that the respondent is a charitable or benevolent society or corporation, and consequently that any devise to such a corporation made within 30 days prior to the death of the testator is void under the provisions of section 1313 of the Civil Code. The part of the section in controversy reads as follows:

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; * * * and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law."

The defendant was organized as a corporation in 1862, under the provisions of subchapter 8 of the act of April 22, 1850 (St. 1850, p. 373), entitled "An act concerning corporations." Its articles of incorporation contained the statement "that the objects of said society should be mutual assistance to the members thereof in case of sickness." The by-laws declared that the society was "established for the only purpose of mutual assistance in case of sickness." They further provided that all persons of the white race of good health, sound mind, and good morals could be admitted as members of the society; that, in order to become a member of the society, the applicant must pay an admission fee varying from $3 to $20, according to age; that all members should pay monthly dues varying from 50 cents to $2, according to age; and that failure to pay dues should forfeit the rights of membership. The society established a hospital and employed physicians, and the by-laws in effect provided that members should be entitled to admission to the hospital and medical treatment therein on depositing one week's charges in advance, and to visits by the society physician at their homes. Other persons, not members, could be admitted to the hospital on payment of such sum as the directors should exact.

It will be observed that no person is to receive any benefit from the society except members thereof and such others as should be admitted to the hospital upon the payment of an agreed compensation.

[1] We are of the opinion that the society is not a charitable or benevolent society,

within the meaning of section 1313. The proposition is settled by the decision in Brown v. La Société Française de Bienfaisance Mutuelle of San Francisco, 138 Cal. 475, 71 Pac. 516. That was an action against the defendant society to recover damages for alleged unskillful conduct of the defendant's surgeon in setting the plaintiff's broken leg. In determining the liability of the defendant it became necessary to determine whether or not it was a charitable society or corporation. An examination of the copy of the by-laws of that society contained in the record of that case shows that in all essential particulars they were the same as those of the respondent here. That society was incorporated in 1854, under the same law. The by-laws of the respondent here appear to have been substantially copied from those of the San Francisco society and they are certainly no more favorable to the theory that it is a charitable corporation than the other. In the Brown Case the court said that from the by-laws it appeared that—

" 'The society is established on the basis of mutuality for the treatment of sick members,' or, as more specifically provided, for the purpose of securing to its members (without payment otherwise than of dues) medical and surgical treatment, including the services of its physicians, surgeons, apothecaries, dentists, nurses, etc., and also medicines. Nor do we find in it any provision for assistance to others, except to paying patients, or sick persons not members, admitted to treatment for agreed compensation. It is therefore merely an association for mutual profit or benefit, similar in its essential nature to other societies formed for such purposes."

Referring to the original by-laws, the court said:

"These, indeed, permit, and even contemplate, the exercise of charity as one of the aims of the society, but there is nothing in them requiring the application of the funds of the society to such purposes (Donnelly v. Boston Catholic Cemetery, 146 Mass. 166, 167 [15 N. E. 505]); nor can the funds contributed by the members be regarded otherwise than as, beneficially, their own property (Coe v. Washington Mills, 149 Mass. 547, 548 [21 N. E. 966])."

The same principle is stated in Gorman v. Russell, 14 Cal. 531. Referring to an organization known as the "Riggers and Stevedores Union Association of San Francisco," which was unincorporated, the court said that it was "a voluntary association formed for the benefit of the members of it," and further that—

"A number of the members of a particular avocation meet for mutual benefit and protection, and prescribe rules for the government of the society thus organized. They agree that each shall contribute a certain fixed sum to the common treasury, and that the sum shall be applied, in a certain event, as in sickness, etc., to the relief of the necessities or wants of the individual members or of their families. This is not a charity any more than an assurance society against fire, or upon life, is a charity. It is simply a fair and reciprocal contract among the members to pay certain amounts, in certain contingencies, to each other, out of a common fund."

The fact that the society there involved was unincorporated makes no essential difference. The members of the corporation here involved are interested therein substantially in the same way as the members of a voluntary association or partnership formed for the same object are interested. No sound distinction exists on this ground. In each case the arrangement partakes of the nature of a contract whereby, for the dues and fees agreed upon and paid, the members receive the medical treatment to be given by the association at the expense of the common fund thus accumulated. Such a society, whether incorporated or not, is not doing charitable work, but is merely rendering the consideration agreed upon in the contract between it and its members.

[2] There is another reason which forbids the conclusion that the respondent is a charitable society or corporation, even if its funds come not solely from charges against its members and patrons. One of the essential features of a charitable use is that it shall be for the public benefit, either for the entire public or for some particular class of persons, indefinite in number, who constitute a part of the public. The persons to be benefited must consist of "the general public or some class of the general public indefinite as to names and numbers." Estate of Coleman, 167 Cal. 214, 138 Pac. 993, Ann. Cas. 1915C, 682; Estate of Lennon, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024. In Estate of Cogswell, 113 Cal. 136, 45 Pac. 270, 35 L. R. A. 269, referring to the claim that a trust for the benefit of the boys and girls of California was void for uncertainty because the particular boys and girls were not capable of designation, the court said:

"It should scarcely be necessary to observe that, when the class has been designated, this very vagueness and uncertainty, and indefiniteness as to individuals and numbers, is a necessary and essential element to the creation of a valid charitable trust."

The court quoted the following from Russell v. Allen, 107 U. S. 167, 2 Sup. Ct. 330, 27 L. Ed. 397, regarding the essentials of charitable trusts:

"They may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity."

In Estate of Sutro, 155 Cal. 736, 102 Pac. 920, the opinion quotes the full definition of

a charity given in Jackson v. Phillips, 96 Mass. (14 Allen) 556. The definition begins with the statement that—

"A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons."

With regard to the full definition there given, this court said that—

It "must be read with the opening phrase constantly in mind that the benefit is for 'an indefinite number of persons,' and not for any particular person or persons, and it must be for all persons falling within a described class, indefinite in number."

There is no force in the argument of the appellants that the persons who are entitled to treatment in the hospital of the respondent society are indefinite in number because the number of members varies from time to time, or because all white persons are eligible for membership. Under its articles and by-laws, no one is entitled to the benefits who does not make an application, pay the initiation fee, become admitted as a member and thereby become a party to the common contract, except those who, not being members, are treated for an agreed compensation as in any other hospital. [*] Many other cases may be cited which support the foregoing propositions. As to corporations for the benefit of members, see Young Men's, etc., Soc. v. Fall River, 160 Mass. 409, 36 N. E. 57; Bolton v. Bolton, 73 Me. 303; Burke v. Roper, 79 Ala. 142; State Council, etc., v. Board, 198 Ill. 441, 64 N. E. 1104; Newport v. Masonic Temple Ass'n, 108 Ky. 339, 56 S. W. 405, 49 L. R. A. 252; St. Clement v. L'Institut Jacques Cartier, 95 Me. 493, 50 Atl. 376; Franta v. Bohemian, etc., Union, 164 Mo. 311, 63 S. W. 1100, 54 L. R. A. 723, 86 Am. St. Rep. 611; Susmann v. Y. M. C. A., 101 Wash. 493, 172 Pac. 554; Morning Star Lodge v. Hayslip, 23 Ohio St. 146; 11 Cor. Jur. 305. As to the necessity that the beneficiaries be indefinite in number, see Fay v. Howe, 136 Cal. 601, 69 Pac. 423; Estate of Upham, 127 Cal. 95, 59 Pac. 315; Spence v. Widney, 46 Pac. 466; Estate of Hinckley, 58 Cal. 488; 11 Cor. Jur. 340.

[3, 4] Appellants contend that the character of the corporation is conclusively determined by the fact that it was organized under subchapter 8 of the act of 1850, which, as they claim, provides for the incorporation of charitable associations only. The first section of the chapter (section 175, Stats. 1850, 373) provides that it shall be lawful for all "churches, congregations, religious, moral, beneficial, literary or scientific associations or societies," to become incorporated under the provisions of the act. We do not think this language justifies the conclusion that all corporations organized under the act are, ipso facto, charitable or benevolent associations or corporations. Corporations of the character named may be either charitable or not, according to the powers they have under the provisions of their articles and by-laws, and their purposes as therein specified. On that subject the statute is silent. In Stewart v. California, etc., Ass'n, 176 Pac. 47, the court said on this subject that—

"The declaration in the articles alone are insufficient to establish the character of the St. Helena Hospital as a public charity, and the evidence of the manner [in which] it was conducted shows that it was not."

And again:

"The character of the institution is to be determined, not alone by the powers of the corporation as defined in its charter but also by the manner of conducting the hospital."

See, also, Bolton v. Bolton, supra.

If it should be objected that the statute does not authorize the formation of such a corporation as the respondent, the answer is that its character, either as a de facto corporation, or as a voluntary association, is nevertheless to be determined by the terms of its articles and by-laws and its conduct and acts in pursuance thereof, and that they show that it is not a charitable or benevolent organization.

There is no force in the argument that neither the articles of incorporation nor the by-laws appear to contemplate the making of profits by the hospital or the payment of dividends to the members. Whether intended to produce profits or not, it is clear that the property was to be used for the benefit of members only and not for charity. In Brown v. La Société, etc., supra, on point the court said:

"Nor can the funds contributed by the members be regarded otherwise than as, beneficially, their own property."

If the society should at any time dissolve, there could be no doubt that the trustees would hold its funds, property, and assets as property belonging to the members individually. This question is fully discussed and so decided in Coe v. Washington Mills, supra, cited in the Brown Case in support of the last-quoted statement.

[5] Appellants contend that there is some essential difference between the words "charitable" and "benevolent" as used in section 1313. We think there is no justification for any distinction as applied to the present case. Estate of Hinckley, 58 Cal. 511; Suter v. Hilliard, 132 Mass. 412, 42 Am. Rep. 444; Bangor v. Masonic Lodge, 73 Me. 434, 40 Am. Rep. 369. The facts already stated show that the society was not formed for purposes properly definable as benevolent, but wholly to accomplish the plan embraced in the contract between it and its members, a contract based on a valuable consideration which the

*Sentence stricken out at this place by order dated March 1, 1920.

law deems adequate. The appellants seem to base their argument on this point in part on the idea that the bequest of Dol to the respondent was made from motives of benevolence. This may readily be conceded, but section 1313 does not declare that such bequests are void. The fact that makes the bequest void is that it is made to a charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses within 30 days before the death of the testator. The purpose in mind of the testator and his motive are alike immaterial.

[6] The bequest under consideration here does not by its terms create any trust whatever. It reads as follows:

"Fourth. I give and bequeath unto the French Hospital of the City of Los Angeles, the sum of five thousand dollars."

It is admitted that by the term "French Hospital" the testator intended to designate the respondent. The legal effect of the bequest is to make the money the absolute property of the respondent, and the language does not impose upon it any trust.

[7] There is a suggestion in the briefs which indicates that there was some question concerning the capacity of the respondent corporation to take a bequest by will. Section 1275 of the Civil Code provides that corporations not formed for hospital purposes or certain other specified purposes cannot take under a will, unless expressly authorized by statute. Section 288 provides that the laws under which corporations existing at the time the Code took effect were formed are applicable to all such corporations which do not elect to continue their existence under the Code provisions as provided in section 287. As we have seen, the statute under which the respondent corporation was formed authorized it to take gifts of real or personal property. As the corporation has not elected to continue under the Code, this provision still remains in force with respect to this corporation. It follows that it has power to accept the gift in controversy, although by section 288 the act of 1850 and its amendments were repealed except as to corporations similarly situated to the respondent.

The order is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

45 Cal. App. 281

FOTO v. BUSSELL et al. (Civ. 3159.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1919.)

GUARANTY ⚖60½ — TRANSFER OF PLEDGED STOCK ON BOOKS OF CORPORATION NOT A "CONVERSION" RELEASING GUARANTOR.

Where certain corporate stock had been pledged as security for the payment of a note, that the pledgee and owner of the note procured such stock to be transferred to him upon the books of the company and had a new certificate issued in his name and voted the stock at a stockholders' meeting, but did not destroy the stock or appropriate it to a third party, and did not sell it until after maturity of the debt, such actions did not constitute a conversion of the stock within Civ. Code, § 2819, so as to exonerate defendant as guarantor on the note.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conversion.]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Philip Foto against J. C. McLemore and Elizabeth V. Bussell on a note. Judgment by default against defendant McLemore, and, after trial, against defendant Bussell, and the last-named defendant appeals. Affirmed.

Muhleman & Crump, of Los Angeles, for appellant.

Stephen Monteleon, of Los Angeles, for respondent.

KERRIGAN, J. This action was brought by Philip Foto, the indorsee of a promissory note, against J. C. McLemore, the maker, and Elizabeth V. Bussell, accommodation guarantor thereof, to recover the principal sum of $5,000 and interest. Defendant McLemore suffered a judgment by default to be entered against him. Subsequently certain stock of a California corporation, given as collateral security for the payment of the note, was, pursuant to the terms of the agreement pledging the stock, sold, and the sum of $500, the price realized at said sale, was credited upon the note. After trial judgment was entered against defendant Bussell for approximately $4,500, and she now appeals from the judgment.

In support of her appeal the appellant contends that there was a conversion of the stock, and that therefore, under the provisions of section 2819 of the Civil Code, she as guarantor was exonerated. The section referred to reads:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

It is true that the evidence shows that, after the plaintiff became the owner and holder of the note and the pledgee of the stock, he, at the suggestion of the secretary of the corporation that the stock should be transferred to him upon the books of the company, delivered the certificate to the secretary

for the purpose, and on the same day it was canceled and a new one issued in the name of the plaintiff. The evidence also shows that on one occasion the plaintiff voted the stock at a stockholders' meeting. But, on the other hand, it appears that the stock was not appropriated to a third party, nor destroyed, nor its nature altered in any respect; that until after the sale of the stock under the agreement of pledge plaintiff fully understood and recognized that he was merely a pledgee of the stock, and no act of his was calculated to change that relationship. Indeed, when the note remained unpaid after maturity, he caused it to be sold according to the terms of the said agreement, and credited the note with the amount of the proceeds of the sale.

The court found that the plaintiff did not unlawfully or otherwise convert or appropriate or dispose of said stock to his own use; that he did not alter or cause to be altered the original obligation of the principal, or impair or suspend the remedies or rights of plaintiff against the principal in respect to the said promissory note and the security pledged therewith, by converting, appropriating, or disposing of the same to his own use, or by exercising acts of control or ownership over the pledged security; that said certificate for said stock was canceled on the books of the company and a new certificate issued to plaintiff in lieu thereof in the name of Philip Foto, but that said transfer was made merely to protect the rights of said plaintiff as the pledgee of said shares of stock; that said plaintiff did vote and cause to be voted said stock at the annual meeting of the stockholders of the said corporation held in February, 1916, not as his own stock, but as the pledgee thereof.

The evidence sustains the findings.

Judgment affirmed.

We concur: WASTE, P. J.; WOOD, Judge pro tem.

45 Cal. App. 262

GHIO v. CLINE. (Civ. 3137.)

(District Court of Appeal, First District, Division 2, California. Dec. 24, 1919.)

1. ESTOPPEL ⊂⊃83(2)—STATEMENT AS TO OWNERSHIP OF ATTACHED BOAT BY ANOTHER NOT ESTOPPING TRUE OWNER.

Where statements by the owner of a boat that his father was the actual owner, made to assignors of a creditor of the father which attached the boat, were not made to induce the attaching creditor to levy, and did not attain their object of obtaining credit for the father, while the attaching creditor made no other inquiry or effort to determine the matter of ownership, having means of knowledge, the owner of the boat was not estopped from claiming it as against the attachment and the sheriff.

2. REPLEVIN ⊂⊃76—RENTAL VALUE MEASURE OF DAMAGES.

In replevin for a boat or other chattel, rental value is the measure of damages for detention, in the absence of any other showing.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Dario L. Ghio against John C. Cline. From judgment for plaintiff, defendant appeals. Affirmed.

Wm. Tomsky, of San Francisco, for appellant.

C. W. Pendleton and Carter & Torchia, all of Los Angeles, for respondent.

NOURSE, J. This is an appeal from a judgment against the defendant, the sheriff of Los Angeles county, in an action of claim and delivery for the recovery of a fishing boat and equipment, held by the sheriff under a writ of attachment.

The facts are that the boat, which was built and equipped at Sausalito, was sailed to San Pedro harbor by the father of plaintiff, where it was used for fishing purposes, partly by the father, but chiefly by the plaintiff. The father was indebted to three different persons who each assigned their claims to Rauer's Law & Collection Company, a corporation, for collection. This company commenced three separate actions in the superior court of Los Angeles county against both father and son. Three separate writs of attachment were issued, and the sheriff, acting under the instructions of the company, attached and took into his possession the boat with its equipment. A third party claim was filed by the son, who, some eight months thereafter, commenced this action. In the attachment suits referred to, judgment went against the father, but the son obtained a judgment of nonsuit in his favor in each case. In this proceeding judgment was rendered in favor of plaintiff for the return of the property attached or its value, which was fixed at $2,000, and for damages for the detention and deterioration, fixed at $884. It was found that all the property had been delivered to the plaintiff immediately after the action was commenced except one dragnet, the value of which was found to be $90, and judgment was given for this amount in addition to the $2,000 found to be the total value of all of the property taken.

By way of defense the sheriff relied upon the estoppel of plaintiff to claim the property and damages arising out of his statements, made to the assignors of the attaching creditor, that the father was the actual owner of the boat. The trial court found that these statements had been made for the purpose of obtaining credit and extension of time upon the indebtedness of the father, but that neither such credit nor extension of time was ob-

tained by reason of the statements. It also found that they had been communicated to the attaching creditor, that it relied upon them when the instructions were given to the sheriff to levy the attachments, but that such statements were not made by plaintiff with the intention of inducing the defendant or the attaching creditor to levy the attachments on the property.

On this appeal appellant assigns as error the conclusion of the trial court that the plaintiff was not estopped to claim ownership of the property or damages for its detention by reason of these misstatements. Two decisions of the Supreme Court of this state are cited by appellant in support of his position upon the defense of estoppel. The first, Mitchell v. Reed, 9 Cal. 204, 70 Am. Dec. 647, was an action against a constable for the loss of a stock of liquors sold by him under a writ of attachment. The plaintiff Mitchell was a merchant engaged in the sale of groceries and liquors. He was also a Son of Temperance, and for that reason had repeatedly denied that he dealt in liquors, stating that the stock in his store was the property of his clerk, who sold them on his own account. These declarations coming to the attention of a creditor of the clerk, he sued out an attachment and had the liquors attached and sold as the property of the clerk. Mitchell obtained judgment against the constable in the court below, which was reversed by the Supreme Court upon the ground that the intention with which the declaration was made was not material, but that, if the declarations had been acted upon by another to his detriment, the party guilty of the misrepresentation was thereafter estopped to unsay what he had before said. Though this case has not been directly reversed or modified by the Supreme Court, there can be no doubt that it is contrary to the great weight of authority upon the doctrine of estoppel. Subdivision 3, § 1962, of the Code of Civil Procedure, in enumerating the presumptions which are deemed conclusive, provides:

"Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Though this was not intended to be a statement of the doctrine of estoppel, it does in many respects follow the rule which is supported by the great weight of authority as to the elements of that defense.

Thus, in Barnhart v. Fulkerth, 90 Cal. 157, 27 Pac. 71, an action for replevin and damages for an unlawful attachment brought on behalf of the true owner of the property, the Supreme Court held that the plaintiff was estopped from claiming the property because of his misrepresentations as to ownership, made to the sheriff immediately prior to the levy of the attachment. In that case it appeared that the plaintiff, knowing that an action had been instituted and that the sheriff was about to levy an attachment upon the property, stated that the property belonged to the defendant in the attachment suit and that he, the plaintiff, held a chattel mortgage on it. Acting upon these representations, and without further inquiry, the sheriff levied the attachment. Thus, by his own declaration, the plaintiff "intentionally and deliberately led another to believe a particular thing true, and to act upon such belief," and the case came clearly within the provisions of section 1962.

The elements present in the Barnhart Case are not found here. The misrepresentations as to ownership were made by respondent for the purpose of obtaining credit and extension of time upon the indebtedness of his father. The court found that neither the credit nor extension of time were obtained by reason of the misrepresentations alone. Respondent had no knowledge of a contemplated suit against his father or of an attachment against the property. These suits were all instituted long after the false representations were made. Thus, though the representations were falsely made for the purpose of working a fraud, the object was not obtained; and, though the attaching creditor relied upon these misrepresentations when it instructed the sheriff to attach the property, it did so at its peril, because it was at all times able to make inquiry as to the fact of ownership and to ascertain the truth of the statements, but it made no effort to do so. In the Barnhart Case the sheriff himself was at the time making investigation as to the ownership of the property and was justified in relying upon the statements then made to him by Barnhart with the knowledge that on the basis of such statements the property would be immediately attached. In the Mitchell Case the misstatements had been frequently made, were intended to be general, and thus became matters of common knowledge.

[1] The trial court having found that the objects for which the false representations were made were not obtained, and that they were not made for the purpose of inducing the attaching creditor to levy the attachment, and that the attaching creditor made no other inquiry or effort to determine the matter of ownership, having the means of knowledge thereof, its conclusion that respondent was not estopped from claiming the property correctly followed.

[2] As to the matter of damages for the wrongful detention, the testimony was confined to the rental value of the property. Though the respondent testified that he knew nothing about the rental value "because all of the boats go on shares," there was some testimony which tended to support the finding of the court that the rental value of the property taken was $90 a month. The defendant offered no evidence on this branch of the case.

"Rental value" is the measure of damages in replevin in the absence of any other showing. Tucker v. Hagerty, 174 Pac. 908.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

45 Cal. App. 294

SOUTHERN TRUST & COMMERCE BANK v. SAN DIEGO SAVINGS BANK.

(Civ. 3168.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1919. Hearing Denied by Supreme Court Feb. 25, 1920.)

GUARDIAN AND WARD ⊜16—GUARDIAN MAY ACT AS SUCH AFTER APPROVAL OF BOND BUT BEFORE ISSUANCE OF LETTERS.

Under Code Civ. Proc. § 1754, providing that before order of appointment takes effect, and before issuance of letters, bond shall be filed and approved, the act of a guardian in drawing a check on a bank on the same day that his bond was approved and filed, but two days before the issuance of letters and the taking of oath, was not without authority of law; letters of guardianship not being an essential prerequisite.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by the Southern Trust & Commerce Bank, as administrator of the estate of John Wood, deceased, against the San Diego Savings Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

Glen H. Munkelt, of San Diego, for appellant.

Sweet, Stears & Forward, of San Diego, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of defendant.

The action was brought to recover the sum of $3,500, alleged to have been wrongfully paid by the defendant upon a check drawn and signed by E. M. Barber, as guardian of the estate of John Wood, an incompetent. From the record it appears that on January 6, 1914, an order was duly made and entered by the superior court of San Diego county appointing E. M. Barber guardian of the person and estate of John Wood, an incompetent person. The order provided:

"Now, therefore, it is ordered, adjudged, and decreed that E. M. Barber be and he is hereby appointed the guardian of the person and estate of said John Wood, an incompetent person; and it is further ordered that letters of guardianship issue to said E. M. Barber upon his giving a bond to said John Wood with sufficient sureties to be approved by the judge of this court in the penal sum of ten thousand dollars, conditioned that said guardian shall faithfully execute the duties of his trust according to law."

On January 7, 1914, said Barber presented the bond required by said order, and, on the same day it was approved and filed. The condition of the bond reads:

"The condition of the above obligation is such that whereas an order was made by the superior court of the county of San Diego, state of California, on the 6th day of January, 1914, appointing the above-named principal, E. M. Barber, guardian of the person and estate of John Wood, an incompetent person, and letters of guardianship were directed to be issued to him upon his executing a bond according to law in the sum above named, Now, therefore, if the said principal shall faithfully execute the duties of the trust according to law, then this obligation shall be void; otherwise to remain in full force and effect."

Thereafter, and on January 9, 1914, letters of guardianship were issued to said Barber and duly filed.

Section 1754 of the Code of Civil Precedure provides:

"Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order," etc.

On January 7, 1914, being the same day on which the bond was approved and filed, but two days before the issuance of letters of guardianship and the taking of the oath, Barber, as such guardian, drew a check on the defendant bank, the one above referred to, which was cashed by defendant and the amount thereof charged to the account of the incompetent. No question appears to be raised as to the disposition of the funds paid upon the check or the right of the bank to honor it and charge the same to the account of the incompetent if said Barber had authority to draw the check. The only serious question presented for determination is as to whether or not, under the facts as briefly narrated, Barber had authority, as guardian, to draw such check.

The question has been decided adversely to appellant's contention that he had no such authority by the Supreme Court of this state in the case of Whyler v. Van Tiger, 2 Cal. Unrep. Cases, 800, 14 Pac. 846. There Mary E. Whyler, the mother of a minor, was appointed its guardian, and she thereupon caused to be presented and approved the bond required by the order of her appointment, and immediately entered upon the discharge of her duties as guardian, but no letters of guardianship were issued to her nor did she take the oath of office. She and the minor owned as tenants in common a piece of real property. On the day after the bond

was filed, acting individually and also as guardian of the estate of the minor, she executed a lease of said premises to the defendant. The question there presented was as to whether or not the lease was valid. The court decided, in effect, that the taking of the oath and the formal issuance of letters of guardianship were not essential prerequisites to the exercise of authority as a guardian, the court saying:

"There is no error in the record. We think that Mrs. Whyler was a guardian when she executed the lease to defendant and that the lease was properly executed."

That case in all material respects is like the present one; and, if the lease in that case was the act and deed of the guardian, certain it is that the check here involved must be regarded as validly issued by said Barber. We cannot distinguish the two cases. Authority in other jurisdictions is in accord with the conclusion reached in the case cited. In 21 Cyc., at page 41, it is said:

"What is known as letters of guardianship is in the nature of a certificate or commission, and while they furnish convincing evidence of the guardian's authority to strangers, are not necessary to authorize the guardian to act or to impress upon him the obligations and burdens of his trust."

In Eyster's Appeal, 16 Pa. 372, it is held that the record of the orphans' court is evidence of the appointment of a guardian, and that the issuing of a certificate of appointment is not material, and that an act as guardian by the person appointed is an assumption of the trust. The cases appear to proceed upon the theory that, while it is the duty of the guardian to take the prescribed oath, it is not a condition of his appointment, but is only designed to secure the faithful performance of his duties. Similarly with the letters of guardianship; they must be issued, and when issued they constitute evidence of the appointee's authority, but not the authority itself. It seems that the object of the statute in requiring letters to issue and to be recorded with the prescribed oath of office attached is to create and preserve permanent and authentic evidence of the qualification and authority of the guardian, and that these several requirements although couched in explicit language, are to be construed as directory only and not mandatory. Dennis v. Bint, 122 Cal. 39, 47, 54 Pac. 378, 68 Am. St. Rep. 17. The oath of a public officer is usually so construed. Mechem on Public Officers, § 263 et seq. The failure to take out letters of guardianship or to take the oath of office may be a sufficient ground for the revocation of the appointment while the neglect continues. Id., § 262. But where, as here, a person is duly appointed, and he promptly files the required bond and at once enters upon the duties of his office, an act performed in the discharge of such duties should be held valid, especially where, as in the case at bar, there was no undue delay in complying with the requirements of the statute as to the issuance of the letters and the taking of the oath.

Judgment affirmed.

We concur: WASTE, P. J.; WOOD, Judge pro tem.

45 Cal. App. 362

HILL v. SCHUMACHER. (Civ. 3084.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1919.)

1. BOUNDARIES ⊂⊃48(1)—LINE WHICH CAN BE MADE CERTAIN IS NOT LEGALLY UNCERTAIN.

Where a survey of the land, under the particular rule of law as to distribution of surplus frontage between different lots which the purchaser of a lot must be held to have known, would at any time have shown the extra frontage, and by application of the legal rule the true boundary line between plaintiff's and defendant's lots could have been made certain, there was no legal uncertainty as to the boundary, within the rule as to acquiescence.

2. BOUNDARIES ⊂⊃37(1) — EVIDENCE NOT SHOWING UNCERTAINTY AS TO LOCATION WHEN FENCE WAS BUILT.

In an action to quiet title to a strip of land in dispute between adjoining lot owners, circumstantial evidence consisting solely of the existence of a fence *held* insufficient to show that any uncertainty as to the location of the true boundary between the lots existed at the time when the fence was constructed.

3. BOUNDARIES ⊂⊃48(2)—MERE ACQUIESCENCE IN EXISTENCE OF FENCE DOES NOT FIX BOUNDARY.

Mere acquiescence in the existence of a fence between two lot owners and occupancy of land up to it does not necessarily amount to an agreement that it is on the accepted boundary line between the lots.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by D. F. Hill against Caroline Schumacher. From judgment for defendant, plaintiff appeals. Affirmed.

Frank C. Hill and Geo. S. Hupp, both of Los Angeles, for appellant.

Isidore B. Dockweiler, Wilbur D. Finch, and Thomas A. J. Dockweiler, all of Los Angeles, for respondent.

BEASLY, Judge pro tem. This is an appeal by plaintiff from a judgment against him in an action to quiet title to a certain narrow strip of land in block 53 of the Huber tract in Los Angeles. The only question involved is that of the existing law arising out of the following facts:

On September 24, 1905, plaintiff purchased lot No. 7, in said block, the lot being described in his deed by its number with that of the block and tract.

The defendant, Caroline Schumacher, is the owner of lot 8 of said tract, and both the plaintiff and the defendant deraigned title from a common source.

The original map of the tract shows block 53 to be divided into 10 lots of a uniform shape and size, each having a frontage of 60 feet on Hill street by a depth of 165 feet. Resurveys made a short time prior to the commencement of this action show block 53 to have an actual frontage of 604.2 feet, instead of 600 feet, as shown by the original map and survey, or an excess frontage of 4.2 feet over and above the 600 feet shown by the original survey and plat for the 10 lots into which the block was divided.

In about the year 1885, a fence was constructed at or near the common boundary line of lots 7 and 8, where it has ever since remained. This fence was in part a picket fence and in part what is commonly called a board fence, the pickets and boards being fastened on the north side of the posts. Lot 8 lies northerly from lot 7. The contention of plaintiff is that the boundary line is on the north side of the posts to which the pickets and boards are attached, and that this constitutes the true boundary between lots 7 and 8. There is no proof as to who erected the fence, nor of any dispute between the owners of the two lots at any time as to the boundary before this dispute arose, nor of any agreement under which the fence was erected between any owners of the respective lots.

The problem arising in the case is thus stated by plaintiff and appellant:

"There are three methods of acquiring title in cases similar to case at bar, wherein a boundary fence is relied upon as the true line, to wit, 1 and 2, with which we are not concerned here, and 3. Where there is either (a) in fact, an uncertainty as to the location of the true line, or (b) it is believed between parties that such an uncertainty exists, and then a fence is erected and acquiesced in for more than five years, such erection of such fence estops either party from thereafter questioning the true location of such line; this is the method of establishing the line relied upon by plaintiff."

[1] Let us first examine the question as to whether there was, in fact, an uncertainty as to the true line. Appellant argues that as surveys begun, respectively, at the north and south ends of the front line of Hill street, in block 53, and run 60 feet to the lot along the frontage, would locate at different places the boundary line between lots 7 and 8, there existed, in fact, an uncertainty as to its location. But he states the law to be that "between Eighth and Ninth streets, there is a surplus of 4.2 feet, and under the decisions this 4.2 feet should be distributed pro rata among the ten lots," and to this statement respondent agrees. A survey in this condition of the law, which plaintiff must be held to have known, would at any time have shown the extra frontage, and by the application of this agreed legal rule the true boundary line between the lots could have been made certain. That is certain which can be made certain. "The boundary is con-

sidered definite and certain when by survey it can be made certain from the deed." Janke v. McMahon, 21 Cal. App. 781, 133 Pac. 21. Therefore no uncertainty as to the fact of the location of the boundary can be held to have existed.

[2] The other inquiry is whether it was believed between the parties that such uncertainty existed at the time the fence was erected. This was a question to be proven by direct evidence or deduced from circumstances in evidence. There was no direct evidence on the point. The only circumstance from which such a belief could have been deduced was the fact that the fence had existed without express objection from the owners of lot 8 for 20 or 30 years. The existence of the fence alone must furnish the basis for the finding if such a finding is to be made, for there is no evidence that the parties ever considered the fence to be the line; no evidence that it was built as such; no evidence that the lot of appellant was used up to the line or that the strip in dispute was used by him at all except in a purely nominal manner, growing out of the occupation of his lot by a residence building which only covered a portion of the lot and did not impinge upon the part thereof in dispute. For all that appears, this fence may have been built by some owner of lot 8 on the land of that lot well inside the boundary thereof for the express purpose of escaping future disputes as to the ownership of the fence. Such was not an uncommon practice 30 years ago.

[3] Further, it seems to us that this case is disposed of by the language of the Supreme Court in the recent case of Staniford v. Trombly, 186 Pac. 599, where it is said:

"The mere acquiescence in the existence of the fence and the occupancy of the land to the north of it would not amount to an agreement that it was on an accepted boundary line."

This case is within the letter of that recent authority.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

45 Cal. App. 298

LOS ANGELES TRUST & SAVINGS BANK v. FORVE et al. (Civ. 3138.)

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1919. Hearing Denied by Supreme Court Feb. 24, 1920.)

1. APPEAL AND ERROR ⊂⊃1011(1)—FINDING ON CONFLICTING EVIDENCE NOT DISTURBED.

The appellate court is powerless to disturb the finding of the trial court made on conflicting evidence which nevertheless abundantly supports the finding.

2. PAYMENT ⊂⊃75 — EFFECT OF CREDIT OF PAYMENTS ON RENEWAL NOTE FROM ESTATE OF BANKRUPT MAKER.

Where a company owing a bank on notes became bankrupt and thereafter payments from the estate were made to the bank, merely because the payments were credited generally by the bank on the bankrupt company's renewal note for the total indebtedness, the bank did not evidence its intention to apply the payments over all the indebtedness instead of to particular items composing it and represented by the other notes to renew which the note on which the payments were credited had been given.

3. PAYMENT ⊂⊃41(1)—RIGHT OF CREDITOR TO APPLY PAYMENTS AND DUTY OF COURT TO DO SO IF HE FAILS.

Civ. Code, § 1479, gives the creditor a right to make application of payments where the debtor does not do so, the right to be exercised within a reasonable time, but where the creditor makes no application of the payments, but merely credits them generally, it becomes the duty of the court to apply them.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Los Angeles Trust & Savings Bank against Philip Forve and Charles E. Packman. From judgment for plaintiff, defendant Forve appeals. Affirmed.

Mott & Dillon, Dockweiler & Mott, and G. C. O'Connell, all of Los Angeles, for appellant.

O'Melveny, Milliken & Tuller, Stuart O'Melveny, and Hewlings Mumper, all of Los Angeles, for respondent Los Angeles Trust & Savings Bank.

Isadore B. Dockweiler, of Los Angeles, for respondent Packman.

LANGDON, P. J. This is an appeal by the defendant Philip Forve from a judgment for the plaintiff, and against him, in an action to recover from defendants their respective proportions of an indebtedness due plaintiff from Phœnix Lighting Fixture Company, in which company the defendants each held one-third of the capital stock at the time of the creation of the indebtedness sued upon.

The answer of the appellant denies that the indebtedness sued upon has not been paid, and alleges that each and every part of said indebtedness has been paid. Appellant also sets up in his answer an alleged agreement between himself and the other defendant and one W. G. Hutchinson, the owner of the remainder of the stock, whereby it was agreed that said Hutchinson would buy all the stock owned by said defendants and would pay the indebtedness of the company to the bank and would save said defendants harmless from all liability as stockholders of said corporation. This second defense does not concern us upon appeal, because the trial court found that the plaintiff bank had no

knowledge of such an agreement and correctly held that it was not bound thereby.

[1] Judgment was given against each of the defendants in the sum of $8,146.15 and costs, but the appeal is by the defendant Forve alone. The first point made by the appellant is that the evidence was insufficient to justify the court in finding that no part of the indebtedness sued upon had been paid, except for certain payments received from the bankruptcy court out of the assets of the Phœnix Company. The argument of the appellant upon this point is merely an argument upon the weight of the evidence. There is a conflict in the evidence upon this point, but the evidence abundantly supports the finding made. We may agree with the appellant's argument that certain inferences might have been made which would support a contrary finding, but this would not help him any. Upon the evidence in the record, we are powerless to disturb the finding of the trial court.

[2, 3] The second contention of the appellant makes necessary a discussion of somewhat complex facts. The Phœnix Company had borrowed from the plaintiff bank certain sums of money aggregating $25,000, which loans were evidenced by promissory notes held by the bank, one in the sum of $5,000, and two in the sum of $10,000 each, dated respectively April 12, 1911, May 22, 1911, and September 1, 1911. The company had also borrowed from the plaintiff bank the further sum of $5,000, for which it had also given its promissory note dated March 6, 1911. The indebtedness evidenced by this last-mentioned promissory note was not included in the amount for which this suit was brought. The indebtedness evidenced by these four notes was found by the court to have been renewed by the note of the company for $30,000, given on April 24, 1912, at which time the four notes before described were marked "paid" and returned to the company. It appears that the appellant was one of the indorsers on three of said notes returned to the company, but this fact is not material here, because he is sought to be held liable, not as an indorser, but under his liability as a stockholder. In the year 1914 the Phœnix Company went into bankruptcy, and the plaintiff bank duly filed its claim against the estate of the bankrupt for $30,295, and to said claim was annexed the promissory note for $30,000 given by the company on April 24, 1912. Said note was introduced in evidence, and shows that payments of interest from July 24, 1912, to January 26, 1914, were indorsed on said note as they were made by the company, and five different payments received from the bankruptcy court were also indorsed thereon. The application of these various credits of sums received from the bankrupt estate is the subject of attack by appellant. They amount in all to something over $9,400. They were applied by the court, first, to the interest due on the entire debt up to the time each payment was received, and then to the extinguishment of the oldest debt, the $5,000 debt of the company, evidenced by the note of March 6, 1911, which indebtedness was not included in this suit, then to the debt next in time of creation, which was evidenced by the note of April 12, 1911. It was for his respective share of the unpaid balance of the indebtedness evidenced by said note of April 12, 1911, and of the indebtedness evidenced by the two notes for $10,000 each, dated May 22, 1911, and September 1, 1911, that judgment was given against the appellant. Stated briefly, appellant's contention is this: The debtor—the Phœnix Company—did not designate upon which indebtedness the payments should be applied. It then became the right of the creditor to elect how the payments should be applied, and the creditor elected to distribute such payments pro rata over the entire indebtedness by crediting the $30,000 note, which covered the entire indebtedness, with these payments. Taking this as a starting point, the appellant urges that the court had no right to change the application of these payments after they had once been applied by the creditor. This position, if correct, would result to the advantage of the appellant, because his stockholder's liability upon the indebtedness of March 6, 1911, had expired at the time of suit, and that indebtedness was not included in this action. Therefore, if the payments received from the bankrupt estate were applied pro rata upon the indebtedness created at different times, a larger portion of such payments would apply to the indebtedness for which the appellant is liable, and his liability would be reduced by something over $2,000. But, in our opinion, the argument of the appellant that, because the payments were credited upon the $30,000 note, the creditor evidenced its intention to apply the payments over all the indebtedness, is far-fetched and without force. The separate notes securing the different items of the indebtedness were not in the possession of the bank. It offered to the bankruptcy court the only evidence which it had, and entered credit upon this evidence of indebtedness for the payments made, in the most usual and convenient manner. The indebtedness was being carried at that time upon the books of the bank as one sum, and there was at that time no reason why a special application of the payments should have been made by the bank. The fact urged by the appellant that the bank did not at that time appreciate that it had any rights against the appellant may be true, but it does not affect the rights of the parties in the present case. The bank may not at that time have had in contemplation any further recovery upon the debt, and for that reason did not avail itself of its right under our Code to make application of the payments as re-

ceived from the bankruptcy court within a reasonable time. But, when it later was informed of its existing rights against the appellant, it was simply in the situation which is contemplated by the Civil Code where no application has been made of payments by either the debtor or the creditor, and it falls to the trial court to make the application under said section. The appellant here was not the debtor. He had no right to specify, when the payments were made, how they should be applied. The company had such a privilege (Civ. Code, § 1479), but did not exercise it. The creditor then had the right to make the application within a reasonable time. It made no application of the payments to the separate debts, but merely credited the payments generally. It then became the duty of the court to apply the payments under section 1479, Civil Code. The action of the court was in accord with said section, and we find no error in the application of these payments.

The judgment is affirmed.

We concur: NOURSE, J.; BRITTAIN, J.

45 Cal. App. 323

BARNARD v. McINTIRE. (Civ. 3126.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1919. Hearing Denied by Supreme Court Feb. 26, 1920.)

1. CORPORATIONS ⟹253—JUDGMENT AGAINST CORPORATION ON CHATTEL MORTGAGE NOTE CONCLUSIVE AS TO VALIDITY OF OBLIGATION IN ACTION TO ENFORCE STOCKHOLDER'S LIABILITY.

Where deficiency judgment was rendered against corporation in action on notes secured by chattel mortgage, questions as to the due execution of the note, the consideration therefor, and as to other matters relating to the validity thereof were res adjudicata in judgment creditor's action against stockholder on stockholder's liability.

2. APPEAL AND ERROR ⟹878(6)—PORTION OF JUDGMENT FAVORABLE TO APPELLANT WILL NOT BE CONSIDERED.

The propriety of a portion of judgment favorable to appellant will not be considered on appeal where adverse party has not appealed therefrom.

3. CORPORATIONS ⟹228 — STOCK SUBSCRIPTION RESCISSION NOT EFFECTIVE AS TO CREDITOR WHO PRIOR THERETO HAD COMMENCED ACTION ON STOCKHOLDER'S LIABILITY.

Corporation's stock subscription contract providing that subscription was subject to rescission upon failure of certain conditions could not defeat the rights of creditor to recover on stockholder's liability, where action thereon had been commenced before rescission agreement had been entered into.

4. CORPORATIONS ⟹228—STOCK SUBSCRIBER IS LIABLE TO CORPORATION CREDITOR FOR UNPAID BALANCE DUE ON SUBSCRIPTION.

Stock subscriber who had waived right to rescind subscription is liable to corporation's creditor for the unpaid balance due on subscription.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by C. H. Barnard against H. W. McIntire. Judgment for plaintiff, and defendant appeals. Affirmed.

I. Henry Harris and Charles A. Bank, both of Los Angeles, for appellant.

Manning, Thompson & Hoover, of Los Angeles, for respondent.

LANGDON, P. J. [1] This is an appeal by the defendant from a judgment in favor of the plaintiff for $1,044.43. The action was an equitable one, to recover $2,688.35 upon an alleged unpaid subscription for stock, due from defendant to the America-Europa Film Company, against which company the plaintiff had recovered a deficiency judgment in an action to foreclose a chattel mortgage. The mortgage had been given by said corporation to secure the payment of a note for $2,500, payable to the plaintiff. The appellant has argued in his briefs a number of questions of fact and has quoted evidence in support of his version of the testimony. But there was conflicting evidence upon the decisive questions of fact in the case, and appellant's argument upon the evidence merely raises the question of whether or not there is any substantial evidence contained in the record upon which certain findings of the trial court may be based. The question of the due execution of the note to the plaintiff, secured by chattel mortgage, the consideration therefor, and such matters we may dismiss very briefly. They are argued by appellant, but are not open to inquiry here, nor were they open to inquiry by the trial court; for, under the findings of the court that the plaintiff had recovered judgment in an action against the corporation based upon said note, and a deficiency judgment had been entered against said corporation after a sale of the personal property under the chattel mortgage, all matters relating to the validity of that obligation against the corporation became res adjudicata.

[2] It was found by the trial court that on January 18, 1916, the defendant subscribed for 4,500 shares of the stock of the America-Europa Film Company, and agreed to pay $2,500 therefor, and that the sum of $510 had been paid by said defendant upon said subscription, leaving a balance due of $1,990, that on the 14th day of January, plaintiff subscribed for 2,500 shares of the stock of said corporation and agreed to pay therefor

the sum of $2,500, and that no part of said sum has been paid. There are other findings of fact which will be discussed hereinafter. The trial court concluded that the plaintiff was entitled to a judgment against the defendant in an amount determined by the relative proportion which the respective amounts due from plaintiff and defendant to the corporation bore to the entire indebtedness sued upon. The court also allowed a reduction in the amount recovered from the defendant in the sum of $83.10, being four-ninths of the value of the personal property sold under the chattel mortgage, and required the plaintiff to assign to the defendant a four-ninths interest in the balance of the judgment against the corporation after the application of the amount to be accordance with any other agreement of rescission between the parties. The propriety of this last portion of the judgment is not presented for our consideration here, as it is favorable to the appellant, who is, of course, not objecting, and the respondent apparently also consented thereto.

The trial court found that a permit to sell stock was issued to the corporation by the commissioner of corporations on November 6, 1916. This permit is set out in the findings, and provides that—

"Each subscription for stock shall be upon the condition (which shall be therein recited) that, unless bona fide subscriptions for not less than 12,500 shares shall have been obtained from responsible subscribers on or before the 15th day of February, 1916, such subscription shall at any time within three months thereafter be subject to rescission by said subscriber, and pending the securing of said subscriptions not less than 80 per cent. of each payment upon each subscription shall be paid by the subscriber to a depositary designated by said company and approved by said commissioner to be held as an escrow and disposed of as follows: [Then follows a provision that the money shall be repaid to any subscriber who shall rescind in accordance with the conditions of the permit.]"

It was found that on January 14, 1916, one A. E. Ruddell entered into an agreement for the purchase of stock of the company under the permit, and by said agreement expressly waived the conditions set forth in said permit as to the escrow of the purchase money, and agreed that the same might be released at once into the treasury of the company. On January 18, 1916, this Ruddell subscription agreement was taken over by the defendant by written agreement, and on said date defendant complied with said written agreement and purchased said stock, and made, executed, and delivered to the corporation his certain promissory notes, dated January 18, 1916, aggregating $2,500. The court also found that the defendant did not repudiate his stock subscription prior to the commencement of this action; but this finding can add nothing to the strength of the plaintiff's case in view of the other findings mentioned that defendant's liability for stock arises by reason of his having "taken over" the Ruddell subscription agreement in which the right to repudiate the stock subscription had been waived. The record contains evidence upon which all of these findings can be based.

[3] The further contention of the defendant that the corporation released him from his agreement to purchase stock is also answered by the findings of the trial court. The court found that no agreement of settlement or cancellation or rescission of said contract of subscription was made prior to the commencement of this action. The written instrument upon which the defendant bases this last contention appears in the findings of the court. It purports to be an agreement that the undersigned members of the board of directors "will pass a resolution releasing Mr. H. W. McIntire from the three notes (aggregating $2,500) in our possession and make a new agreement with him," etc. The court found that this instrument was signed by certain directors in their individual capacity. There is nothing in the record to show that the resolution to be passed in the future was ever, in fact, passed by the directors of the corporation. It therefore becomes unnecessary for us to discuss the power of the directors to take such action. It does appear from the record that on October 23, 1916, a month after this action was begun, the corporation signed an agreement releasing the defendant from his notes given for the payment of his stock, and such agreement recited as a consideration therefor that the defendant had previously rescinded his said stock subscription and had advanced the sum of $400 to the corporation, and that the corporation had agreed to release him from his subscription and from the payment of his notes given therefor. The court has found that said last-mentioned contract was not made in accordance with any other agreement of rescission between the parties. The instrument cannot be of importance here, however, for another reason. It was entered into after this action was begun, and, since the defendant had lost both by express waiver and by the lapse of the time limited in the permit issued by the commissioner of corporation the right to rescind his subscription, the corporation could not gratuitously afford him this right at the expense of a creditor of the corporation. He is not injured by reason of having advanced $400 to the corporation for its current expenses, as this amount and more was due upon his subscription and was credited by the court upon the same.

[4] The court having found upon substantial evidence that the defendant by written instrument appearing in the record waived all right to rescind his subscription, that he did not in fact attempt to rescind his subscription before the commencement of the action, which was after the time provided

for in the permit under which his stock was sold to him, and, indeed, after the time limited in the amended permit, and that the corporation did not in fact release him from such subscription, it follows that he is liable for the unpaid balance due thereon to a creditor of the corporation. Blood v. La Serena Land Co., 150 Cal. 764, 89 Pac. 1090.

The argument contained in the appellant's brief with reference to the injustice done to the defendant in permitting the plaintiff to rescind his stock subscription is inapplicable here, because the court has held the plaintiff to his contract of subscription. His obligation upon his stock subscription was found by the trial court, and the indebtedness to the corporation due from plaintiff on account of said subscription was applied pro rata to the satisfaction of the judgment held by him as a creditor of the corporation. The judgment seems not only correct in law, but in substantial accord with the equities of the parties. Both plaintiff and defendant are compelled to carry out their stock subscription agreements, and the losses which the business venture suffered are borne by them equally in proportion to their holdings in the company.

The judgment is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

45 Cal. App. 292

MITCHELL v. RUSSELL. (Civ. 3164.)

(District Court of Appeal, First District, Division 1, California. Dec. 26, 1919.)

HUSBAND AND WIFE ⊂=264—EVIDENCE SUFFICIENT TO SUSTAIN FINDING THAT PROPERTY WAS COMMUNITY PROPERTY.

In surviving husband's action against daughter to whom deceased wife had devised property, evidence *held* to sustain finding that the property, though in wife's name, had been purchased and paid for by joint efforts of husband and wife during their coverture while residing in the state.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Reuben H. Mitchell against Ella L. Russell. Judgment for plaintiff, and defendant appeals. Affirmed.

P. M. Andrews, of San Diego, for appellant.

A. C. Mouser and John W. Rummage, both of San Diego, for respondent.

KERRIGAN, J. This is an action to quiet title. The plaintiff had judgment as prayed, and the single question presented upon the defendant's appeal is whether or not the evidence sustains the finding of the trial court that the property involved in the action was community property of the plaintiff and his deceased wife. After a careful examination of the record we have arrived at the conclusion that this question must be answered in the affirmative.

The plaintiff and his wife, Martha L. Mitchell, were at the time of the latter's death living upon the property here concerned, and it stood of record in her name. By her last will and testament she undertook to devise it to the defendant, her daughter by a former marriage, and she left the remainder of the property standing of record in her name to her husband, the plaintiff. The testimony tending to support the judgment is as follows: The plaintiff and the deceased were married in Massachusetts in the year 1893, and in the following year they moved to this state, settling in the city of San Diego. The plaintiff at that time was possessed of $150, and his wife of an amount somewhat in excess of $2,500. They lived together in San Diego until the time of the wife's death, which occurred in the month of April, 1917. Shortly after settling in San Diego they began buying and selling parcels of real estate, and in the 23 years of their married life there they handled 32 pieces of such property, the title to nearly all of which was taken in the wife's name, some, however, being taken in the name of the plaintiff. Upon sales of this property the money representing the price thereof was usually deposited to the credit of Mrs. Mitchell, irrespective of whether it stood in her name or that of her husband, although on one occasion the sum of $1,200, the proceeds of the sale of a parcel standing in her name, was divided equally between them, and was used by them to defray the expenses of a trip east. The plaintiff is by trade a carpenter. For at least ten years after coming to California he followed his trade, and from his earnings and a pension received by him as a veteran of the United States army he was able to save some money, which went into the purchase price of parcels of land bought as mentioned above. He also furnished much of the materials and did most of the carpenter work in improving the greater part of the property purchased. He kept no account of the money thus supplied by him, nor of the value of such materials, nor of the amount of labor so performed. The sums of money the spouses respectively brought to this state, together with any funds subsequently acquired as the result of their transactions of the nature described, were commingled and used indiscriminately in their purchases, without any effort to segregate or keep an account of their respective contributions. The reason why title to the property was as a rule taken in the name of Mrs. Mitchell was, as testified by the plaintiff, that he anticipated at all times that he

would predecease his wife, in which event the care and expense of the administration of his estate would be avoided. In so far as the particular piece of property here in question is concerned, it constituted the home of plaintiff and his wife, and the plaintiff was present and participated in the negotiations which resulted in its purchase. As a carpenter he added a room and made other improvements to the house standing upon it, and he furnished the materials for and built a second house upon the lot. In these instances, as in all others, no account was kept or charge made for his labor or for the materials furnished for the purpose of this improvement. They were regarded as contributions to the general venture.

The trial court found that "said property was purchased and paid for on the 22d day of August, 1912, with funds acquired by the joint efforts of plaintiff and said Martha L. Mitchell during their coverture and while residing in the city of San Diego." We think the evidence above narrated sustains this finding, for which reason the judgment is affirmed.

We concur: WASTE, P. J.; WOOD, Judge pro tem.

45 Cal. App. 266

TUNMORE v. MACLEISH. (Civ. 3135.)

(District Court of Appeal, First District, Division 2, California. Dec. 24, 1919.)

1. NEW TRIAL ⊂=44(4)—MISCONDUCT OF JURY IN EXAMINING PLAINTIFF'S MOTORCYCLE ALLEGED TO HAVE BEEN INJURED.

In examining the motorcycle of plaintiff, suing for injury thereon, during a recess of court to ascertain whether or not plaintiff's wife could have seen the speedometer from the seat where she was sitting in the rear, as she testified, the jury was not only taking evidence out of court without the knowledge of the parties, but was taking evidence along new lines, which plaintiff had no opportunity to explain or refute, and such misconduct was ground for a new trial.

2. NEW TRIAL ⊂=56—QUESTION OF PREJUDICE TO PLAINTIFF FROM JURY'S MISCONDUCT WITHIN DISCRETION OF COURT.

Though a mere irregularity which does not affect the substantial rights of the party or prevent him from having a fair trial does not justify granting new trial, the question of whether the action of the jury in examining plaintiff's motorcycle, on which he was injured, during a recess, and thus taking evidence independently, under all circumstances materially affected plaintiff's substantial rights, and prevented him from having a fair trial, was within the discretion of the trial court.

3. APPEAL AND ERROR ⊂=1015(5)—DETERMINATION ON CONFLICTING AFFIDAVITS PRESENTED ON MOTION FOR NEW TRIAL CONCLUSIVE.

The determination of the trial court, allowing motion for new trial on conflicting affidavits of matters alleged in such affidavits, is conclusive on appeal.

4. APPEAL AND ERROR ⊂=977(3)—GRANT OF NEW TRIAL WILL NOT BE DISTURBED IF REASONABLY JUSTIFIED.

The action of the trial court in granting a new trial will not be disturbed on appeal if reasonably or debatably justified.

5. APPEAL AND ERROR ⊂=856(5)—GRANT OF NEW TRIAL SUSTAINABLE ON ANY GROUND OF MOTION NOT EXPRESSLY EXCLUDED WILL BE SUSTAINED.

If order granting new trial can be sustained on any ground stated in the motion and not expressly excluded by the order, it will be sustained.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by C. A. Tunmore against A. L. Macleish. From an order granting plaintiff a new trial after an adverse verdict, defendant appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Oscar E. Winburn, Charles Winburn, and Ray Howard, all of Los Angeles, for respondent.

LANGDON, P. J. [1] This is an appeal from an order granting a motion for a new trial. The action was one for personal injuries suffered by the plaintiff by reason of a collision between a motorcycle, on which the plaintiff was riding, and an automobile being driven by the defendant. The verdict of the jury was for the defendant. A motion for a new trial was made upon six grounds. The order granting the motion was upon four grounds. The first of these grounds is stated to be: "Irregularity of jurors in examining motorcycle out of court." The facts in relation to this incident, as they appear from the affidavit of Nora Tunmore, the wife of the plaintiff, and a witness in the case, are that during a recess of the court and before the introduction in evidence of the motorcycle upon which the plaintiff was riding at the time of the accident, two jurymen carefully examined the motorcycle and its various parts, and in discussing the said motorcycle at the time of this examination, one of said jurymen stated to the other that it was impossible for the plaintiff's wife to have seen the speedometer from where she was sitting on the rear seat at the time of the accident. It also appears from the affidavits of this witness and of the plaintiff that at the time the motorcycle was examined by the

said jurymen the speedometer was not in the same position that it had occupied at the time of the accident—but that it had become loosened and had slipped out of position by reason of the force of the impact of the automobile and the motorcycle at the time of the accident. It appears from the affidavit of one of the attorneys for the plaintiff, and from an examination of the record that no evidence was introduced upon the question of the position of the speedometer prior to the time of the collision. In examining the motorcycle during a recess of court for the purpose of ascertaining whether or not the plaintiff's wife could have seen the speedometer from where she was sitting, the jury was not only taking evidence out of court without the knowledge of the parties, but was taking evidence along new lines which the plaintiff had no opportunity to explain or refute. It is said in the case of Higgins v. L. A. Gas & Electric Co., 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717:

"It is a fundamental rule that all evidence shall be taken in open court, and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of such exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain."

A very learned discussion of this question appears in said last-cited case, and the reasoning therein, we think, clearly brings the present case within the inhibition of the rule. Also, in the present case, there is the added irregularity that the exhibit was examined out of court and before it had been introduced in evidence. It is improper for a jury to receive any evidence out of court. Rodgers v. Central Pac. Railroad Co., 67 Cal. 607, 8 Pac. 377.

[2] While it is true, of course, as contended by counsel for the respondent, that a mere irregularity which does not affect the substantial rights of the other party or prevent him from having a fair trial does not justify the granting of a new trial, the question as to whether the action of the jury under all the circumstances materially affected plaintiff's substantial rights and prevented him from having a fair trial was peculiarly one that was addressed to the discretion of the trial court. As was stated in the case of Piercy v. Piercy, 149 Cal. 166, 86 Pac. 507, the trial court having heard and seen the witnesses on the trial, and having knowledge as to those circumstances of a case which cannot be reproduced in the printed record, is in a better position than is the appellate court to determine as to the effect of the irregularity upon the result of the trial.

The respondent argues that the affidavits of the jurors may not be considered by the court upon such an irregularity in their conduct. A discussion of that question becomes unnecessary here. We have stated the facts as they appear in the affidavits of the plaintiff and his wife without regard to affidavits of any of the jurors.

[3] The argument of the respondent based upon the allegations of the counter affidavits cannot be urged here, because the determination of the court upon conflicting affidavits of matters alleged in said affidavits is conclusive here. Barrett v. Graham, 19 Cal. 635; Love v. Watts, 1 Cal. Unrep. 24; Diller v. Northern Cal. Power Co., 162 Cal. 532, 123 Pac. 359, Ann. Cas. 1913D, 908. Whether the conduct of the attorney for the plaintiff constituted a waiver of this irregularity is a question dependent upon conflicting allegations appearing in the affidavits and counter affidavits, and the determination of the trial court upon this matter will therefore not be disturbed.

[4, 5] It has been repeatedly held that the action of the trial court in granting a new trial will not be disturbed upon appeal if there is a reasonable or fairly debatable justification for its action. Harrison v. Sutter Street Railway Co., 116 Cal. 156, 47 Pac. 1019. If the order granting a new trial can be sustained upon any ground stated in the motion and not expressly excluded by the order, it will be sustained. Gordon v. Roberts, 162 Cal. 506, 123 Pac. 288; Cahill v. Stone Co., 167 Cal. 126, 138 Pac. 712. It, therefore, becomes unnecessary for us to discuss the other grounds upon which the order was based.

The order appealed from is affirmed.

We concur: BRITTAIN, J.; NOURSE, J.

45 Cal. App. 372

SCHERER v. EIDENMULLER. (Civ. 2898.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1919.)

1. EVIDENCE ⊜472(4) — PROPER TREATMENT BY DOCTOR A SUBJECT FOR EXPERTS.

What is or is not proper practice in examination and treatment by a physician and surgeon, or the usual practice and treatment, is a question for experts, and can be established only by their testimony.

2. PHYSICIANS AND SURGEONS ⊜18(8)—NEGLIGENCE IN TREATMENT OF GUNSHOT WOUND IN ELBOW NOT SHOWN.

Evidence *held* insufficient to establish negligence in the treatment of a gunshot wound in the elbow.

3. PHYSICIANS AND SURGEONS ⊜18(8)—OFFER TO TAKE PATIENT TO ANOTHER MORE EXPERIENCED DOCTOR FOR SECOND OPERATION NOT ADMISSION OF INCOMPETENCY.

That defendant, who had operated on and treated a gunshot wound in plaintiff's elbow, told him he would take him to another doctor for another operation, because he had had more experience with such cases and had just returned from the war, and defendant had not had a like case before, is not an admission of incompetency and unskillfulness, that is, that he did not possess that reasonable degree of learning and skill possessed by others of his profession in his locality.

4. PHYSICIANS AND SURGEONS ⊜18(6)—INCOMPLETE RECOVERY OF PATIENT RAISES NO PRESUMPTION OF LACK OF SKILL OR ATTENTION.

That a patient does not make a complete recovery raises no presumption of absence of proper skill and attention on the part of the attending doctor.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Otto Scherer against W. C. Eidenmuller, Jr. Judgment for plaintiff, and defendant appeals. Reversed.

Stanley Moore and R. W. Palmer, both of San Francisco, for appellant.

Devoto, Richardson & Devoto and Karl Kennedy, all of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment of $2,000 against him in an action brought by the plaintiff to recover damages for alleged improper surgical and medical treatment administered to the plaintiff by the defendant, a practicing physician of San Francisco. The facts are, stated briefly, that on the 24th day of April, 1916, plaintiff received a gunshot wound in the right elbow; the bullet passing through the joint and shattering the bones. He was treated at the emergency hospital, where the wound was bandaged, and he returned to his home. During the evening of the same day the pain became very severe and he called the defendant, a physician, who administered a hypodermic to ease the pain. The next morning the defendant directed the plaintiff to go to a hospital for treatment, and while plaintiff was at the hospital defendant examined the wound, had X-ray pictures taken and bandaged the arm again. The arm was badly swollen and inflamed and it was decided that an operation was not advisable until this condition was relieved. On the 11th day of May, the swelling and inflammation having subsided some, an operation was performed by the defendant, assisted by Dr. Remmell, and the arm was placed in a plaster cast, through which an opening was made to allow access to the wound for cleansing and treatment. Later this cast was removed and the arm placed in splints. After the operation the plaintiff called regularly at the office of the defendant and was treated by him. The arm showed signs of infection and discharged pus from the date of the operation until August 21st. At this date, the wound having failed to heal, X-ray pictures were again taken, and the defendant advised the plaintiff that it would be necessary for him to undergo another operation. At this time the defendant stated to the plaintiff that he would take him to another physician, Dr. Stoddard, who had just returned from the war zone and who had had considerable experience with injuries of this character. Plaintiff and defendant together consulted Dr. Stoddard, who also advised another operation. Plaintiff thereupon discontinued his visits to the defendant's office and consulted physicians selected by him, who performed a second operation. After the second operation the wound healed rapidly, but the elbow remained stiffened.

[1] The appellant attacks the verdict as unsustained by the evidence, and this argument raises several questions of law. The first of these is a construction of the evidence under the rule laid down in the case of Houghton v. Dickson, 29 Cal. App. 321, 155 Pac. 128, to the effect that what is or is not proper practice in examination and treatment by a physician and surgeon or the usual practice and treatment, is a question for experts and can be established only by their testimony. This same rule has been reiterated in the case of Dameron v. Ansbro, 178 Pac. 879, and in other cases cited therein. It is the contention of the plaintiff that the defendant was negligent in not taking X-ray pictures after the operation and before August 21st, for it is contended that if such pictures had been taken they would have shown a condition calling for a second operation, and it is argued inferentially, though without any evidence in the record in support thereof,

that a second operation at an earlier date would have prevented plaintiff's arm from becoming stiff. The only expert testimony offered by the plaintiff for the purpose of establishing the negligence of the defendant was that of Dr. Coffey. In reply to repeated questions directed to the same matter, Dr. Coffey maintained whether or not he, as a physician, would take X-ray pictures shortly after performing an operation such as was performed in the present case would depend upon whether or not he was certain or uncertain of his mechanical fixation in the operation. Dr. Coffey also stated that the length of time that would be required to form a union of the bones, where the person was in good health, might be six months or a year or longer. The following questions and answers also appear in the direct examination of Dr. Coffey:

"Q. Supposing there was infection which lasted from the time of the operation on May 11th until August 21st, almost continuously. Can you state, with that situation existing, whether or not you would, before August 21st, have operated anew upon the arm after taking X-ray photographs? A. No; I wouldn't; that wouldn't govern me; what would govern me would be the infection; if it cleared up and I could go into that field, that would govern me entirely; not the X-ray; the infection would determine the going in there and disturbing this wiring or doing any further work, because I would be opening up a new field of infection. Q. What would you say, Doctor, in the event there was a constant condition of suppuration during all that period of time? A. I would treat the suppuration and forget all about the fracture. Q. What method would you use in the treatment of the infection? A. Well, one of the antiseptics—wash it out, clean it; if it was confined to that locality, I would simply resort to local dressings. I would inject an antiseptic fluid and get proper drainage. I would wash it. Q. During the treatment for the suppuration would it be necessary to or usual to take any X-ray photographs to ascertain the condition not only of the bones but of the tissues? A. Well, if I had suppuration, the X-ray would serve no purpose because I would be governed entirely—the mechanical work upon that arm would be governed entirely by the presence of the infection. I wouldn't attempt to go in there while there was infection. * * *"

There is other testimony of this witness of a like character. It clearly appears from his entire testimony that whether or not it would be desirable to take X-ray pictures at frequent intervals after an operation such as this would depend upon the individual case and the personal knowledge of the internal situation possessed by the man who had performed the operation; that, regardless of whether or not X-ray pictures had been taken at frequent intervals, it would have been unwise, according to the opinion of Dr. Coffey, to have operated during the time that the wound showed signs of infection; that in cases of this character it might be necessary to operate half a dozen times on a bone before getting a union. It is admitted that the wound was suppurating during the entire time it was being treated by the defendant, and it is also admitted that the treatment given it during such period was the treatment which Dr. Coffey testified he would himself have given in a similar case. Dr. Coffey testified that he had had 27 years' experience as a physician and surgeon and had handled over 18,000 fracture cases; that the injury to the plaintiff was a very serious injury; that it was such an injury as was likely to result in a stiff elbow; that it was an unusual injury; that not many doctors in this locality have had cases of precisely this kind; and that he himself had never had a case like it.

[2] We have discussed this testimony at length because upon it plaintiff must rest to establish negligence in the treatment received by him. We think it falls far short of the proof required.

[3] The respondent argues that because the defendant stated to the plaintiff about August 20th that he would take him to Dr. Stoddard for the second operation because Dr. Stoddard had had more experience with such cases and had just returned from the war zone, and that he, defendant, had not had a case like this one before, this amounts to an admission of incompetency and unskillfulness upon the part of the defendant. We think these statements are susceptible of no such construction. As pointed out before, Dr. Coffey testified that in an experience covering 18,000 fracture cases he had never seen a case like this one. The defendant testified that he had had considerable experience in fracture cases, but had never had one precisely like this. The fact that Dr. Stoddard was admitted to be more experienced and skilled along this particular line does not imply that the defendant did not possess that reasonable degree of learning and skill possessed by others of his profession in his locality. This question is discussed in the case of Houghton v. Dickson, supra, where it is said that the fact that some other physician may have discovered a dislocation in an arm does not show a want of ordinary care in the defendant physician, since the physician who made the discovery may have been a man who, by reason of superior learning and advantages, possessed far more than ordinary skill in his profession. The court in that case quotes from the case of James v. Crockett, 34 N. B. 540, as follows:

"A surgeon does not undertake to perform a cure, nor does he undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself. * * *"

Surely it will not be contended that the measure of ordinary skill is the amount of

skill and experience acquired by physicians who have been working for some time in the war zone and handling a constant succession of difficult and unusual cases.

[4] Though the determination of the questions herein discussed cuts the foundation from under the judgment in this case, it is pertinent to remark also that the record contains no evidence that it would have been possible or likely by any course of treatment, no matter how skillful, to have restored to the plaintiff the full use of his arm after an injury such as occurred here. The fact that a patient does not make a complete recovery raises no presumption of the absence of proper skill and attention upon the part of the attending physician. Haire v. Reese, 7 Phila. (Pa.) 138, quoted in Houghton v. Dickson, supra.

It becomes unnecessary to discuss the other points urged by the appellant.

The judgment is reversed.

We concur: BRITTAIN, J.; NOURSE, J.

44 Cal. App. 778

McNETT v. McNETT. (Civ. 3171.)

(District Court of Appeal, First District, Division 1, California. Dec. 13, 1919.)

1. DIVORCE ⊂⊃184(1)—ORDER AWARDING CUSTODY OF MINOR CHILD CANNOT BE REVIEWED ON APPEAL FROM FINAL JUDGMENT.

Where a husband was granted a divorce on his cross-complaint, the wife cannot, on her appeal from the final judgment of divorce, obtain review of an order entered pending the entry of such judgment directing that custody of a minor child of the marriage be delivered to the husband, for the order was a subject of a separate appeal.

2. APPEAL AND ERROR ⊂⊃1011(1)—FINDING OF TRIAL COURT ON CONFLICTING EVIDENCE WILL NOT BE DISTURBED.

Where the evidence was conflicting and was sufficient to support the findings of the trial court, such findings will not be disturbed on appeal.

3. CONTINUANCE ⊂⊃22—ALLOWANCE FOR ABSENCE OF WITNESSES RESTS IN DISCRETION OF TRIAL COURT.

The allowance of a continuance to procure the presence and testimony of an absent witness is a matter which lies very largely in the discretion of the trial judge.

4. APPEAL AND ERROR ⊂⊃966(2)—ORDER DENYING CONTINUANCE FOR ABSENCE OF WITNESSES NOT DISTURBED UNLESS DISCRETION IS ABUSED.

An order denying a continuance on account of the absence of a witness will not be disturbed on appeal unless an abuse of discretion is shown.

5. CONTINUANCE ⊂⊃24—DENIAL OF CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESS HELD NOT AN ABUSE OF DISCRETION.

Where it did not appear that the absent witness was the only witness who could have given evidence as to the matters for which his presence was desired, and it appeared that appellant was provided with the presence and testimony of other witnesses as to such subject-matter, the denial of a continuance on account of the absence of such witness is not an abuse of discretion.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action for divorce by Willie Emily McNett against Burnham McNett, who cross-complained. From a judgment for defendant on his cross-complaint, plaintiff appeals. Affirmed.

C. C. Pease, of San Diego, for appellant.

L. E. Dadmun, of San Diego, for respondent.

RICHARDS, J. [1] This is an appeal from a judgment in favor of the defendant upon his cross-complaint in an action for divorce. In the notice of appeal from the judgment the plaintiff also states that she takes an appeal from an order of the court directing that the custody of a minor child of the parties be turned over to the defendant pending the rendering and entry of the judgment. As to the so-called appeal from the latter order, we have vainly searched the voluminous record before us for the order referred to; but even if our search had been successful we could not consider the same upon that portion of the appeal, for the reason that the notice of appeal shows upon its face that said order was made before final judgment, and was not therefore the subject of a separate appeal.

[2] Upon her appeal from the judgment itself the appellant makes the contention that the evidence in the case is insufficient to sustain the findings and judgment of the trial court. In support of this contention the plaintiff has embodied in her brief a few scattered and evidently incomplete excerpts from the reporter's transcript, which contains 611 pages of the testimony of over 20 witnesses who were called and testified at the trial for or against the respective parties, and who were examined—and the most important of whom were cross-examined and re-examined—at great length. The light which the appellant thus sheds upon her contention as to the insufficiency of the evidence in the case is entirely too feeble and flickering to enable us to determine the point without an extended examination of the entire evidence in the case. We have, however, attempted to make such examination, and from even a cursory inspection of the

record it sufficiently appears that the testimony of the parties and of their witnesses in the case is sharply in conflict as to practically every issue involved therein.

Aside from this, however, we have satisfied ourselves from a careful inspection of the record that the findings of the court are fully supported by the testimony offered on behalf of the cross-complainant herein, and that the judgment of the court based upon such findings will not therefore be disturbed upon appeal.

[3-5] The appellant further contends that an error was committed by the trial court in its order denying the plaintiff's motion for a continuance of the cause after the same was at issue in order to enable her to obtain the presence and testimony of one Dr. C. R. Knox, who was at that time absent from that portion of the state, and of whom it was asserted in the affidavit for such continuance that he could give testimony material to the plaintiff if present at the trial of the cause. The matter of the granting or denial of continuances for the purpose of enabling a party to procure the presence and testimony of absent witnesses is a matter which lies very largely within the discretion of the trial judge; and it must therefore be made to appear very clearly that such discretion has been abused before the cause will be reversed upon appeal for an alleged error of the court in denying a further continuance of the case. The record discloses no such abuse of discretion in the instant case, since the affidavit and other documents presented by the plaintiff upon the hearing of said motion utterly fail to show that the absent witness was the only witness who could give evidence as to the matters for which his presence was desired, or that the plaintiff was not provided with the presence and testimony of other witnesses to every matter respecting which the absent witness could have testified. This being so, it cannot be said that the trial court committed any abuse of discretion in requiring the plaintiff to go to trial without the presence of Dr. Knox.

As to the appellant's contention that the court committed error amounting to an abuse of discretion in awarding the custody of the minor child, Robert McNett, to the defendant, his father, during the pendency of the trial and during certain periods after the entry of the judgment therein as specified in said judgment, the only argument which the plaintiff presents in support of such contention is one predicated upon her prior contention as to the insufficiency of the evidence to justify the findings and judgment of the court in the defendant's favor; but since, as we have seen, such findings and judgment constitute the determination of the trial court upon conflicting testimony, this court will not review upon appeal the conclusion which the trial court has thus arrived at in relation to the custody of the minor children of the parties to the action either before or after the entry of the judgment therein.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 95

DRIPPS v. ALLISON'S MINES CO. et al.

(Civ. 3028.)

(District Court of Appeal, Second District, Division 2, California. Dec. 17, 1919.)

1. WATERS AND WATER COURSES ⟸21—FIRST LOCATOR OF MINE CANNOT ALLOW TAILINGS TO RUN FREE ONTO LOWER CLAIMS.

The first locator on mining ground has no right, by custom or otherwise, to allow "tailings," to run free in gulch through which stream runs, and render valueless the mining claims of subsequent locators below him.

2. MINES AND MINERALS ⟸124—UPPER LOCATOR LIABLE FOR INJURY TO LOWER LOCATOR FROM TAILINGS IRRESPECTIVE OF NEGLIGENCE.

Where the land of a lower locator of a mining claim is invaded by "tailings," "slickens," or other material from the claim of an upper locator, such upper locator is liable, however carefully he may have worked his mine.

3. MINES AND MINERALS ⟸124—MINE OWNER ROLLING BOULDERS FROM TRAIL UPON ANOTHER MINING CLAIM LIABLE.

Where one mining claim locator, by running a trail or road around the claim of another, caused rocks and boulders to roll down the side of the gulch upon such other's claim, endangering the lives of persons attempting to work it, and impairing, if not destroying, its value for mining purposes, he is liable to the locator of the other claim.

4. WATERS AND WATER COURSES ⟸21—RIGHT OF SUBSEQUENT UPPER LOCATOR TO USE WATER OF STREAM.

As between locators of mining claims on a stream flowing through the public domain, the rule, "Qui prior est tempore, potior est jure," is applicable, but the upper locator, though subsequent, and though possessing a subordinate right, may make reasonable use of the waters of the stream, despite some consequent deterioration in them the reasonableness to be determined by the jury on the facts of each case.

5. MINES AND MINERALS ⟸18—LOCATIONS SHOULD CONFORM TO PUBLIC SURVEY IF PRACTICABLE.

As declared by Rev. St. U. S. § 2331 (U. S. Comp. St. § 4630), it is the policy of the United States to have mining locations in compact form; if the lands have been surveyed, the location in its exterior limits must conform to the public survey, if reasonably practicable; if the

land is unsurveyed, the location as reasonably as practicable must be rectangular in form, with east and west and north and south boundary lines, and otherwise approximating conformity to the public survey system.

6. MINES AND MINERALS ⊂⊃18—IRREGULARITY IN SHAPE OF CLAIM SURROUNDED BY OTHERS PERMISSIBLE.

The requirement of Rev. St. U. S. § 2331 (U. S. Comp. St. § 4630), that placer mining claims conform as nearly as practicable with the system of public land surveys does not require a placer locator to conform his location to legal subdivisions of the public surveys and the rectangular subdivisions thereof when conformity would compel him to place his lines on other prior located claims surrounding him, whether or not the claim be on surveyed or unsurveyed lands, but he may conform its boundaries to the surrounding claims, regardless of any irregularity in form so produced.

7. MINES AND MINERALS ⊂⊃18—PLAT AND SURVEY NOT ESSENTIAL TO PERFECTING LOCATION OF CLAIM.

The plat and survey referred to by Rev. St. U. S. § 2331 (U. S. Comp. St. § 4630), providing that where placer claims cannot be conformed to legal subdivisions of government surveys, survey and plat shall be made as on unsurveyed lands, are the plat and survey to be made and filed when application for patent is made, and are not essential to perfecting valid location of claim.

8. MINES AND MINERALS ⊂⊃25—FAILURE TO RECORD LOCATION NOTICE WITHIN TIME PRESCRIBED NOT A FORFEITURE.

The failure of a locator of a placer mining claim to record his notice of location within the time prescribed by Civ. Code, § 1426d, did not work a forfeiture of his claim; there being no such penalty fixed by the statute.

9. MINES AND MINERALS ⊂⊃25, 29(4)—WATERS AND WATER COURSES ⊂⊃21—RIGHT OF PRIOR LOCATOR OF PLACER CLAIM WHO DID NOT RECORD NOTICE IN TIME.

The locator of a placer mining claim, notwithstanding his failure to record his location notice within the time prescribed by Civ. Code, § 1426d, acquired not only a right of possession which he did not forfeit merely because of his neglect to make a timely record, but also a location which, if imperfect, was nevertheless superior to any other location on the same ground that others might subsequently have attempted to make; his right to use water reasonably necessary for beneficial use on his claim being superior to any rights in others to use the water on their subsequently located claims on the public domain lying farther up the gulch.

Appeal from Superior Court, Los Angeles County; E. T. Zook, Judge.

Action by J. W. Dripps against the Allison's Mines Company and others. From judgment for defendants, plaintiff appeals. Reversed.

Houge & Hazen, of Los Angeles, for appellant.

H. F. Bridges, of Sierra Madre, and F. E. Dunlap, of Los Angeles, for respondents.

FINLAYSON, P. J. Plaintiff sues to recover damages for certain acts of trespass alleged to have been committed by defendants to the injury of plaintiff's placer mining claim, and to enjoin further continuance of the acts. At the conclusion of plaintiff's evidence the court gave judgment for defendants on the merits without requiring the introduction of any evidence on their part. From this judgment plaintiff appeals.

The complaint alleges that plaintiff is the owner of a placer mining claim in Laurel Gulch, Los Angeles county, containing 20 acres, in the form of a parallelogram, 80 by 40 rods, with its side lines running northerly and southerly and substantially parallel with the direction of the gulch and likewise with the stream that flows therein; that after plaintiff located his claim, defendants located their mining claim to the north of plaintiff's and further up the gulch; that in working their mill defendants caused large quantities of "tailings" to be carried down to and deposited upon plaintiff's claim, to a depth of from several inches to several feet; that subsequent to plaintiff's location defendants constructed a trail or road around and above plaintiff's claim and that, by reason thereof, they have caused rocks and boulders to roll down upon his claim thus making it dangerous for him to work thereon; that a stream of water, flowing southerly down and through the gulch, passes through the claims of both plaintiff and defendants; that the use of the water in the stream is necessary to the working of plaintiff's claim; that by permitting the tailings from their mill to enter into and flow down the stream, defendants have polluted its waters, so that it has become muddy and unfit for plaintiff's mining operations; and that, unless enjoined, the acts thus complained of will compel plaintiff permanently to discontinue working his mine.

The court below found against each of these alleged acts of trespass, notwithstanding there was ample evidence, uncontradicted, to support the allegations of the complaint with regard to each act complained of. For this reason the judgment must be reversed, unless, as contended by respondents, plaintiff failed to prove a valid mining location, which seems to be the principal question on this appeal.

Plaintiff and his witnesses testified that "tailings" from defendants' mill accumulated on plaintiff's land along the stream the entire length of his claim, and from six inches to two feet in depth; that large rocks and boulders, aggregating many tons, rolled down the steep sides of the gulch; that this was

caused by the trail built and used by defendants; that it would cost $25,000 to remove the rocks, and several thousand dollars to remove the tailings; that it is not practicable to work plaintiff's claim without first removing the rocks and tailings; that the water in the stream is made "muddy and riley" by the tailings from defendants' mill; and that this "gums up the riffles," so that his placer mining claim cannot be worked profitably.

[1-4] We think the uncontradicted evidence amply sufficient to show that the tailings which defendants permitted to run down the gulch rendered plaintiff's mining claim—assuming for the present that his was a valid location—valueless for mining purposes—the only purpose for which it had any value. This being so, plaintiff, if his location is valid, would be entitled to relief even though it should appear that defendants' location was prior to his. It is well settled that the first locator on mining ground has no right, by custom or otherwise, to allow tailings to run free in the gulch and render valueless the mining claims of subsequent locators below him. Lincoln v. Rodgers, 1 Mont. 217; Fitzpatrick v. Montgomery, 20 Mont. 181, 50 Pac. 416, 63 Am. St. Rep. 622; Esmond v. Chew, 15 Cal. 137; Hobbs v. Amador, etc., Co., 66 Cal. 161, 4 Pac. 1147; Robinson v. Black Diamond Co., 57 Cal. 412, 40 Am. Rep. 118; Lindley on Mines (3d Ed.) § 843. Where the land of the lower locator is actually invaded by "tailings," "slickens," or other material from the claim of the upper locator, it makes no difference how carefully the latter may have worked his mine. His liability does not depend upon negligence in the construction or use of his property. If his work in fact injures the property of another he is none the less liable, be he ever so cautious or careful to avoid injurious consequences. Hill v. Smith, 27 Cal. 476; Levaroni v. Miller, 34 Cal. 231, 91 Am. Dec. 692; Salstrom v. Orleans, etc., Co., 153 Cal. 551, 96 Pac. 292. What we have said respecting defendants' liability for the tailings carried down upon plaintiff's claim applies with equal force to the rocks and boulders that were caused to roll down the steep sides of the gulch by reason of the trail constructed by defendants, thereby endangering the life of any person who might attempt to work the claim, and seriously impair, if not utterly destroy, its value for mining purposes. As said in Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557:

> "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, * * * so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the Constitution."

As to the water in the stream, which plaintiff claims was polluted by the tailings and débris from defendants' mill, the rule whereby the rights of the respective parties should be determined is this: The right to mine on public lands and the right to divert and use for mining purposes the waters of a stream that runs wholly through the public domain stand upon an equal footing, subject to the principle, "Qui prior est tempore, potior est jure." Some deterioration in the quality of the water necessarily results from carrying on mining operations on a running stream. A prior locator cannot insist that the stream above him shall not be used by subsequent locators or appropriators for mining purposes, and that the water shall flow to his claim in a state of absolute purity. While the subsequent locator will not be permitted so to conduct his operations as to unreasonably interfere with the fair enjoyment of the stream by the prior locator, or to destroy or substantially injure the latter's superior rights as a prior locator, nevertheless, the law recognizes the necessity for some deterioration, which, within reasonable limits, is damnum absque injuria. Any other rule might involve an absolute prohibition of the use of all the water of a stream above a prior location in order to preserve the quality of a small portion taken therefrom. The reasonableness of the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. The essence of the rule is tersely expressed in the homely maxim of the early miners' law, "live and let live." Esmond v. Chew, supra; Bear River, etc., Co. v. New York M. Co., 8 Cal. 327, 68 Am. Dec. 325; Hill v. King, 8 Cal. 336; Hill v. Smith, supra; Provolt v. Bailey, 62 Or. 58, 121 Pac. 961; Atchison v. Peterson, 20 Wall. 507, 22 L. Ed. 414; Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 Pac. 465, affirmed 230 U. S. 46, 33 Sup. Ct. 1004, 57 L. Ed. 1384; Lindley on Mines (3d Ed.) § 841. In this state the location and possession of a mining claim draws to itself the right to a reasonable use, for mining purposes, of the waters of a stream flowing through the claim. Parties holding possessory rights in separate parcels of land, title being in the United States, have the rights of riparian owners in the waters of any stream flowing naturally over both parcels. A locator on public lands with a view of appropriation becomes the absolute owner against every one but the government, and is entitled to all the incidents which appertain to the soil except rights antecedently acquired. As between locators of mining claims on a stream flowing through the public domain, the rule, "Qui prior est tempore, potior est jure," is applicable (Leigh v. Independent Ditch Co., 8 Cal. 323; Crandall v. Woods, 8 Cal. 136); but the upper locator, though subsequent in time, and though, for that reason, his is a subordinate right, may, nevertheless, make reasonable use of the waters of the stream, the reasonableness to be determined by the jury upon

the facts and circumstances of each particular case.

We think the evidence amply sufficient to support the allegation as to the injurious invasion of plaintiff's claim by the tailings from defendants' mill, the pollution of the stream thereby, and the injurious effects of the rocks that were caused to roll down on plaintiff's claim by reason of the construction of defendants' mountain trail, and that, as to these acts of alleged trespass, the findings should have been in plaintiff's favor. We think, therefore, that the court erred in finding against plaintiff's allegations respecting the acts of trespass, and that such error is cause for reversal, unless, as claimed by respondents, plaintiff has no valid mining claim.

Respondents, ignoring the points specifically urged by appellant as grounds for reversal, have pivoted their whole case on this appeal upon the one question: Was plaintiff's location a valid mining location? Their contention that plaintiff has no right or title to the land which he claims has been injured by defendants' acts is grounded on two propositions: (1) That plaintiff did not locate his claim in conformity with the United States system of public land surveys; and (2) that his location notice was not recorded in the county recorder's office within 30 days after its posting, as required by section 1426d of our Civil Code.

[5, 6] Section 2331 of the Revised Statutes (U. S. Comp. St. § 4630) provides that—

> "All placer-mining claims * * * shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys."

It is the policy of the government to have mining locations in compact form. No shoestring claim will receive the government's sanction. Locations upon unsurveyed lands, as well as those upon surveyed lands, are within the purview of the statute. If the lands have been surveyed by the government, the location, in its exterior limits, must conform to the public survey, if reasonably practicable; if the land be unsurveyed, the location, as reasonably as practicable, must be rectangular in form, with east and west and north and south boundary lines, and otherwise approximating conformity to the public survey system within the limits of practicability. Wood Placer M. Co., 32 L. D. 364; Snow Flake Placer, 37 L. D. 250. The evidence does not disclose whether the land was publicly surveyed land or not. During the trial counsel for defendants sought to evoke from plaintiff's counsel an admission that the land had been surveyed, but the latter warily evaded making any such admission. If the land was not publicly surveyed land, we are not prepared to say that the location did not conform to the United States system of public land surveys to the extent required by the statute where the land is unsurveyed. In monumenting and staking his claim, plaintiff evidently endeavored to locate a piece of land that should include the exact 20-acre unit of location permitted by Congress, and be rectangular in form, with side lines 80 rods in length, running north and south, and end lines 40 rods in length, extending east and west. But regardless of this, there is one complete answer to defendants' objection, and that is the fact that, according to the admission of the pleadings, plaintiff's location was surrounded on all sides by prior claims. It is alleged in the complaint, and not denied by the answer, that "at all times herein mentioned"—and that, according to paragraph 8 of the complaint, includes the time when, in August, 1913, plaintiff "established himself" upon his claim—defendants "have been the owners of, interested in, * * * and in possession and control of, certain real property and mining claims adjoining the above-described mining claim of plaintiff on the northerly, easterly, southerly, and westerly sides thereof." This, we think, is tantamount to an allegation, admitted by the answer, that, at the time when plaintiff located his claim, it was surrounded on all sides by prior claims. The conformity requirement of the federal statute does not require a placer locator to conform his location to legal subdivisions of the public surveys and the rectangular subdivisions thereof, when such requirement would compel him to place his lines on other prior located claims. It is not, therefore, essential that his claim conform with the United States system of public land surveys when it is surrounded by prior locations. Conformity with the United States public survey system would not be reasonably practicable in the location of public land thus surrounded by prior claims; and whether the claim be on surveyed or unsurveyed lands, if it be surrounded by such prior claims, its boundaries may conform thereto regardless of the irregularity of the form thus produced. Snow Flake Case, supra; Lindley on Mines (3d Ed.) § 448.

[7] Because section 2331 of the Revised Statutes says that "where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands," respondents insist that plaintiff's claim is invalid because he never caused his land to be surveyed or a plat to be made. But the plat and survey referred to by the section invoked by respondents are the plat and survey to be made and filed when the application for a patent is made, and are not an essential to the perfecting of a valid location. White v. Lee, 78 Cal. 596, 21 Pac. 363, 12 Am. St. Rep. 115.

Plaintiff monumented and staked his claim and posted his location notice on August 5, 1913. His first notice, recorded September 30, 1913, did not correctly describe his claim;

so, on the same day that he posted his first notice, August 5, 1913, he posted another notice, but failed to record this second notice until July 16, 1915. Because neither notice was recorded within 30 days after it was posted, as required by section 1426d of the Civil Code, respondents contend that plaintiff never acquired any valid mining claim, and that therefore it is of no consequence that the court, contrary to the evidence, found against plaintiff's allegations respecting defendants' acts of trespass.

[8] The Code does not visit a locator with forfeiture as a consequence of his failure to record his location notice in time. No such dire result follows his neglect. Though Congress has recognized the right of states to pass statutes, and of mining districts to adopt regulations, requiring the recording of location notices, Congress itself has not made the recording of the notice an essential prerequisite to a valid mining claim. So far as the steps required by Congress are concerned, a location right accrues by virtue of the prerequisite acts of discovery, prior possession, and marking boundaries. If the recording of the location notice be a necessary step to perfecting a valid mining claim, its necessity must be found clearly expressed in the state statute. Haws v. Victoria Copper M. Co., 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; Ford v. Campbell, 29 Nev. 578, 92 Pac. 206. That plaintiff's failure to record his notice within the time prescribed by the Code did not work a forfeiture of his claim, there being no such penalty affixed by the statute, is settled by the decisions of the Supreme Court of this and other states, as well as by the decisions of the federal courts. Emerson v. McWhirter, 133 Cal. 510, 65 Pac. 1036; Stock v. Plunkett, 183 Pac. 657. See, also, Zerres v. Vanina (C. C.) 134 Fed. 610; Last Chance M. Co. v. Bunker Hill M. Co., 131 Fed. 579, 586, 66 C. C. A. 299; Sturtevant v. Vogel, 167 Fed. 448, 93 C. C. A. 84; Ford v. Campbell, supra; Gibson v. Hjul, 32 Nev. 360, 108 Pac. 759; Strepey v. Stark, 7 Colo. 614, 5 Pac. 111. It must be held, therefore, that, notwithstanding his failure to record the location notice within the time prescribed by the Code, plaintiff did not, for that reason, forfeit his mining claim or his possessory right thereto, and that he has such title to the ground monumented and staked by him as entitles him to relief against any unlawful trespass thereon.

[9] Under the evidence adduced at the trial, plaintiff's right to such water from the stream as may be reasonably necessary for his mining purposes is superior to any right that defendants may assert thereto. There was evidence to show that, from the time plaintiff made his location, defendants had actual notice that he was in possession of his claim, asserting a right thereto as a locator thereof under the United States mining laws. Under two recent decisions—one by the highest federal tribunal and the other by the Supreme Court of this state—it must be held that, notwithstanding plaintiff's failure to record his location notice within the time prescribed by the Code, he acquired, not only a right of possession which he did not forfeit merely because of his neglect to make a timely record, but a location that, if imperfect, would, nevertheless, be superior to any location on the same ground that defendants might subsequently have attempted to make. Stock v. Plunkett, supra; Butte, etc., Co. v. Clark, etc., Co., 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447. We think that if plaintiff's location would be superior to any that defendants subsequently might have attempted to make on the ground monumented and staked by him, his right to such water from the stream as may be reasonably necessary for beneficial use on his claim would be superior to any right in defendants to use the water upon their subsequently located mining claims on that part of the public domain that lies further up the gulch.

We are satisfied that plaintiff's evidence was sufficient to make out a prima facie case entitling him to relief. It is quite possible, however, that, on the retrial of the case, defendants, who, at the last trial, were not required by the court to adduce any evidence whatever, may make a showing that will present the case in entirely new and different aspects.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 328

GLOBE INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 3114.)

(District Court of Appeal, Second District, Division 1, California. Dec. 30, 1919.)

1. MASTER AND SERVANT ⟸371—CARPENTER BUILDING SILO FOR DAIRY PARTNERSHIP INJURED IN EMPLOYER'S BUSINESS WITHIN WORKMEN'S COMPENSATION ACT.

Where a carpenter employed by a partnership to build a silo on its dairy farm died from a fracture of the skull caused by the fall of a scaffold, the accident occurred in the course of the business of employers; the silo being essential to the business.

2. MASTER AND SERVANT ⟸416—FINDING OF ELECTION UNDER WORKMEN'S COMPENSATION LAW IS RENDERED UNNECESSARY BY STIPULATION.

A finding that the employers had elected to submit themselves to the Workmen's Compensation Law is unnecessary where the parties have stipulated that such was the fact.

3. MASTER AND SERVANT ⟸416—STIPULATION RENDERING FINDING OF ELECTION UNDER WORKMEN'S COMPENSATION LAW UNNECESSARY.

A stipulation based on evidence by employers that they had accepted the Workmen's Compensation Law and had taken out insurance *held* to constitute an admission rendering an express finding of election unnecessary.

Proceedings under Workmen's Compensation Law by Mrs. Etta M. Schrock and others to recover compensation for the death of A. B. Schrock, employé opposed by Singleton & Haskell, employers, and Globe Indemnity Company, a corporation, insurance carrier. An award of compensation was made by the Industrial Accident Commission, and the insurance carrier brings certiorari. Award affirmed.

H. W. Kidd, of Los Angeles, and A. J. Verheyen, of Hollywood, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

JAMES, J. The indemnity company petitioner brought this proceeding for the purpose of obtaining a review of the evidence and findings made by the Industrial Accident Commission under which an award was entered.

Defendants Singleton & Haskell were copartners engaged in the dairy business. Petitioner was the insurance carrier. In September, 1918, A. B. Schrock, by occupation a carpenter, was employed by the copartners. He had been so employed at intervals for a considerable length of time doing cement and carpenter work as required. In the month mentioned he had built a silo on the dairy farm of the copartners, and, after a short interval, was called to build a second silo, upon which he was working when the scaffolding gave way, precipitating him to the bottom of the structure, and causing a fracture of the skull from which he died. Compensation was asked for on the part of the widow and minor children, and an award was made against the indemnity company here complaining.

[1] The first point made is that the engagement of the deceased was both casual and not in the course of the business or occupation of his employers. That it was casual may be admitted; that it was in the course of the business of his employers is fully borne out by the testimony. On that point one of the copartners testified as follows:

"Q. Now, these silos that were being built, especially the one on which he was working at the time of his death, for what purpose are they used? A. Well, they are for putting our corn in, to keep the ensilage for the winter. Q. For the manufacture of ensilage for winter feed, and that winter feed is fed to milk cows? A. Yes. Q. Part of your business, is it? A. Yes. Q. It is your business to feed cows and produce milk, and the work that he was doing was to erect a silo to further that purpose? A. Yes."

It would seem that the having of these receptacles for the storing of feed for the dairy cows was as essential to the business conducted by the copartners as the maintaining of barns for the shelter of the animals, or in which hay or other fodder might be kept. This first contention made by petitioner, we think, is so plainly without substantial merit as to deserve no further discussion.

The second point relied upon is that there was no sufficient evidence or finding to show that the employers of Schrock (being engaged in a business expressly exempted from the provisions of the Employers' Liability Act [St. 1917, p. 831]) had, as they were permitted to do, elected to bring themselves under the provisions of the act in question. We quote paragraphs 3, 4, and 5 of the findings as follows:

"(3) That at the time of said injury said employers were engaged in the occupation of conducting a dairy, and said employé was engaged in building a silo for the storing of ensilage for feeding cows at said dairy; that thereafter said employé was at said time engaged in dairy labor within the meaning of section 8 of the Workmen's Compensation, Insurance, and Safety Act of 1917; that at said time said employers were insured against liability for compensation under said act by defendant Globe Indemnity Company, a corporation, by a policy which covered the applicant; and that therefore the parties hereto were at the time of said injury subject to the provisions of said act and to the jurisdiction of this commission.

"(4) That the employers had knowledge of said injury as defined by section 15 of said act.

"(5) That the defendant Globe Indemnity Company, a corporation was at the time of said injury the insurance carrier for said employers, and is liable for the full compensation which the employers are liable to pay, and that said employers are therefore entitled to be relieved from liability on account of such injury and to be dismissed from this proceeding."

[2, 3] It may be correct to say that by finding 3 an election on the part of the employers to submit themselves to the provisions of the law is not expressly determined, but, even though such an admission be made, the evidence is ample to the point, and in that particular takes the form of a stipulation. It is unnecessary to cite authorities that facts admitted in the pleadings or stipulated to be true need not be made the subject of a finding. At page 19 of the record submitted we find that the following occurred while one of the partners was being examined as a witness:

"Q. Do you and Mr. Singleton engage in any other business besides that of the dairy busi-

ness? A. No; only just that ranch up there is what we have together. Q. Have you signed an acceptance of the Workmen's Compensation Law for yourself and for your employés and taken out insurance? A. Yes; we have; we have taken out insurance.

"The Referee: I suppose you folks will stipulate to that?

"Mr. Kidd: Yes; I admit that to be a fact."

We construe that stipulation to be an admission both that an election had been made by the employers to bring themselves within the provisions of the Compensation Law, and also that insurance had been taken out thereunder. Further than this, the answer of the indemnity company petitioner as filed with the commission contained the following admission:

"Admits that on or about September 23, 1918, Absalom B. Schrock met with a certain accident by reason of which he was killed, and that when so injured he was in the employ of the defendants W. H. Singleton and James S. Haskell, and that at the time of the happening of the said accident and of the death of said Absalom B. Schrock said Globe Indemnity Company had issued and outstanding a certain policy of insurance indemnifying said Singleton and Haskell within the limits expressed in said policy from the liability imposed on them by law under the terms of the Workmen's Compensation, Insurance, and Safety Act of the state of California, and that the defendant employers and this answering defendant had due and sufficient notice of the happening of said accident and of the said death."

Again, we find a stipulation in writing made by petitioner in the course of proceedings before the commission, which reads as follows:

"It is stipulated that the defendant Globe Indemnity Company, a corporation, was, at the time of the injury which forms the subject matter of the above-entitled proceeding, the insurance carrier for the employer and had insured the employer against liability for compensation to the employé under the Workmen's Compensation, Insurance and Safety Act of 1917, and is liable for the full compensation which the employer is liable to pay, if any."

Throughout the record made at the hearing before the commission up to the point that a rehearing was asked for, it is not apparent that there was any dispute between petitioner and its adversaries regarding the fact that the employers of Schrock were, in the transaction of their business amenable to the provisions of the Compensation Law.

We find no further points made in the brief filed by petitioner which merit or require additional discussion.

The findings and award of the respondent commission are affirmed.

We concur: CONREY, P. J.; SHAW, J.

45 Cal. App. 302

ROPER v. SMITH et al. (Civ. 3073.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1919.)

1. LIMITATION OF ACTIONS ⟸142—ACKNOWLEDGMENT OF INDEBTEDNESS MUST BE TO CREDITOR.

A distinct and unconditional recognition of indebtedness sued on, made in petition by minor defendants to court to obtain authorization for the giving of a second mortgage, did not, under Code Civ. Proc. § 360, take the case out of the operation of statute; the writing being addressed to court and not to the creditor.

2. LIMITATION OF ACTIONS ⟸143(6) — DEFENDANTS WHO REQUESTED FORBEARANCE ESTOPPED TO PLEAD STATUTES.

In action to foreclose mortgage, *held*, that defendants were estopped to plead the statute of limitations by reason of the forbearance of the plaintiff's assignor to sue defendants at the latters' request and upon their promise to pay the mortgage debt.

3. LIMITATION OF ACTIONS ⟸151(4)—THERE BEING A VALUABLE CONSIDERATION, THE LAW WILL PRESUME THAT FORBEARANCE WAS FOR A REASONABLE TIME.

Though there was no definite period that the creditor agreed to forbear where there was a valuable consideration given for the forbearance, the law will imply that it must be for a reasonable duration, so that the running of the statute of limitations would be suspended for a reasonable time.

4. LIMITATION OF ACTIONS ⟸174(1)—ESTOPPEL TO PLEAD LIMITATIONS AGAINST MORTGAGEE AVAILABLE TO MORTGAGEE'S ASSIGNEE.

Where defendants would have been estopped to plead limitations against suit to foreclose a mortgage, if it had been brought by the original mortgagee, they were estopped to plead limitations where such suit was brought by the mortgagee's assignee, under the rule that an estoppel operates, not only on the parties to the transaction, but also on their privies.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by F. L. Roper against Charlotte Delia Smith and others. From an adverse judgment, plaintiff appeals. Reversed.

Charles F. Fury, of Petaluma, for appellant.

F. A. Meyer, of Petaluma, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment entered upon an order sustaining a demurrer to the complaint in an action to foreclose a mortgage on real property, the plaintiff being the owner by assignment of the obligation secured by said mortgage. The demurrer was sustained upon the theory that the action was barred by the statute of limitations. The institution of the suit was about 4½ years after the ma-

turity of the note, and was, consequently, barred unless, as the plaintiff contends, the defendants were estopped to set up the defense of the statute, or unless there was an acknowledgment in writing by the defendants of the indebtedness.

The complaint alleges that in February, 1907, Mrs. Fidelia Winton by an escrow deed conveyed the real property concerned to Charlotte Delia Smith and Dean Kingsley Smith, two of the defendants in the action, who at that time were minors. Subsequently, in April, 1908, said Fidelia Winton, notwithstanding said deed in escrow, conveyed the property to John W. Winton, her husband, and this deed of conveyance was recorded in April, 1912. In April, 1914, Fidelia Winton died, whereupon the escrow deed to said defendants was placed upon record. Prior to her death and on November, 1913, John W. Winton executed the note and mortgage in suit to plaintiff's assignor. The note was payable one day after date, and about a year after that date, no interest having been paid upon the note, the original mortgagee was threatening foreclosure of the mortgage. In order to prevent such action and the sale of the defendants' interest in the property, it was deemed advisable, in the interest of said minor defendants, to purchase for them the title of said John W. Winton. Accordingly, it was agreed between the mortgagee and the guardian of said minors that the mortgagee should advance to them a sum of money approximately sufficient to accomplish that purpose, and, as security for the payment of the loan, the mortgagee was to accept a second mortgage on the property. The accrued interest on the first mortgage was to be paid by said minor defendants, and they were to pay the balance due on the original note as soon as funds were available for that purpose. In consideration of this agreement the mortgagee was to forbear to prosecute the threatened suit or to take any steps to foreclose the mortgage, not, however, for any specified time. In accordance with this understanding, the superior court, upon petition setting forth these facts granted to the guardian of the minors permission to purchase the Winton title and to mortgage the property to plaintiff's assignor for $700. This second mortgage was executed, the Winton title purchased, the interest on the note and mortgage paid, and the mortgagee, relying upon the request of said defendants and their promise to pay said mortgage executed by Winton, forbore commencing his action of foreclosure, and but for said request and promise on the part of said defendants said mortgagee would have commenced his action prior to the expiration of four years from the date of said note.

[1] The first contention of the appellant is that the petition of said minors, made to the superior court, to obtain its authorization for the giving of the second mortgage hereinbefore referred to, contained a distinct admission in writing of the indebtedness here sued upon, which acknowledgment brings the case within the provisions of section 360 of the Code of Civil Procedure and removes it from the operation of the statute of limitations as pleaded. Granting, for the sake of argument, that the petition contained a distinct and unconditional recognition of the obligation, for which the defendants were liable, as seems necessary under the provisions of the section referred to, still, as the writing was addressed to the court and not to the creditor, it cannot be held to have taken the case out of the operation of the statute. It was said by this court in Visher v. Wilbur, 5 Cal. App. 562, 90 Pac. 1065, 91 Pac. 412:

"The test would be, it seems to us, was the party to whom the acknowledgment, if any, was made, legally competent to make a contract with respect to the subject as to which the statute had run?" Citing Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609.

In that case the Supreme Court said:

"It is very certain that an actual promise can be made only to the creditor, and it follows that the acknowledgment from which the promise is to be inferred must be made to the creditor. An admission to a stranger of the existence of the debt cannot be construed an acknowledgment to the creditors such as indicates an intention on the part of the person making the admission to hold himself bound to pay, nor is it expressive of his willingness to pay. 'An unqualified admission to a stranger will not take the case out of the statute or constitute a good cause of action.' Trousdale's Adm'r v. Anderson, 9 Bush [Ky.] 276."

[2] The next contention of the appellant is that the defendants were estopped to plead the statute of limitations by reason of the forbearance of the plaintiff's assignor to sue the defendants at the latters' request and upon their promise to pay the mortgage debt.

It is no doubt well settled that, where a party has been induced by the debtor to forbear suit until his right of action is barred by the statute, the latter will be estopped to say that the action is brought too late (1 Woods on Limitations, § 76); and in this state an even more liberal rule has been recognized, viz., that—

"If, pending the running of the statute, the time of payment is extended by the creditor, with the assent of the debtor, the statute does not run during the time of the suspension." State Loan, etc., Co. v. Cochran, 130 Cal. 245, 62 Pac. 466, 600; Smith v. Lawrence, 38 Cal. 24, 99 Am. Dec. 344.

In each of these cases the forbearance was for a definite agreed time, and the period of limitations was held to be extended in the same measure. And this suspension of the statute is held to arise by virtue of the prin-

ciple of equitable estoppel, the delay in bringing suit, and the consequent jeopardy to the interests of the creditor, being attributed by the law to the action of the debtor, of which he may not take advantage.

[3, 4] In the case at bar there was no definite period that the creditor agreed to forbear, but as there was a valuable consideration given for such forbearance the law would imply that it must be for a reasonable duration. A brief suspension only in the present case is all that would be necessary to avert the bar of the statute. If, then, the present suit had been brought by the mortgagee, it would have to be held that the defendants were estopped to plead the statute, and it seems to be the rule also that his assignee is accorded the same right. The general rule as to estoppel is that it affects the immediate parties to the transaction and their privies. Bigelow on Estoppel (6th Ed.) pp. 372, 629.

"It is a general rule that an estoppel operates not only on the parties to the transaction but also on their privies in blood, estate, and contract." 10 R. C. L. 837.

In Krathwohl v. Dawson, 140 Ind. 1, 38 N. E. 469, 39 N. E. 496, it was held that, where the maker of a note is estopped in favor of the holder thereof to set up a defense thereto, the holder's assignee is entitled to the benefit of the estoppel. See, also, the application of this principle in Wood v. Seely, 32 N. Y. 105; Short v. Jackson, 2 Ky. (Sneed Ky. Dec.) 192.

It follows from the foregoing that the court erred in its conclusion that the plaintiff's cause of action was barred by the statute of limitations and in sustaining the defendants' demurrer to the complaint.

The judgment must therefore be reversed, and it is so ordered.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 384

SMITH v. CENTRAL & PACIFIC IMPROVEMENT CORPORATION.

(Civ. 3114.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1919.)

1. CORPORATIONS ⟸473—EVIDENCE INSUFFICIENT TO SHOW THAT DEFENDANT CORPORATION HAD NOTICE OF ASSIGNMENTS OF INTERIM BOND CERTIFICATES AGAINST WHICH DEBTS OWING BY ASSIGNOR HAD BEEN CHARGED.

In an action to recover the value of certain bonds which defendant corporation had undertaken to issue by the terms of interim certificates assigned to plaintiff, where it appeared that such certificates were issued to a third person in payment of real estate upon which the third person had acquired an option and to which he had later obtained a deed from plaintiff, and that certain amounts due from such person to defendant had been charged against the certificates by the third person's request, evidence *held* to support a finding that defendant had no notice that such third person had assigned the certificates to plaintiff, so that the charges so made against the certificates, having been made in good faith, were binding as against plaintiff.

2. EQUITY ⟸57—EQUITY REGARDS AS DONE THAT WHICH OUGHT TO BE DONE, NOT APPLICABLE WHERE THE ACT UNDER CONSIDERATION HAS BEEN WAIVED.

In an action to recover the value of corporate bonds to be issued on interim certificates taken out by plaintiff's assignor, where it appeared that such assignor had waived the issuance of the bonds, the maxim that equity regards as done that which ought to be done, and that therefore the bonds should be considered as having been issued and to have passed to plaintiff by delivery as negotiable instruments, could not be applied, since equity will not regard as done that which a party has for a consideration waived.

3. CORPORATIONS ⟸473—TENDER OF CHECK FOR AMOUNT DUE ON CORPORATE INTERIM CERTIFICATES DEPENDENT ON PERFORMANCE OF CONDITION WAS SUFFICIENT.

In an action to recover the value of certain corporate bonds to be issued on interim certificates, a tender by the corporation of the balance due in the form of a check payable to plaintiff assignor, but not accepted by such assignor nor indorsed by him, together with a letter requesting plaintiff to call at defendant's office "so that we may pay you this money and have you make the proper indorsements on the certificates," was a sufficient tender in view of Civ. Code, § 1498, providing that, when a debtor is entitled to performance of a condition precedent to or concurrent with performance on his part, he may make his offer to depend upon the due performance of such condition; the nonproduction of the check to plaintiff being of no consequence in view of section 1496, the offer not having been accepted.

4. TENDER ⟸15(3)—OBJECTIONS TO MODE OF TENDER NOT MADE AT TIME ARE WAIVED.

By failure to object to a tender as to the mode of the offer, the party to whom the tender is made waives the grounds of the objections which he had an opportunity to state at the time and which could then have been obviated by the tenderer.

5. CORPORATIONS ⟸473 — CREDITS AGAINST INTERIM CERTIFICATES ASSIGNED WITHOUT NOTICE ARE BINDING ON ASSIGNEE.

Where a corporation has issued interim bond certificates in payment of real estate purchased from one who held an option from plaintiff, and subsequently acquired title and debts owing by such person to the corporation were charged against the certificates by his request, without notice that the certificates had been assigned to the original owner of the realty, who was the beneficial owner of the certificates, such

credits were in the same situation as though they had been given to the beneficial owner himself.

6. CORPORATIONS ⟸473—PERCENTAGE STIPULATED FOR RIGHT TO CALL CORPORATE BONDS BEFORE MATURITY CANNOT BE INCLUDED IN JUDGMENT FOR VALUE OF SUCH BONDS WHEN ISSUANCE WAIVED.

Where one of the conditions upon which corporate bonds were to be issued upon interim certificates was that the corporation after a given time should have the right to call the bonds before maturity by paying an additional 5 per cent. upon the principal of the bonds so called, such additional 5 per cent. cannot be allowed in a judgment against the corporation for the value of the bonds undertaken to have been issued where the actual issuance of the bond had been waived by plaintiff's assignor.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Howard B. Smith against the Central & Pacific Improvement Corporation. Judgment for plaintiff for part only of the amount sued for, and he appeals. Affirmed.

Frank F. Oster, of Los Angeles, for appellant.

Arthur Wright, Hunsaker & Britt, Le Roy M. Edwards, and Samuel Poorman, Jr., all of Los Angeles, for respondent.

RICHARDS, J. The plaintiff sued for $65,000, and interest, alleged to be due to him as the value of certain bonds which the defendant had undertaken to issue by the terms of certain interim certificates made and given by it to one W. W. Wilcox and assigned by Wilcox to the plaintiff. The plaintiff had judgment for the sum of $38,582.78 as principal and $4,331.04 as interest, the difference between the sum of these amounts and the amount sued for having been by the defendant credited to Wilcox in extinguishment of certain obligations due from him and one D. Johnston and charged to said certificates before receiving notice of such assignment. The plaintiff appeals.

The facts may be summarized as follows: The defendant was organized by several persons who at the time were members of an improvement club in the city of Los Angeles, known as the South Main Street Improvement Association, among them being R. H. Raphael, Andrew Beyrle, J. M. Carpenter, their attorney, Arthur Wright, and the secretary of the club, C. R. McKeon. These persons were interested in improving the character of the business property in the locality indicated by the name of the club, and the immediate object of the organization of the defendant as a corporation was the acquisition of a parcel of land, 150 feet square, situated at the corner of Main and Washington streets in said city, and upon which there was at the time a one-story building, of which property the plaintiff was the owner. It was thought desirable by the persons mentioned to erect upon this lot a substantial business block of a character to enhance the value and desirability of property generally in its immediate neighborhood. W. W. Wilcox and D. Johnston were acquaintances of long years' standing of the plaintiff, they having had business relations together in the city of Colton, of which the plaintiff was still a resident, Wilcox and Johnston having removed to Los Angeles. Mr. Beyrle owned property adjoining that of the plaintiff, and formed the acquaintance of Wilcox and Johnston upon an occasion when the latter were attending to some business in connection with the plaintiff's said property. These three gentlemen got into conversation, and the project of acquiring the plaintiff's property for the aforesaid purpose was brought up and discussed, as a result of which Wilcox undertook to see the plaintiff and find out on what terms it could be acquired. He did so, and received an authorization from the plaintiff to negotiate a sale of his property for $80,000 of 6 per cent. serial bonds to be issued by the proposed corporation when organized, said bonds to be a first mortgage upon the property, including the proposed improvements, the purchaser also to assume an existing mortgage indebtedness thereon of $45,000. It was also understood between the plaintiff and Wilcox that the latter could retain for himself any excess over the price mentioned that he might obtain from the purchaser. Wilcox thereupon wrote a letter, dated February 7, 1912, to Mr. Raphael, who was the leading spirit in the proposed enterprise, and who, upon the subsequent organization of the corporation, became its president; said letter being in the following terms:

"Dear Sir: About one year ago Mr. Smith quoted * * * a price of $900 per foot for his lot on Main and Washington, that being the cost to him, taxes and interest included. He later agreed to take $850 per foot. He would not entertain a proposition for bonds or stock. A few weeks ago he requested me to examine the building and determine on the proper front. While there I met Mr. Beyrle who told me of the project to build and issue stock and bonds. I favored the enterprise and endeavored to interest Mr. Smith, and as the result of several interviews I am prepared to state that a deal can be made with Mr. Smith as follows: As settlement buyers are to pay mortgage of $45,000 and issue $82,500 in 6 per cent. bonds, interest to begin January 1st, 1913; also $10,000 in stock.

"Yours truly, W. W. W."

This letter led to negotiations between Wilcox and Raphael, as a result of which, on February 14, 1912, Wilcox addressed another letter to him, reading as follows:

"Dear Sir: Referring to conversation had with you recently regarding Main and Washing-

ton property, wherein you state that your people insisted on bonds drawing interest from July 1st, 1913, instead of January 1st, 1913, I find I am unable to meet this request as Mr. Smith insists upon the bonds he takes drawing interest from January 1st, 1913, thereby bringing the first semi-annual payment due July 1st, 1913.

"I now have full power and authority in way of a signed option from Mr. H. B. Smith for the handling of his property, and am in a position to renew the offer made you on the 7th inst. viz.: As settlement buyers are to pay mortgage of $45,000, and issue $82,500 in 6 per cent. serial first mortgage bonds, interest to begin January 1st, 1913, also $10,000 in stock. Said bonds to be based upon not over 50 per cent. of the valuation of the property including proposed improvements.

"Yours truly, W. W. Wilcox."

A few days later the following paper was executed by Wilcox, Raphael, Beyrle, and Carpenter:

"For a valuable consideration by me received, the receipt of which is hereby acknowledged, I hereby agree to convey the following described real estate in the city of Los Angeles, California: (Here follows description of plaintiff's property.) To Andrew Beyrle, J. M. Carpenter and R. H. Raphael, or to any corporation or person or persons that they may designate, in accordance with the attached letter addressed to R. H. Raphael and executed by myself and dated February 14, 1912, all to be done upon their demand; a deed for same to be deposited in escrow when they demand. This matter to be escrowed within four months.

"In witness whereof I have hereunto affixed my signature this 19th day of February, 1912.

"W. W. Wilcox.

"We accept above: R. H. Raphael, Andrew Beyrle, J. M. Carpenter, as Agents of a Proposed Corporation."

The letter referred to as attached to said writing is the one immediately above set out.

As a step in carrying out the terms of this paper, Attorney Wright prepared a deed from the plaintiff to Wilcox and another from Wilcox to Raphael, Beyrle, and Carpenter as therein provided; but upon the objection of Johnston (who as a friend of the plaintiff sought to protect his interest) to the title to the property going to these individuals these deeds were not finally executed and delivered.

Raphael, Beyrle, and Carpenter, with the assistance of Arthur Wright, their attorney, proceeded with the organization of the defendant; the organization being completed within a brief interval. In the meantime the plaintiff, apparently in order to facilitate the sale of his property to the defendant (he being at this time a resident of Colton), made a deed thereof to Wilcox. At the next meeting between Wilcox and the organizers of the corporation and their attorney this transfer to Wilcox was communicated to those present, and, according to the testimony of Beyrle, the following occurred with reference thereto:

"At the meeting that we organized the question was brought up as to closing that option, and Mr. Wilcox arose, and he says: 'I own that property now; I have a deed to it and you can do business with me; you don't have to pay any attention to the option.' And Mr. Wright got up and he says: 'That simplifies matters materially. We can fix that up now on a basis that we can go ahead.'"

Wilcox thereupon made a deed of the property to the defendant and placed it in escrow, to be delivered upon receipt by the escrow holder for the account of Wilcox of $10,000 par value of the capital stock of the defendant fully paid, and $82,500 par value 6 per cent. first mortgage 20-year gold bonds of said corporation; said bonds prior to their creation and issuance to be evidenced by a temporary interim certificate. This certificate was issued on April 10, 1912, and by it the defendant promised and agreed to proceed to authorize, create, and issue its said corporate bonds, the same to be secured by a deed of trust constituting a first lien or mortgage against certain real property, including that thus acquired by the defendant. Between that date and May 8, 1912, the defendant, at the request of Wilcox, issued to him, in lieu of said certificate for $82,500, five identical certificates except as to the amount of bonds called for, one being for $2,500 par value and the other four for $20,000 each, and these latter, evidencing the defendant's obligation to issue an aggregate of $80,000 of its said bonds, were on said 8th day of May, 1912, assigned by Wilcox to the plaintiff; but neither the plaintiff nor Wilcox notified the defendant of said assignment.

The bonds called for by these interim certificates were to be issued not later than six months from the date of said certificates, but when that time arrived it was the consensus of opinion of the directors of the corporation (of which Wilcox was one) that it was to the interest of the corporation not to issue said bonds, but to pay in cash from time to time as it was able the face value thereof. Accordingly on January 10, 1913, at a time when the first payment of interest upon the bonds called for by the interim certificates was not yet due, it paid to Wilcox on account of the principal of said bonds the sum of $10,000, and on the 30th of the same month paid to him the further sum of $5,000, which amounts Wilcox paid over to the plaintiff, who accepted the same apparently without objection. The defendant also between that time and February 3, 1914, paid to Wilcox the interest accruing upon said bonds. In February, 1914, the defendant, being in need of money, the question was discussed at a meeting of its board of directors at which Wilcox was present. It was resolved to immediately call upon the company's stockholders for the payment of balances due upon their subscriptions, and also to make an active effort to collect amounts

due from other debtors. At this time Wilcox was indebted to the defendant in the sum of $10,794.93, and at said meeting he requested that this amount be charged against the said interim certificates. He also at the same time directed that the sum of $7,664.03 due from Johnston to the defendant be also charged against them. These amounts were so charged accordingly and the several items of indebtedness from these two gentlemen to the corporation were canceled. In November of the same year Wilcox and Johnston having subscribed to a further issue of stock by the defendant, and being indebted on account thereof in the sums of $2,394 and $2,014, respectively, these amounts by the direction of Wilcox were charged against said certificates; and in February, 1915, Wilcox and Johnston being respectively indebted to the defendant in the sum of $2,012 and $772 for assessments upon capital stock of the defendant owned by them, these amounts by direction of Wilcox were also charged against the said certificates. In addition to these credits to Wilcox and to Johnston at the direction of Wilcox, the defendant also paid to the latter further sums representing interest on the balance due upon said certificates, and also, at his request, made the amounts of these last payments equal to the respective sums which would have been due as such had the abovementioned charges against the certificates not been made, Wilcox representing that he needed these extra amounts, the effect of these payments being to still further reduce the amount of the principal of the obligations. On October 6, 1915, Wilcox notified defendant of the assignment by him to the plaintiff of the interim certificates.

In its findings the trial court declared that Wilcox, the obligee named in each of said interim certificates, and with whom at all times prior to October, 1915, the defendant dealt as the owner thereof and as the sole person from whom moved the consideration therefor, waived the authorization and creation by defendant of its corporate bonds and the execution of its deed of trust to secure the same; that defendant in good faith accepted such waiver and in reliance thereon made payments to Wilcox; that the defendant, prior to October 6, 1915, had no notice of the assignment to the plaintiff by Wilcox of the several interim certificates, nor notice or knowledge of such facts or circumstances as would put a reasonably prudent man upon inquiry respecting such assignment or the actual ownership of said certificates, but that, on the contrary, at all times prior to said date the defendant was informed, and in good faith believed, that Wilcox was the holder and owner of said certificates. The court also found that the plaintiff had no knowledge prior to February 2, 1916, that Wilcox was representing to the defendant that he was the owner of said interim certificates, or that the defendant was making payments to Wilcox on account of said certificates other than of interest and the first two payments of $10,000 and $5,000, respectively, or was canceling obligations at the request of Wilcox and charging them against the principal of said certificates, but that the plaintiff did not at any time prior to February 2, 1916, notify defendant that said certificates had been assigned to him; and it found that the plaintiff, in failing to notify defendant of said assignment, misled the defendant and permitted Wilcox to mislead the defendant at all times prior to October 6, 1915, into the belief that Wilcox was the sole and absolute owner of said certificates, and that in so doing he was grossly negligent. It also found that prior to February 28, 1916, the defendant tendered to plaintiff on account of said certificates the sum of $16,868.62 and demanded the surrender of such one or more of said certificates as should, by the application of said sum to the payment of the amounts due upon one or more thereof, be fully discharged and paid, but that the plaintiff refused to accept said amount. The amount of the judgment in plaintiff's favor was for the sum sued for, less the charges against the certificates made at the direction of Wilcox. It is this difference which causes plaintiff's dissatisfaction with the judgment and upon which he bases his appeal.

The first and principal contention of the appellant is that the finding of the trial court that the defendant made the aforesaid charges against the said certificates in good faith and without knowledge of facts or circumstances sufficient to put it upon inquiry as to the assignment by Wilcox to the plaintiff of said certificates is unsupported by the evidence.

[1] The case upon both sides has been presented at considerable length and with conspicuous ability, and we have given to it the careful examination which its importance deserves. From such study we have reached the conclusion that this finding of lack of notice on the part of the defendant is supported by the evidence. It is true there are facts which, standing alone, pointed clearly to the ownership of this property by the plaintiff, and that the proceeds of the sale belonged to him and not to Wilcox. As instances of these we may refer to the fact that it was known to the persons who organized the defendant, and who upon its organization became its officers and directors, that the plaintiff was the owner of the property at the inception of the negotiations for its purchase; that he had authorized Wilcox to negotiate for its sale; that Wilcox a few days after having agreed upon the terms of a sale to the defendant produced a deed to himself of the property without apparently

having the means to pay for it except through the consideration which the defendant itself was to pay; that, after the consummation of the transaction and the issuance to Wilcox of one interim certificate in the amount of $82,500, he, at the request of Mr. Raphael, the president of defendant, invested $2,500 in an enterprise in which said president was interested; and that during the conversation between them ensuing upon such request Raphael expressed the opinion that Wilcox was going to make a good deal of money out of the sale of plaintiff's property to the defendant, whereupon Wilcox replied that only $2,500 of the interim certificates would go to him, following which Wilcox surrendered the single certificate for $82,500, and had issued in its place five certificates—four for $20,000 each and one for $2,500, which last he used for the purpose of making the investment invited by Mr. Raphael. There are other facts occurring later which, if uncontradicted, might or should lead a prudent person to make the inquiry suggested; but the fact that they were contradicted by other testimony precludes their consideration by this court. But, as offsetting the circumstances recited, there were the facts that the title to the property when taken over by the defendant was actually in Wilcox's name, and his assurance to the persons organizing the corporation and their attorney that they could henceforth deal with him as the owner and take no further notice of the option theretofore given to them (which option had been given by Wilcox under his authorization from the plaintiff); that the interim certificates were issued in the name of Wilcox; that he did not inform the defendant of his assignment thereof to the plaintiff, and that the plaintiff did not do so; that during a period of almost four years after the transaction was closed the interest upon the amount due, together with payments of principal, were made to Wilcox who, at all times up to October, 1915, in his dealings with the defendant either actively asserted ownership of said certificates or allowed the defendant to rest under the belief that he was such owner. It is to be remembered that the plaintiff has not based its claim against the defendant upon the fact of his ownership of this property and his sale of it to the defendant through his agent Wilcox. He has preferred to base his cause of action upon the assignment made by Wilcox to him of the interim certificates on May 8, 1912, and the evidence touching all preceding matters can only be regarded for the light it throws upon the question whether the defendant had notice of the plaintiff's ownership of the certificates through such assignment. We think that the circumstances in the case from which Wilcox's ownership of these certificates could have been legitimately inferred counterbalance those circumstances which indicated that the ownership was in the plaintiff, and that, the trial court having weighed one set of facts against the other and arrived at a conclusion, this court will not interfere with it.

The next contention of the appellant is predicated upon an equitable maxim which he contends should be given application to this case, namely, "Equity regards as done that which ought to be done." Its application to this appeal is this: That the interim certificates called for the issuance of bonds; that such bonds (appellant asserts) when issued would be negotiable instruments; that the title to a negotiable instrument passes by delivery; that therefore defendant could not safely make payments upon the interim certificates without assuring itself that the recipient of the payments had the certificates in his possession; and that had it done so it would have discovered the plaintiff's ownership of them.

The respondent answers this contention by pointing out first that the bonds in this case, if issued, were to be secured by a mortgage; that a bond so secured is not a negotiable instrument (Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881); that the issuance of the bonds was (and the court so found) waived by Wilcox, and that upon the strength of such waiver the respondent paid out large sums of money; and, finally, that the certificates themselves were not negotiable and could pass only by assignment.

[2] Without considering in detail all of these points, we think the respondent is clearly right in its contention that the issuance of the bonds was waived by Wilcox; and, if so, there is no room for the application of the equitable maxim invoked, for equity will not regard as done that which a party has for a consideration waived.

The appellant also makes the point that the court found an estoppel against the plaintiff different from that pleaded in the defendant's answer and outside of the issues. We have not heretofore referred to this in our reference to the findings, as it is apparent that, if we are correct in our conclusion that the finding of the court as to the defendant's lack of notice is sustained by the evidence, its finding on the question of this estoppel is immaterial and may be disregarded.

The next contention of the appellant which we will notice is that the finding of the court that the defendant tendered to the plaintiff the sum of $16,868.62 is not supported by the evidence, and in support of this contention refers to certain evidence that the tender was made in the form of a check made payable to Wilcox, which was not accepted by Wilcox nor indorsed by him. But there is also evidence that after the tender to Wil-

cox the defendant wrote to the plaintiff a letter, part of which reads as follows:

"From Feb. 2, 1916, we have had written out and ready for delivery a check for $16,868.62 to be paid upon the interim certificates. Mr. Wilcox has known of this for some time, but for some reason or other will not bring the certificates in for proper indorsement. If it really be true that you do own these certificates we would like to have you call at the office with them so that we may pay you this money and have you make the proper indorsements thereon, and we also want to see that there has been indorsed thereon the various items that we have charged up against them in behalf of Mr. Wilcox."

[3-5] By section 1498 of the Civil Code it is provided:

"When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition."

The fact that the check was not produced to plaintiff is of no consequence, for it is provided by section 1496 of the Civil Code that—

"The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted."

And, of course, all objections to the mode of the offer which plaintiff had an opportunity to state at the time, and which could then have been obviated by the defendant, were waived by plaintiff's failure to make any such objection. The whole question, then, as to whether a tender was made to plaintiff, depends upon the existence of defendant's right, as a condition concurrent with the payment of the $16,868.62, to the performance of the condition imposed by it, namely, the indorsement upon the certificates of payments made and credits given prior thereto. That defendant was so entitled cannot admit of dispute if we are correct in our conclusion already announced as to the defendant's lack of notice of the assignment of the certificates; for, by payments made and credits given to Wilcox, in ignorance of his assignment of the instruments, defendant was in the same situation as if it had made the payments and given the credits to plaintiff himself. In that event it could have required proper acquittances therefor, and such precisely were the indorsements demanded. The objection of the appellant that the check was made out to Wilcox and not to him is met by the letter above quoted, wherein it is said: "We would like to have you call at the office so that we may pay you this money." It is apparent from this language that the defendant was not insisting upon the plaintiff's acceptance of this particular check, but was prepared to deliver money or, if the plaintiff preferred, a check in his own name.

[6] It is finally urged by the appellant that the court ought to have allowed in its judgment an additional 5 per cent. upon the amount represented by the bonds called for in the certificates, for the reason that one of the conditions upon which the bonds were to be issued was that the defendant after a given time should have the right to call the bonds before maturity by paying an additional 5 per cent. upon the principal of the bonds so called.

We think this point is disposed of by what we have said as to the waiver of the issuance of these bonds. The bonds were never issued. The occasion, therefore, never arose for their premature retirement and the consequent obligation to pay the additional 5 per cent. And if it be said that they ought to have been issued, the reply is that such issuance was validly waived.

This disposes of the questions necessary to be discussed.

For the reasons given, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

45 Cal. App. 260

MATIASICK v. PACIFIC ELECTRIC RY. CO. (Civ. 3139.)

(District Court of Appeal, First District, Division 2, California. Dec. 24, 1919.)

APPEAL AND ERROR ⊂⊃933(4) — NEW TRIAL PRESUMED GRANTED ON PERMISSIBLE GROUND.

In the absence of contrary showing, it must be presumed, on appeal, the instructions not being in the record, that the motion for new trial, made on all the statutory grounds, was granted in conformity to Const. art. 6, § 4½, prohibiting the granting of new trial on specified grounds, unless, after an examination of the entire record, including the evidence, the court is of the opinion that the error complained of has resulted in a miscarriage of justice.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Stella Matiasick, a minor, against the Pacific Electric Railway Company. From an order granting a new trial, plaintiff appeals. Affirmed.

R. T. Lightfoot and Lee Utley, both of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for respondent.

BRITTAIN, J. Stella Matiasick, a minor, who sued by her guardian ad litem, appeals from an order granting a new trial in a case in which the jury rendered a verdict for

$4,000 against the Pacific Electric Railway Company as damages for the death of her father.

The appellant's father was riding in a buggy driven by another man. The buggy approached the railroad tracks of the defendant corporation at the rate of about 4 miles an hour, in the afternoon of December 17, 1916. The motorman in charge of the car of the defendant first saw the buggy when it was about 15 feet from the railway tracks. He was then about 200 feet from the crossing. He could see the buggy was approaching the track very slowly, and that the men were paying no attention to the approaching car. He blew his whistle several times, but they paid no attention to it. He did not sound his bell. After he had blown the whistle, he put on the emergency brake. He was "somewhere around 200 feet from the crossing," and was traveling at about 25 miles an hour. He applied all the brakes available, and was slowing down for the crossing, and was "aiming to hit the crossing at about 20 miles an hour." He thought that he reduced the speed of the car to less than 20 miles an hour, and that when he struck the buggy he was going about 8 miles an hour. There was some evidence in regard to the space required to stop the car when running at various rates of speed. The defendant denied the negligence alleged in the complaint, and affirmatively pleaded that the accident was caused by the failure of the appellant's father and the driver of the buggy to exercise ordinary care, caution, and prudence in the premises, and in separate affirmative defenses upon these alleged facts charged both direct and contributory negligence, and that the proximate cause of the collision was the action of the two men in the buggy. At the close of the trial an amended and supplemental complaint was filed, setting up facts under which it is claimed the "last clear chance" rule should have been applied. There is not incorporated in the transcript any copy of the instructions given to the jury. The notice of motion for a new trial specified all the grounds permitted by the Code. The record shows that the motion was made on all the grounds stated in the notice and upon the files and minutes of the court, and that it was granted.

The brief of the appellant is based wholly upon the claimed sufficiency of the evidence to justify the verdict. So far as the record shows, the motion may have been granted upon any of the other grounds on which it was made. In view of the rule that all presumptions are in favor of the action of the superior court and against the abuse of discretion vested in that court, and in the absence of a contrary showing, on appeal it must be presumed the motion was granted on the ground of errors in law, or of newly discovered evidence, or of accident or surprise, or upon some other ground, the disregard of which by the superior court would have resulted in a miscarriage of justice. It is not to be presumed that the trial judge violated the provisions of the Constitution. Article 6, § 4½, Const. Cal. It cannot be determined upon the showing in this case that the court abused its discretion in granting a new trial. Moore v. Thompson, 138 Cal. 23, 70 Pac. 930; Byrne v. Reed, 75 Cal. 277, 17 Pac. 201; Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511; Hitchcock v. McElrath, 69 Cal. 635, 11 Pac. 487; McAulay v. Truckee Ice Co., 79 Cal. 50, 21 Pac. 434.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 312

DORN v. OPPENHEIM et al. (Civ. 3052.)

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1919. Hearing Denied by Supreme Court Feb. 26, 1920.)

1. LANDLORD AND TENANT ⊂⊃116(5)—NOTICE NECESSARY TO TERMINATE LEASE FROM MONTH TO MONTH.

In case of a lease from month to month, the estate does not terminate by mere lapse of time, and neither party can terminate the relation without giving notice in advance for the time required by law; such a tenancy may be terminated by notice, under Civ. Code, § 1946, for one month before expiration of the term.

2. LANDLORD AND TENANT ⊂⊃116(5)—TENDER OF KEYS INEFFECTUAL AS NOTICE TO TERMINATE.

Tender of keys to the lessor by the lessee of a store from month to month was a mere offer to terminate tenancy and surrender possession, which, when promptly declined by the lessor, did not operate as the notice necessary to terminate.

3. LANDLORD AND TENANT ⊂⊃231(5) — EVIDENCE OF STATEMENTS AND ACTS OF TENANT AFTER VACATION ADMISSIBLE TO SHOW CONTINUED CONTROL.

In an action for rent of store premises leased from month to month, evidence of statements and acts transpiring after the lessee and his firm or company vacated the store was admissible in proof of the lessor's claim that the tenancy was not terminated at the time of vacation, and that the tenant continued to exercise dominion and control over the premises thereafter.

4. LANDLORD AND TENANT ⊂⊃230(8) — EVIDENCE AS TO RELATIONSHIP OF PARTIES PRIOR TO VACATION UNNECESSARY IN VIEW OF PLEADINGS AND ADMISSION OF COUNSEL.

In an action for rent of store premises leased from month to month to a firm which incorporated, in view of the complaint, answer, and admission of defendants' counsel that there was

a month to month tenancy between plaintiff lessor and the company up to the time of vacation of the premises, evidence as to the relation of the parties prior to the date of vacation *held* unnecessary.

5. LANDLORD AND TENANT ⟸230(1) — COMPLAINT ALLEGING TENANCY OF DEFENDANT COMPANY SUFFICIENT TO SUPPORT JUDGMENT FOR LESSOR IN ABSENCE OF OBJECTION.

In an action for rent of store premises leased from month to month to a firm which incorporated, complaint, though not directly alleging that the company, a defendant, was the lessor's tenant, which alleged that it was agreed the rent was to be paid the lessor by the company in advance every month, in conection with other allegations, as well as the answer, *held* sufficient to support judgment for the lessor, in the absence of objection below.

6. APPEAL AND ERROR ⟸193(1) — MERE DEFECTS IN MANNER OF PLEADING FACTS CANNOT BE CONSIDERED FOR FIRST TIME ON APPEAL.

Mere defects in the manner of stating facts cannot be considered for the first time on appeal.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by N. A. Dorn against Samuel J. Oppenheim, Elias Levy, and the Western Bag Company, a corporation. From judgment for plaintiff, defendants appeal. Reversed as to the individual defendants; affirmed as to the corporate defendant.

Wise & O'Connor, of San Francisco, and Goldman & Altman, for appellants.

F. A. Dorn and C. D. Dorn, both of San Francisco, for respondent.

WOOD, Judge pro tem. Defendants appeal from a judgment rendered against them for nine months' rent from June 1, 1916, to March 1, 1917, for certain store premises on Clay street in San Francisco. Oppenheim and Levy were joined as defendants because of their alleged ownership of all except one share of the capital stock of the corporation.

The plaintiff originally leased the premises to the Western Bag Company, a copartnership, for the term of five years from March 1, 1912, at the monthly rental of $200, payable monthly in advance. On December 14, 1915, the defendant Western Bag Company was incorporated, and immediately took over from the partnership all of the assets, including bills receivable, but none of the liabilities, and continued the business at said premises. Whether the lease passed along as an asset or kept company with the liabilities does not appear, and is unimportant, as the complaint was framed on the theory that the defendant occupied the premises as a tenant of plaintiff from month to month, and the answer alleges that the copartnership so occupied it, and not otherwise.

[1] The only controversy at the trial was as to whether the tenancy terminated on June 1, 1916, or March 1, 1917. Immediately prior to June 1, 1916, the corporation moved its business to a store on Main street, and on the day last mentioned, when plaintiff called there to see about his rent, a clerk or stenographer offered him the keys to his premises, which he refused. Upon his return to his own office he found that the keys had been left there. He immediately sent them back to the defendant, with a letter stating that he expected payment of the rent up to March 1, 1917, the date when the lease would expire. No other notice was given that defendant intended to terminate the tenancy. Of course, when plaintiff called at the Main street store, he knew that the corporation had moved from his premises. It is said by appellants "that defendant was not required, under our statutes, to give notice of the termination of the tenancy." The authorities do not support the statement. In Stoppelkamp v. Mangeot, 42 Cal. 323, it is said:

"In the case of a lease from month to month the estate does not terminate by the mere lapse of time. Neither party can terminate the relation without giving notice in advance for the time required by law."

Such a tenancy may be terminated by the notice under section 1946 of the Civil Code. Corson v. Berson, 86 Cal. 439, 25 Pac. 7. The notice to terminate a month to month tenancy must be for one month before the expiration of the term. Owen v. Herzihoff, 2 Cal. App. 623, 84 Pac. 274.

[2] It is contended that if a notice to terminate was required, then the tender of the keys was sufficient, and that defendant can be held for rent for only one month. The most that can be reasonably claimed for such tender is that it was a mere offer to terminate the tenancy and surrender possession, which was promptly declined by the landlord. Furthermore, Mr. Oppenheim, the manager of the corporation, seems to have construed the matter in that light. It appears without contradiction that between the middle of July and the middle of August following the tender of the keys he told a real estate agent that they still had the property and would be willing to rent it if he had a tenant. He looked for the keys, and was informed by the stenographer that they had been given to some one to look at the building, and had not been returned. He then sent a man, who opened the door of the premises for the agent and a prospective tenant. Two or three days later he instructed the agent to get a locksmith to open the door so that the agent could again exhibit the premises. He told him to have keys made, and paid for

them when they were delivered to him by the agent. He said to the agent that he did not care whether he rented the building or not, because they might get in a big consignment of bags and put them in there and make as much as they would be out at the time the lease expired.

[3] It is urged that evidence of these statements and acts of Mr. Oppenheim transpiring after June 1st cannot be considered, as it is not shown that they were ever communicated to the plaintiff. The evidence went in without objection, and was properly admitted in proof of plaintiff's claim that the tenancy was not terminated on June 1st, and that defendant continued to exercise dominion and control over the premises thereafter, even though they were vacant.

The inference appears that for some reason which he considered advantageous to the corporation Mr. Oppenheim did not take legal steps to terminate the month to month tenancy. He was largely interested in and had a comprehensive knowledge of the business, and was fortified with the assistance of counsel. He was manager and had control, not only of the corporation, but of the affairs of the partnership from its very inception. He participated in the negotiations which resulted in the lease to the partnership. Upon the organization of the corporation practically three-fourths of the stock was issued to him, while at the time of the trial he testified that he owned it all except two shares.

[4] It is contended that plaintiff did not allege or prove, and that the court did not find, that the relation of landlord and tenant, existed between plaintiff and the corporation. This contention is based in part upon the existence of the lease from plaintiff to the partnership, and cases are cited to the effect that there is no privity of contract between a landlord and an under tenant.

The complaint, among other things, alleges that the corporation went into the possession of the premises in December, 1915; that on the same day the corporation became a tenant in these premises of plaintiff at the monthly rental of $200 per month, and it was agreed to be paid to plaintiff by the corporation in advance each and every month; that the corporation remained in possession as a tenant from month to month up to March 1, 1917, paying the rent up to June 1, 1916. The answer alleges that on or about June 1, 1916, the corporation occupied the premises as a tenant from month to month and not otherwise, that on June 1st it surrendered the said premises to plaintiff, and that said tenancy terminated on that day. Defendants' counsel admitted at the trial "that there was a month to month tenancy between the plaintiff and the corporation, but denied the existence of such a lease subsequent to June 1, 1916." The findings followed the allegations in the complaint, and in view of the answer and the admission of counsel no evidence was necessary as to the relation of the parties prior to the date last named.

Whatever agreements or negotiations were had between these parties or with the partnership were not in evidence. It appears that both parties, apparently with full knowledge of all the circumstances of the case, and advisedly, both in their pleadings and in their statements to the court, agreed to the ultimate fact that the corporation was a tenant of plaintiff under a month to month tenancy up to June 1, 1916. No citation of authority seems necessary to show that under these circumstances defendant cannot now in this court, for the first time, raise the question that it does not appear that the corporation was the tenant of plaintiff.

[5, 6] As to the objection to the sufficiency of the complaint, it is true that there is no direct allegation that the corporation was a tenant of plaintiff. It is alleged, however, that it was agreed that the rent was to be paid to plaintiff by the corporation in advance each and every month. This, taken in connection with the other allegations hereinbefore alluded to, is sufficient to support the judgment where, as here, no objection was ever taken to the complaint in that particular in the trial court. Mere defects in the manner of stating facts cannot be considered for the first time on appeal. Fudickar v. East Riverside I. Dist. 109 Cal. 34, 41 Pac. 1024; Merrill v. Pac. Transfer Co., 131 Cal. 582, 63 Pac. 915; Guerian v. Joyce, 133 Cal. 405, 65 Pac. 972; Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 518, 75 Pac. 106.

As the trial court made no finding as to whether or not there had ever been an account stated between the parties, it is unnecessary to consider the objections raised as to the sufficiency of the evidence to support a judgment upon that count in the complaint.

Upon the hearing the respondent conceded that the complaint was insufficient to support the judgment against the stockholders Oppenheim and Levy. As to them, therefore, the judgment is reversed. The judgment against the Western Bag Company, a corporation, is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

182 Cal. 191

CHAMBERS et al. v. FARNHAM et al.
(L. A. 4905.)

(Supreme Court of California. Feb. 6, 1920.)

CORPORATIONS ⊂=264—LIABILITY OF STOCKHOLDERS FOR DEBTS OF CORPORATION "LIABILITY CREATED BY LAW" BARRED IN THREE YEARS.

An action against the stockholders individually for corporation's breach of covenants of a lease is barred by limitations if not brought within three years after the execution of the lease, regardless of when the breach occurred; the liability of a stockholder created by Const. art. 12, § 3, and Civ. Code, § 322, being a "liability created by law" within the meaning of Code Civ. Proc. § 359, and the rendition of judgment against corporation neither created a new liability, nor extended the time for suit against stockholders.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Liability Created by Law.]

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. M. Conley, Judge.

Action by B. L. Chambers and another against J. E. Farnham and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 179 Pac. 423.

Drew Pruitt, of Los Angeles, for appellants.

Barstow, Beach & Rohe and Barstow, Rohe & Jeffers, all of Los Angeles, for respondents.

ANGELLOTTI, C. J. This is an appeal by plaintiffs on the judgment roll alone from a judgment entered in favor of the defendants. The action was one to recover from the defendants, all of whom were stockholders of the Belmore Land & Water Company, a corporation, their proportion as such stockholders of an alleged liability of such company to plaintiffs. Except for a written stipulation of the parties as to the amount of capital stock of the company and the amounts owned and held by the respective defendants, no evidence was introduced, the findings being based on such stipulation and the pleadings. The claim of plaintiffs against the corporation was one for damages which plaintiffs alleged they sustained by reason of an alleged breach of a covenant contained in a lease of certain land for farming purposes delivered by the corporation to plaintiffs. This lease was executed and delivered to plaintiffs on September 25, 1911, and was for a term of two years, commencing October 2, 1911. It contained a provision reading as follows:

"It is agreed by party of the first part [the corporation lessor] that he shall construct a dam across the Silver creek and Panoche creek, on or before December 20, 1911, and to place headgates at different points of turnouts."

The purpose of this was to divert water from said creeks for the irrigation of such land, the same being located in a dry and arid region, and such irrigation being essential to the raising of grain and other crops thereon. The corporation did construct the dam in accord with the terms of the lease across said creeks. It was substantially alleged that the corporation failed to construct the headgates at the points of turnout necessary to enable plaintiffs to irrigate, during the spring of 1912, 800 acres sowed to barley by plaintiffs, with the result that they sustained damage during March, April, and May, 1912, in the sum of $5,078.55. Defendants attempted to deny these allegations, and the trial court found them untrue on the express ground that no evidence had been introduced thereon. It may be that in some respects the denials were not sufficient, but some of them, including the denial of allegation of damages, were specific and complete, with the result that the judgment for defendants would have to be affirmed for want of proof of any liability on the part of the corporation to respond in damages, unless that proof is supplied by the fact admitted by the pleadings and found by the trial court that on January 26, 1914, plaintiffs obtained a judgment against the corporation in an action instituted by them against the corporation for the recovery of damages by reason of said breach of said lease, in the sum of $5,078.55 damages, and costs, no part of

which has ever been paid. This action against defendant stockholders was commenced on January 13, 1915, which was more than three years after the execution and delivery of the lease, but, it may be conceded, within three years after the alleged breach of the covenant of the lease relied on. The trial court found that this action was barred by the statute of limitations, because not brought within three years after the date of the execution of the lease.

We are satisfied that in view of the well-settled law in this state in regard thereto it must be held that the conclusion of the lower court that the action is barred by the statute of limitations was correct. The particular statute applicable is section 359, Code of Civil Procedure, which requires that an action against a stockholder to enforce a liability created by law must be brought within three years after "the liability was created." It is thoroughly settled that the liability of a stockholder created by section 3, article 12, of the Constitution, and section 322, Civil Code, "for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation [or association]," is a liability created by law within the meaning of section 359, Code Civ. Proc., and that an action upon this primary and independent liability must be brought within the time specified therein, i. e., within three years after the liability was created. In Hunt v. Ward, 99 Cal. 612, 615, 34 Pac. 335, 336 (37 Am. St. Rep. 87), this court said:

"Of course, there is a clear and wide distinction between the creation of a liability and the accruing of a cause of action thereon; and section 359, ex industria, emphasizes that distinction. A liabilty may be absolute or contingent; it may be unconditional or limited; it may be presently enforceable by action, or there may be time given for its performance; but, whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred."

This has been repeatedly approved and is settled law in this state. See Gardiner v. Royer, 167 Cal. 238, 240, 139 Pac. 75, and cases there cited. It is not disputed by counsel on this appeal. The question to which appellants devote their argument is as to *when* the liability of the Belmore Land & Water Company, in respect to the matter here involved, was contracted or incurred, for admittedly the liability of the then stockholders sprang into existence at the very moment of the contracting or incurring of the liability by the corporation—in other words, was "created" at that very moment—and was barred by the provisions of section 359, Code of Civil Procedure, upon the expiration of three years therefrom without action instituted against the stockholders. This is true altogether regardless of the judgment obtained against the corporation, which did not create a new liability or extend the time prescribed by the statute for bringing suit against the stockholders. See Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Stilphen v. Ware, 45 Cal. 110; Larrabee v. Baldwin, 35 Cal. 155.

When was the liability of the corporation which is here involved contracted or incurred? As we have seen, the claim of plaintiffs against the corporation is necessarily for damages for a breach of covenant contained in their contract of lease with such corporation, a claim on the contract for damages for a breach thereof. There is no semblance of merit in the suggestion of counsel for appellants that the claim is not on the contract of lease, but is one "upon an implied contract created by law," etc., subsequent to the execution of the lease, and nothing said in Yule v. Bishop, 133 Cal. 574, 62 Pac. 68, 65 Pac. 1094, or in Coulter Dry Goods Co. v. Wentworth Hotel Co., 171 Cal. 500, 153 Pac. 939, in discussing Yule v. Bishop, supports counsel in this regard. The decision in Yule v. Bishop, supra, was based upon the ground that under our statutes and decisions the original obligation of the corporation had been *extinguished by payment* by the indorser of a note of the corporation, such a payment by a surety being held to be "full performance" of the obligation within the meaning of section 1473, Civil Code. Hence, as was said in Coulter Dry Goods Co. v. Wentworth, supra, in commenting upon that case, "the liability sued upon was not that which the corportion incurred when it signed the note—this liability having been extinguished by payment—but * * * was upon a new liability arising at the time of the payment of the note by the indorser." Of course, there is no analogy between such a case and one where a plaintiff's only possible claim is for damages for a breach of an obligation created by a contract which has in no way been performed or extinguished. The narrow question remaining here is whether such a liability on the part of the corporation is incurred at the time of the execution of the contract or at the time of the breach, or possibly at the time the damage is suffered. In the light of the views announced in the leading case of Hunt v. Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87, and the long line of cases following and approving the doctrine there enunciated, culminating in the comparatively recent case of Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 Pac. 939, where the cases were reviewed and the matter exhaustively considered, we deem this question no longer open to discussion. The liability of the corporation to respond in

damages for any failure to perform the covenants contained in its contract was necessarily created or incurred by the execution of the contract, notwithstanding that no right of action could accrue until a breach. We have already seen (Hunt v. Ward, supra) that whatever the character of the liability, whether absolute or contingent, unconditional or limited, presently enforceable by action or not, "it is created by the consummation of the contract, act, or omission by which the liability is incurred." Here, the liability being created by contract, it was the consummation of the contract that created the liability. Counsel for appellants rely upon the words "act or omission" contained in the quotation from Hunt v. Ward, supra, as declaring that the omission of the corporation to perform may be taken as the time of the incurring of the liability, but manifestly those words have no application where, as here, the liability is one created by contract. The words "contract, act, or omission" are used distributively, as indicating possible different sources of liability, such as contract, negligence, etc. Here the source of liability was the contract. As said in Coulter Dry Goods Co. v. Wentworth, supra (see 171 Cal. 510, 153 Pac. 943), *when the corporation* made its contract with the plaintiffs, it "*incurred a liability for any breach of the contract which it might commit*, and its stockholders were equally liable for such breach. The stockholders *who were such when the contract was made* are therefore bound under the Constitution, which holds them for the 'liability' incurred by the corporation during the time that they were stockholders." (The italics are ours.)

The case of Johnson v. Bank of Lake, 125 Cal. 6, 57 Pac. 664, 73 Am. St. Rep. 17, relied on by appellants, was overruled by this court in Coulter Dry Goods Co. v. Wentworth, supra, as not being in accord with the other adjudicated cases on this subject. Much reliance is placed by appellants on Johnson v. Hinkel, 29 Cal. App. 78, 154 Pac. 487, which, it may be conceded, does sustain their claim as to when the liability was incurred (see 29 Cal. App. 80, 82, 154 Pac. 488, 489), the District Court of Appeal practically holding that the liability of the corporation was created by its act in violating a covenant in the lease held by it, and that the plea of the statute of limitations on the part of the defendants was not sustained. This particular matter, which is only very briefly discussed in the opinion of the District Court of Appeal, was not brought to the attention of this court in the petition for hearing by this court, which was filed by the plaintiff, and passed unnoticed. On this point the decision of the District Court of Appeal is absolutely opposed to what was held by us in Coulter Dry Goods Co. v. Wentworth, supra, which was decided within a few weeks after Johnson v. Hinkle, supra, was decided, and cannot be followed.

From what we have said it follows that the learned judge of the trial court was correct in his conclusion that plaintiffs' action against defendant stockholders was barred by the statute of limitations. In view of our conclusion on this branch of the case, it is unnecessary to determine whether the judgment against the corporation afforded sufficient proof in this action against the stockholders of the allegation of the complaint relative to the breach of the covenant in the lease and the damage suffered by plaintiffs.

The judgment is affirmed.

We concur: SHAW, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

OLNEY, J. (concurring). I concur in the main opinion. I think, however, it should be said, in addition, that the statement that the date of the incurrence of the contractual obligation by a corporation is the date of the contract has reference only to those cases wherein an obligation, either absolute or contingent, is assumed by the corporation by the very making of the contract itself. This is true in the great generality of cases, but there are not infrequently cases where it is not true. Instances are not uncommon of contracts which, when made, are purely unilateral and under which one of the parties assumes no obligation whatever until the happening of some event entirely within the control of such party. An example is where a contract is made to sell upon certain fixed terms such specified goods or articles as the vendee may subsequently order. Under such a contract no obligation is incurred by the vendee until an order for the goods is given, and if the vendee is a corporation the statute of limitations as to the liability of its stockholders for the price of the goods will begin to run from the date of the order and not from the date of the original contract.

182 Cal. 140

WESTERN STATES GAS & ELECTRIC CO. v. BAYSIDE LUMBER CO.
(S. F. 8528.)

(Supreme Court of California. Jan. 27, 1920.)

1. MUNICIPAL CORPORATIONS ⊂⊃680, 681(2)—PERMISSION BY MEMBER OF COUNCIL DOES NOT AUTHORIZE USE OF PART OF STREET.

Where an ordinance provided that any person might use a public street for a lawful purpose for a reasonable time on obtaining permission from the mayor, permission by a member of the council would not give authority to so use the street.

2. MUNICIPAL CORPORATIONS ⊂⊃691 — OBSTRUCTION OF PUBLIC HIGHWAY A "NUISANCE."

Under Pol. Code, §§ 2731, 2737, 2739, Civ. Code, § 3479, and Pen. Code, §§ 370 and 372, an obstruction of a public highway is a nuisance, even though it may also be declared a nuisance by a municipal ordinance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Nuisance.]

3. MUNICIPAL CORPORATIONS ⊂⊃680, 681(8)—MUNICIPALITY HAS NO AUTHORITY TO PERMIT USE OF STREETS FOR PRIVATE PURPOSES.

Except where the use is temporary, or power has been delegated by the Legislature, a municipality has no power to authorize the use of streets for a private purpose, and cannot grant an abutting owner the right to construct his building so as to encroach on the street.

4. MUNICIPAL CORPORATIONS ⊂⊃680, 681(8)—MUNICIPALITY HAS NO AUTHORITY TO ALLOW USE OF STREET FOR LUMBER YARD.

Both under a general law and its ordinances a municipality had no authority to allow a lumber company to use one-half of the street permanently for a lumber yard, and the piling of lumber in the street, with the accompanying obstruction, amounted to a nuisance.

5. MUNICIPAL CORPORATIONS ⊂⊃809(1)—LIABILITY OF PERSONS CREATING NUISANCE TO ONE INJURED.

Where a lumber company unlawfully used the street for a lumber yard, depositing large piles in the street, the piling of lumber constituted a nuisance, and the lumber company was liable for the death of one killed by the falling of a pile of lumber.

6. MASTER AND SERVANT ⊂⊃398—EMPLOYER SUBJECT TO WORKMEN'S COMPENSATION ACT CHARGEABLE WITH FOREMAN'S KNOWLEDGE OF ACCIDENT.

Under Workmen's Compensation Act, § 20, a master must be deemed to have actual knowledge of the accident, so as to be liable without claim, where its foreman visited the scene of the accident and saw the body of the deceased servant before it had been removed.

7. MASTER AND SERVANT ⊂⊃389—EMPLOYER ENTITLED TO SUBROGATION UNDER WORKMEN'S COMPENSATION ACT.

Where a master was liable under the Workmen's Compensation Act, § 20, because it had actual notice of the accident, it may, under section 31, recover damages from third person whose negligence caused the death of the servant, for which death the master paid compensation.

8. APPEAL AND ERROR ⊂⊃884 — DEFENDANT CANNOT COMPLAIN OF INTRODUCTION OF DOCUMENTARY EVIDENCE WHERE IT RESISTED PLAINTIFF'S SUBSEQUENT MOTION TO STRIKE SAME.

Defendant cannot complain of the introduction of documentary evidence where it resisted plaintiff's subsequent motion to strike same.

9. MASTER AND SERVANT ⊂⊃412—TESTIMONY AS TO DEPENDENCY IN ACTION FOR SUBROGATION UNDER WORKMEN'S COMPENSATION ACT NOT PREJUDICIAL.

In an action by an employer who had paid compensation for the death of a servant against a third person causing the injury, brought under Workmen's Compensation Act, § 31, where it appeared that the widow had received $4,500 in compensation and $3,000 life insurance, the introduction of testimony that she was dependent on deceased for support *held*, in view of the presumption of such dependence, not prejudicial.

10. MASTER AND SERVANT ⊂⊃347—PROVISION OF WORKMEN'S COMPENSATION ACT ALLOWING SUBROGATION CONSTITUTIONAL.

Provision of Workmen's Compensation Act, § 31, allowing an employer who had paid compensation to recover against a third person whose negligence caused the injury to the servant, is a mere legislative recognition of the equitable doctrine of subrogation, and is not invalid as being in excess of the power given the Legislature by Const. art. 20, § 21, to fix the liability of employers.

11. MASTER AND SERVANT ⊂⊃405(4) — EVIDENCE SUFFICIENT TO SHOW INJURY TO EMPLOYÉ IN PERFORMANCE OF HIS DUTIES WITHIN WORKMEN'S COMPENSATION ACT.

In an action by an employer who had paid compensation for the death of a servant, evidence *held* sufficient to show that deceased, whose death resulted from a fall of a pile of lumber placed in the street by defendant, was in performance of his duties; it appearing deceased was unhitching a horse tied near the pile so as to proceed with his work.

12. MASTER AND SERVANT ⊂⊃389—RECOVERY BY EMPLOYER SEEKING SUBROGATION NOT LIMITED BY WORKMEN'S COMPENSATION ACT.

Where an employer pays compensation under the Workmen's Compensation Act for the death of a servant, and sues a third person causing the death, the measure of damages is not that fixed in the act, but the employer must pay to the dependents the difference, if any, over and above the amount paid.

13. MASTER AND SERVANT ⊂⊃389—SUBROGATION UNDER WORKMEN'S COMPENSATION ACT ALLOWED ON CLAIM OF WIDOW ALONE.

As Workmen's Compensation Act, § 19a, gives the right of recovery to the widow and not to the minor children of a deceased employé, the making of a claim by the widow alone

is sufficient to transfer to the employer the right of recovery, established under Code Civ. Proc. § 377, against the third person whose acts caused the death of the employé.

14. MASTER AND SERVANT ⊂=389—EMPLOYER INSTEAD OF INSURER ENTITLED TO SUBROGATION UNDER WORKMEN'S COMPENSATION ACT.

Where an employer paid the widow of a deceased servant the compensation due under the Workmen's Compensation Act, and there was no evidence that an insurance carrier had paid the compensation or served notice on the widow that it accepted responsibility, the employer may, under sections 34e and 34f, recover from a third person whose acts caused the death, regardless of the claim that the right of action was in the insurance carrier.

15. MASTER AND SERVANT ⊂=410—INSTRUCTIONS ON CONTRIBUTORY NEGLIGENCE WARRANTED BY PLEADING.

Where, in an action by an employer who had paid compensation under the Workmen's Compensation Act against a third person whose acts caused the death of an employé, there was no plea that the employé was guilty of contributory negligence, the answer, alleging that the injury was wholly the result of the negligence of deceased, amounting merely to a denial that defendant was negligent, an instruction that contributory negligence was not a defense in the action was proper.

16. TRIAL ⊂=256(10)—INSTRUCTION ON DAMAGES SUFFICIENT IN ABSENCE OF REQUEST.

In an action for the death of an employé who left a widow and minor children, instructions on the measure of damages which authorized recovery for pecuniary loss and included as an element of damage to the children the loss of the care of a father *held* not open to objection, for defendant, desiring a more emphatic instruction limiting liability to pecuniary loss, should have requested it.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by the Western States Gas & Electric Company against the Bayside Lumber Company. From a judgment for plaintiff defendant appeals. Affirmed.

E. W. Wilson, of Eureka, for appellant.

Pierce H. Ryan, of Eureka, for respondent.

WILBUR, J. This action was brought to recover for the death of J. J. Sullivan, an employé of the plaintiff, who, it is alleged, was killed by reason of the misconduct of the defendant. Plaintiff claims to have succeeded to the rights of the widow and children of the deceased, under the terms of the Workmen's Compensation Law (section 31, Stats. 1913, p. 295), and brings suit by virtue of that statutory subrogation to recover from the defendant. The defendant was operating a lumber yard on both sides of and on Whipple street, in the city of Eureka, using a portion of that street for the piling of lumber. The deceased was killed by the falling of a portion of a pile of lumber which was immediately adjacent to a hitching post in the center of Whipple street, to which was hitched a horse and wagon used by the deceased in his occupation as foreman of the plaintiff corporation. The accident occurred about 3:50 in the afternoon. Numerous questions were raised by the defendant with relation to the right of the plaintiff to recover, based upon the provisions of the Workmen's Compensation Law, but before considering these matters we will consider the question arising out of the alleged responsibility of the defendant for the death of the deceased. This responsibility is based upon the theory that the piling of lumber in a public street was a public nuisance, and that the same was so negligently piled that it fell and killed the deceased.

[1-5] An ordinance of the city of Eureka prohibited the obstruction of the public streets, but that ordinance contained a provision upon which the defendant relies for a reversal by reason of a ruling of the trial court upon evidence offered by it and upon an instruction to the jury given upon the subject. This provision is as follows:

"Sec. 7. Any person can have the use of any public street, sidewalk, or alley for any proper and lawful purpose for a reasonable time, on obtaining permission therefor from the mayor of the city."

The defendant offered evidence to show that an application was made to a member of the city council by defendant for leave to pile lumber upon the westerly end of Whipple street. Any permit given by a member of the council would not comply with the ordinance in question, but in connection with the ruling of the court the defendant offered to prove, in effect, that the permit authorized by section 7 of the ordinance was given. The court held that the defendant would not be permitted to show that it had obtained permission from the duly authorized authorities of the city to pile lumber in a street in pursuance of the ordinance. An obstruction of a public highway is a nuisance under the general law as well as under the ordinance in question. Pol. Code, §§ 2731, 2737, 2739; Civ. Code, § 3479; Pen. Code, §§ 370, 372; Ex parte Taylor, 87 Cal. 91, 25 Pac. 258. In determining the question as to whether or not authority from the mayor of the city of Eureka would authorize the use in question—for, in view or the ruling of the trial court, we must assume that the defendant could have made such proof—we should consider the nature and scope of the authority of the municipality over the street in question and the right of the city council to delegate to the mayor the authority to issue permits. The rule is thus stated in 28 Cyc. 870:

"Except where the use is temporary or the power has been delegated by the Legislature, a municipality has no power to authorize the use of streets for a private purpose, that is, one from which neither the municipality nor its citizens derive any consideration or benefit. * * * And a municipality has no power to grant to an abutting owner the right to so construct his building as to encroach on the street, nor to use the streets for stands or booths for business purposes."

It would appear from this statement, and we find no authority to the contrary, that the city of Eureka would have no power to authorize the use of a street for a lumber yard. See, also, Strong v. Sullivan, 181 Pac. 59; notes, 125 Am. St. Rep. 343, 345, 348; 1 Am. St. Rep. 840, 841. Examining the evidence in the light of this principle, it appears that the post to which the horse used by the deceased was hitched at the time of the accident was almost on a center line of the 60-foot street, and that the lumber pile was within 1 foot of the post. This lumber pile was one of ten or more piles located at intervals along the center line of the street. There were also nine piles of lumber at intervals along the north property line; each extending into the street about 10 feet. Five of the piles of lumber along the center line of the street extended south of this line about 12½ feet, leaving to the south thereof a passageway for travel of only 17½ feet. The lumber was piled as usual in lumber yards, except that it is claimed there were no cross-ties holding the tiers together, and to this defect and the fact that it was three inches out of plumb is ascribed the fall of the lumber which killed the deceased. The height of the piles varied; the pile that fell being about 9 feet high. It appears that the street had thus been used by defendant for a number of years, and that the particular pile which caused the death of the deceased had been placed in the street two or three months before the accident and was to remain there indefinitely.

Without considering the extent to which a city may authorize temporary obstructions in a public street, or permanent structures for the purpose of approach to abutting property, such as involved in Marini v. Graham, 67 Cal. 130, 7 Pac. 442, and Ex parte Taylor, supra, it is sufficient for the purposes of this case to say that the use of a portion of the public street as a lumber yard, as aforesaid, was neither "lawful nor proper" nor for a "reasonable time," within the meaning of section 7 of the city ordinance, and therefore not one which the mayor of the city was authorized by such ordinance to permit. Even had the ordinance in question attempted to grant to the mayor power to issue such permits, the power to grant the use of the street for such purposes could not have been delegated by the legislative authority of the city to the mayor, even if it should be conceded that the city council had the power to legalize such an obstruction. It follows that both under the provisions of the general law, above quoted, and under section 4 of the ordinance in question, which provides that, "Any person who will throw, deposit, or place any rubbish * * * or obstruction of any kind, except as hereinabove provided, in or upon any public street, lane, sidewalk, park, alley, or public thoroughfare, shall be deemed guilty of committing a public nuisance," the ruling of the trial court excluding the evidence was correct; that the piling of lumber in the public street constituted a public nuisance; and that if the death of the deceased proximately resulted from the falling of the lumber in question the defendant is responsible for his death. To this effect the jury was properly instructed. McKune v. Santa Clara Valley Mill & Lumber Co., 110 Cal. 480, 42 Pac. 980.

[6, 7] It is contended that plaintiff was not entitled to sue for the death of its employé. The Workmen's Compensation Act expressly authorizes such suit where a lawful claim is made against the employer. Section 31, Stats. 1913, p. 295. It is claimed, however, that as no written notice of this injury was served on the plaintiff it is not entitled to bring this suit, unless it had "actual knowledge of the accident," which by the statute is made equivalent to such notice. Sec. 20, Stats. 1913, p. 290; Smith v. Ind. Acc. Com'n, 174 Cal. 199, 162 Pac. 636. The evidence, however, sufficiently shows that plaintiff had actual knowledge of the accident. Its foreman arrived at the scene of the accident before the deceased was removed and while the circumstantial evidence of the cause of his death was still manifest to his observation. Under these circumstances the law charges the employer with notice. Thereafter a claim was made by the widow of deceased on, and granted by, the employer. This, under the law, entitled the employer to be subrogated to the rights of the family of the deceased and authorized the bringing of the suit in question. Section 31, Workmen's Compensation Law.

[8, 9] Upon the authority of Mahoney v. San Francisco, etc., Ry. Co., 110 Cal. 471, 42 Pac. 968, 43 Pac. 518, Green v. Southern Pacific Co., 122 Cal. 563, 55 Pac. 577, Simoneau v. Pacific Electric Ry. Co., 159 Cal. 506, 115 Pac. 320, and Steinberger v. Cal. Electric Garage Co., 176 Cal. 386, 168 Pac. 570, the following testimony, adduced over defendant's general objection, is claimed to be erroneous and prejudicial: "Q. Did you have any other means of support except your husband's earnings? A. No, sir." Plaintiff, however, had introduced in evidence the written claim made against it by the widow, wherefrom it appeared that the deceased left surviving him a widow and three minor children, and that the deceased had no source of income besides his wages. The introduction of this claim is

also counted on by the defendant as error, but as plaintiff's motion to strike the same out was resisted by the defendant it cannot now complain of its introduction. In view of this testimony, and the legal presumption that the husband did his duty in supporting his wife and children, the defendant was not prejudiced by testimony that she depended on her husband for support, particularly in view of the fact that the evidence showed that the widow had received $4,500 in compensation from the plaintiff and $3,000 life insurance. She was entitled to rely upon her husband for support, and the admission of the evidence that she had received $7,500 compensation for his death certainly would overcome any prejudice that might have accrued because she had stated that she had no means of support other than her husband's wages. The defendant was not entitled to this latter evidence (section 31, supra), and, in view of its admission, ought not to be heard to complain of the ruling in question. Furthermore, it cannot be said that "such testimony could have been offered for no other purpose than to create prejudice," as in Green v. Southern Pacific Co., supra. Here the plaintiff relies upon a statutory subrogation as the foundation of its claim, and this subrogation only exists in the case of a lawful claim against it by persons wholly or partially dependent upon the deceased for support. Workmen's Compensation Law, Stats. 1913, § 15, subd. c, 1, 2. This makes the fact of such dependency relevant, and might serve as an excuse for the offer of such evidence, even where the dependent is a wife living with the deceased at the time of his death, and therefore conclusively presumed to be wholly dependent upon him for support. Id., § 19a, 1. While the plaintiff was entitled to rely on this conclusive presumption in establishing the facts which resulted in its being subrogated to the claim of the family, the offering of such evidence in further proof of the fact of dependency does not necessarily evidence an intention to play upon the sympathy of the jury or to secure an unjust advantage. The evidence may have been introduced in an abundance of precaution in view of the contention then advanced, and still maintained, by the defendant that there was no subrogation in favor of the plaintiff.

[10] With reference to the contention that the law is unconstitutional in so far as it operates to transfer the cause of action to the plaintiff, for the reason that it goes beyond the purview of the constitutional provision (article 20, § 21) authorizing legislation fixing the liability of employers to employés and deals with the liability of third persons, it is sufficient to say that the statutory provision concerning the right of subrogation of the employer is merely a legislative recognition of the equitable doctrine of subrogation, and is clearly within the legislative authority. We have recently considered the effect of such legislation in Stackpole v. Pacific Gas & Electric Co., 186 Pac. 354, and need not give further consideration to that subject at this time.

[11] It is contended that the evidence fails to show that the deceased was engaged in the performance of his duties at the time of the injury. The accident occurred during the working hours, and it is to be inferred from the facts in evidence that the deceased, having completed his tasks at the office of the plaintiff, was about to proceed to other duties of his employment which involved the use of the horse and wagon, and that while unhitching the horse he was killed. The evidence was sufficient to justify the conclusion of the jury that he was engaged in the performance of the duties of his employment at the time he was killed.

[12] There is nothing in the point that the measure of damages is that fixed in the Workmen's Compensation Act for compensation for injuries to be paid by the employer to the dependents of the employé. This action was brought against a third person causing such death to recover the full amount of damages suffered by the family, and plaintiff is required to pay to the family the difference, if any, over and above the amount theretofore paid to her.

[13] With reference to the question as to whether or not this suit can be maintained where no guardian is appointed for the minor children and no claim is made by them against the employer, except the claim made by the mother, it is sufficient to say that the statute (section 19a, Workmen's Compensation Law) gives the right of recovery to the widow and not to the children. The making of the claim, therefore, by the widow against the employer was sufficient to transfer to it the right of recovery established under section 377 of the Code of Civil Procedure. It is therefore unnecessary, in order to perfect the plaintiff's right of subrogation, for the children to make any claim against it.

[14] With reference to the claim that the right of action, if any, is in the insurance carrier of the plaintiff, it is sufficient to say that there is no evidence that the insurance carrier has paid the compensation or served notice upon the widow that it accepted the responsibility. Under these circumstances the employer, having paid the widow the compensation provided by law, is entitled to maintain the suit. Sections 34e, 34f. The provisions of section 30, subd. 2, cited in support of the contention, only apply where there is a general contractor and an intermediate contractor, and have been held unconstitutional. Perry v. Indus. Acc. Com'n, 181 Pac. 788.

[15] The court instructed the jury that the contributory negligence, if any, of the de-

ceased, was not a defense in the action. This instruction was evidently based upon the fact that contributory negligence was not pleaded as a defense. The answer alleged that the injury was wholly the result of the negligence of the deceased, which amounted to nothing more than a denial of negligence on the part of the defendant. The instruction was fully justified under the pleadings. Crabbe v. Mammoth Channel M. Co., 168 Cal. 500, 143 Pac. 714. Of course, if the case had been tried upon the theory that contributory negligence was involved, and the jury had been so instructed, this court would not upon appeal hold that the issue of contributory negligence was not involved. Hughes v. Warman Steel Casting Co., 174 Cal. 562, 163 Pac. 885; Schuh v. Herron Co., 177 Cal. 13, 18, 169 Pac. 682; Busch v. Los Angeles Ry. Co., 174 Pac. 665, 2 A. L. R. 1607. In this case, however, the court instructed the jury that contributory negligence was not an issue. It could only have been made such by an amendment of the pleadings.

[16] Defendant complains of the instruction with reference to the measure of damages, contending that the jury was thereby authorized to return a verdict for some amount in addition to the pecuniary loss suffered by the family of the deceased. The instructions on this subject begin with the following statement:

"If, under the evidence and instructions of the court, the jury find for the plaintiff, then, in assessing the damages which plaintiff is entitled to recover, the jury should assess the same with reference to the pecuniary loss sustained by the widow and children of the deceased."

Then follows an enumeration of the elements which are to be considered by the jury in arriving at the pecuniary loss. The clause particularly objected to, as allowing something in addition to the pecuniary loss, is the following:

"And if you find for the plaintiff, in determining the amount of damages to the children, you have and are to consider the value of the nurture and instruction, moral and physical, and intellectual training, if any, which the father gives to the children, and in determining such value you are not limited to a case of similar service rendered by a hired servant, but may take into consideration the value of such service when rendered by the father to his children, having regard to the evidence in this case, if there be any, as to the ability and willingness of the deceased to nurture, care for, train, and educate his children."

Construing together the instructions as to the measure of damages, the clause complained of merely calls the attention of the jury to an additional element to be considered in arriving at the pecuniary loss suffered by the widow and children. If the defendant believed that a more pointed and emphatic instruction limiting the liability to the pecuniary loss was necessary, it should have requested such instruction.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; OLNEY, J.; SHAW, J.; LAWLOR, J.

45 Cal. App. 15

CITY OF LOS ANGELES v. PACIFIC COAST S. S. CO. (Civ. 3169; L. A. 5520.)

(District Court of Appeal, First District, Division 1, California. Dec. 15, 1919. Opinion of Supreme Court, in Bank, Denying Hearing, Feb. 13, 1920.)

1. NAVIGABLE WATERS ⟸37(2)—STATE MAY GRANT SUBMERGED LAND TO CITY.

The Legislature had authority, under Const. art. 15, to convey submerged lands to the city of Los Angeles, as it did by act approved May 1, 1911 (St. 1911, p. 1256), for purposes in harmony with the trust upon which the state had been invested with title by the general government.

2. NAVIGABLE WATERS ⟸37(8)—CITY OF LOS ANGELES HOLDS TITLE TO SUBMERGED LANDS GRANTED TO IT BY THE STATE IN ITS GOVERNMENTAL AND NOT PRIVATE CAPACITY.

The city of Los Angeles, under St. 1911, p. 1256, derived title to submerged lands which it holds in its governmental capacity, and not merely in its private or proprietary capacity, being invested with the full title to such lands for the purpose of administering the trusts for which the general government turned the lands over to the state, and it possesses all of the power which the state formerly held in relation to such lands, including the right of possession, and can maintain an action to quiet title against one holding a public franchise for the possession and use thereof for the purposes of maintaining a wharf under Pol. Code, §§ 2906–2920.

3. WHARVES ⟸7—GRANT OF FRANCHISE TO MAINTAIN EXTENDS FOR TWENTY YEARS ONLY.

Pol. Code, §§ 2906–2920, provides for the grant of franchises to persons for the purpose of maintaining wharves on submerged land for a term only of 20 years, and empowers the board of supervisors to provide that the ownership of the wharves erected should, upon the termination of the franchises, become vested in the public body which is the owner, and which would then become entitled to the possession of the lands.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by the City of Los Angeles against the Pacific Coast Steamship Company. A judgment for plaintiff is affirmed in the appellate court, and hearing denied in the Supreme Court.

Gibson, Dunn & Crutcher, of Los Angeles, and Geo. W. Towle, of San Francisco, for appellant.

Albert Lee Stephens and Anderson & Anderson, all of Los Angeles, for respondent.

RICHARDS, J. This action was brought by the plaintiff to quiet its title and right of possession to a tract of submerged land at San Pedro of which the defendant was in possession and was thereon maintaining a wharf under a franchise granted to it under the provisions of the Political Code.

The case was submitted to the trial court upon a stipulation as to its facts, from which stipulation it appeared that the title which the city of Los Angeles had in and to said tract of submerged land was such as was conveyed to it by an act of the Legislature approved May 1, 1911 (Stats. 1911, p. 1256), and that the only claim of title and right of possession of the Pacific Coast Steamship Company was that arising out of the franchise granted to it under the provisions of sections 2906–2920 of the Political Code. The trial court rendered its judgment in favor of the plaintiff upon these stipulated facts, and by such judgment it was decreed that plaintiff was the owner of said lands, and that all of the claims of the defendant thereto were invalid except that under the terms of its said franchise dated April 23, 1901, the defendant was entitled to the possession of said lands for a period of 20 years from the said date of said franchise, but for no longer period, and that upon the expiration of the said term of said franchise, unless the same should be renewed or extended or a new franchise granted to the defendant by the plaintiff or other proper authority, the wharf constructed and being maintained by said defendant upon said lands should become the property of the plaintiff as the owner of said lands and as the party then entitled to the possession thereof.

[1] Upon its appeal from such judgment the defendant and appellant herein makes several contentions. The first of these is the contention that the Legislature under the terms of the Constitution had no power to make the grant of the title to said submerged lands which was attempted to be made by the act of the Legislature of May 1, 1911, supra. An examination of the terms of this act shows that in substance and effect it is in all respects similar to prior acts of the state Legislature granting to municipalities tidelands and harbor frontages, to which the state held the title for certain trust purposes from the general government, and of which it has made from time to time such legislative grants under the provisions of article 15 of the state Constitution. These grants have been uniformly upheld by the Supreme Court of this state, and the policy and power of making such grants to municipal corporations for purposes in harmony with the trusts upon which the state had been invested with title to the same has become so well settled as to be, at this late date in our state history, beyond dispute. It may be suggested, however, that the contention which the appellant now makes in that regard is fully and finally answered by the decision of the Supreme Court of this state in the case of Cimpher v. City of Oakland, 162 Cal. 87, 121 Pac. 374.

[2] As to the claim of the appellant that the title, if any, which the city of Los Angeles derived to the lands in question under said act of the Legislature was one which it held not in its governmental but merely in its private or proprietary capacity, we find no merit in this claim. The trusts upon which the city of Los Angeles received its title to said premises were the identical public trusts upon which the state had originally received and held said lands up to the time of its said grant of the same to said city. These trusts, being for public uses, were essentially governmental in their character, and the city of Los Angeles, in taking over from the state the title to said lands for the purpose of fulfilling these trusts, was merely acting as one of the subordinate governmental agencies of the state, and as such it was by the terms of said act invested with the full title to said premises for the purpose of administering such trusts. This being so, it became possessed of all of the power which the state formerly held in relation to said lands and all of the rights to the ownership and possession thereof which the state had prior to said grant, and hence with full power as the successor of the state, to maintain this action as against the defendant claiming to hold a public franchise for the possession and use of said premises for the purpose of maintaining a wharf thereon under the provisions of sections 2906–2920 of the Political Code.

[3] The next and only further contention which the appellant makes herein is that under the terms of its said franchise granted on April 23, 1901, by virtue of the foregoing sections of the Political Code, its right of possession thereof, and also its right to the use and operation of the wharf which it had constructed thereon, was not limited to the term of 20 years, and hence that the trial court in so undertaking to limit the same was in error.

This claim on the part of the appellant is predicated upon a construction which it undertakes to place upon section 2910 of the Political Code. Said section has reference to the procedure before the board of supervisors having power to grant applications for such franchises, and the portion thereof upon which the appellant relies to sustain his foregoing contention reads as follows:

"If from the proofs it appear that the public good or convenience will be promoted thereby, the board of supervisors may grant to the applicant the right to erect or construct a wharf, chute, or pier as prayed for, and to take tolls

for the use of the same for the term of twenty years."

The appellant bases his claim upon the punctuation of this portion of said section, insisting that the limitation of 20 years therein has reference solely to the right to take tolls. We find no merit in this contention, and are satisfied that the evident purpose of the entire chapter of the Political Code in which this section occurs was to limit the terms of the grant of the franchises referred to therein to said term of 20 years, and empowered the said board to provide that the ownership of the wharves erected upon such lands should, upon the termination of such franchises, become vested in the public body which was the owner and which would then become entitled to the possession of said lands. This matter appears to us to have been settled beyond the point of further dispute by the case of Santa Cruz v. Southern Pacific Co., 163 Cal. 538, 126 Pac. 362, which we are unable upon principle to distinguish from the case at bar. Under the authority of that case the right of the trial court to include in its judgment the clause thereof which invests the plaintiff with title to the wharves constructed and maintained by the said defendant upon the said lands of said city upon the expiration of said franchise on April 23, 1921, must also be sustained.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

Opinion of Supreme Court, in Bank, Denying Hearing.

PER CURIAM. In denying an application for a hearing in this court after decision of the district court of appeal of the first appellate district, division one, we deem it proper to say that we do not understand that the judgment of the superior court is to be construed as depriving the appellant of any such right as it may have under section 1019, Civil Code.

182 Cal. 211

ROBINSON v. CITY OF GLENDALE et al. (L. A. 5301.)

(Supreme Court of California. Feb. 13, 1920.)

1. PROPERTY ⇐3 — WATER PIPE LINES AND EASEMENTS THEREFOR ARE "REAL ESTATE" AND NOT "PERSONAL PROPERTY."

Under Civ. Code, §§ 658, 660, 662, water pipe lines, imbedded in the soil for purpose of supplying water to the lands to which they extend, and easements granted by owner of land in which the pipes are imbedded, are real estate and not personal property, both before the water is carried therein and after the use for that purpose has ceased.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property; Real Property.]

2. PLEADING ⇐8(11)—ALLEGATION OF OWNERSHIP NOT DEPENDENT ON ALLEGED FACTS NOT A CONCLUSION OF LAW.

In an action to quiet title, an allegation in complaint of ownership which does not purport to be based on facts previously stated, and which is independent thereof, is not a mere conclusion of law, but an allegation of the ultimate fact constituting a sufficient pleading of ownership.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by A. C. Robinson against the City of Glendale and others. Judgment for defendants, and plaintiff appeals. Reversed.

P. S. McNutt, of Los Angeles, for appellant. E. W. Sargent, W. G. Cooke, and W. E. Evans, all of Los Angeles (J. F. Keogh, of Los Angeles, of counsel), for respondents.

SHAW, J. The court below sustained a demurrer to the complaint, and thereupon rendered judgment in favor of the defendants, from which the plaintiff appeals. The grounds of the demurrer were that the complaint did not state a cause of action, and also that it was uncertain in several particulars.

The complaint alleged that in 1908 the plaintiff and several other persons were the owners in fee in severalty of certain parcels of real estate, eight in number, immediately outside of the city of Glendale; that in said year said landowners for the purpose of supplying their lands with domestic water, laid in the soil of said lands and adjoining land a 4-inch water pipe 1,690 feet long, 422 feet of which was in plaintiff's parcel; that plaintiff at the same time, in his own land, laid 241 feet of 2-inch water pipe connecting therewith; that 400 feet of the 1,690 feet extended across other land not owned by the parties, but was laid therein by right of an easement for that purpose granted by the owners of said lands; that this pipe was imbedded in and permanently affixed to the soil with the intent to make it an appurtenance to the lands of said parties. Unnecessary details were stated, evidently for the purpose of showing that the pipes described constituted real property. The complaint proceeds to aver that the said parties continued the use of said pipe for the ensuing six years, and that after said period his coowners conveyed their interest therein to plaintiff. The time when this conveyance was made is not stated and without some allegation of its date it would not appear that the plaintiff was the owner at the time of beginning the action. The complaint then proceeds as follows:

"And the plaintiff is now the absolute and unqualified owner in fee of said real property, pipes, right to flow water, easements, appur-

tenances and rights to sell connections to said pipe, and that plaintiff is successor to all the rights and privileges of his predecessors as mentioned herein, other than himself, in said pipe and rights and appurtenances thereto, and has still retained all his own original right in the said property, and is now the owner in fee of the whole of it."

Then follows the usual allegation in a complaint to quiet title that the defendants claim some estate or interest in the property adverse to the plaintiff, which claims are unfounded.

[1] The facts we have stated are sufficient to show that the pipe lines and the easements therefor, described in the complaint, are real estate and not personal property. Civ. Code, §§ 658, 660, 662; Southern P. Co. v. Spring Valley W. Co., 173 Cal. 296, 159 Pac. 865, L. R. A. 1917E, 680; Dietz v. Mission, etc., Co., 95 Cal. 100, 30 Pac. 380; Fudickar v. East Riverside Dist., 109 Cal. 36, 41 Pac. 1024; Hoyt v. Hart, 149 Cal. 730, 87 Pac. 569; Copeland v. Fairview, 165 Cal. 154, 131 Pac. 119; Stanislaus W. Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359. Its character as real property is not affected by the fact that it is not averred that plaintiff owned a right to water in connection therewith, or that the pipes were in use for that purpose when the action was begun. Where pipes are laid in real estate for the purpose of carrying water to the lands to which they extend, the pipes while imbedded in the soil constitute real property both before the water is carried therein and after the use for that purpose has ceased.

[2] The allegation of ownership above quoted is not stated as a mere conclusion of law following from the facts previously alleged. The allegations considered in Turner v. White, 73 Cal. 299, 14 Pac. 794, Fredericks v. Tracy, 98 Cal. 658, 33 Pac. 750, and McCaughey v. Schuette, 117 Cal. 223, 46 Pac. 666, 48 Pac. 1088, 59 Am. St. Rep. 176, cited by respondent, are not identical with those appearing in this case. In Turner v. White, the allegation of ownership was expressly predicated on the facts stated. The averment was that "by virtue of" said facts plaintiff became the owner. Obviously this was intended to be a conclusion of law. Fredericks v. Tracy was an action in claim and delivery, and the decision merely held that the averments did not show the right to possession of the property at the time the complaint was filed. In McCaughey v. Schuette, the point of the decision is that under well-settled rules of pleading, allegations showing that plaintiff acquired the title to the land at a date prior to the time the action was begun will not supply the place of an averment that he was the owner thereof at that time, although such fact might by the rules of evidence justify the inference that he continued to be the owner, if no subsequent conveyance by him was shown. The rule that a complaint which merely pleads evidence of title is not sufficient where the plaintiff's cause of action depends upon his having the title at the time of filing the complaint does not apply here. The allegation that the plaintiff is now the absolute owner of the property does not purport to be based on the facts previously stated, but is independent thereof. Except when it is so made dependent, or when the evidentiary facts stated are necessarily inconsistent therewith, such a general allegation of ownership is always recognized as an allegation of the ultimate fact, and a complaint containing it sufficiently pleads plaintiff's ownership. Payne v. Treadwell, 16 Cal. 243; Fudickar v. East Riverside, etc., Co., supra; Heeser v. Miller, 77 Cal. 193, 19 Pac. 375; Johnson v. Vance, 86 Cal. 130, 24 Pac. 863; Gray v. Walker, 157 Cal. 384, 108 Pac. 278; Shurtleff v. Kehrer, 163 Cal. 26, 124 Pac. 724. The previous allegations in this complaint merely indicated that he had been the owner at some time, not stated, but previous to the beginning of the action.

The particulars wherein the complaint is uncertain, assigned in the demurrer, are merely mentioned by the defendants in their brief, and are not discussed therein. They are not of sufficient importance to require notice, even if they had been fully argued. The court erred in sustaining the demurrer to the complaint.

The judgment is reversed.

We concur: LAWLOR, J.; OLNEY, J.

182 Cal. 202

PEOPLE v. ALASKA PAC. S. S. CO.

(Sac. 2831.)

(Supreme Court of California. Feb. 9, 1920. Rehearing Denied March 8, 1920.)

1. CORPORATIONS ⊜631 — DERIVE POWERS FROM LAWS OF STATE OF CREATION.

A corporation derives its powers from its articles of incorporation and the laws of the state in which it was created.

2. CORPORATIONS ⊜631—DERIVE NO FRANCHISE BY COMPLYING WITH LAW REGARDING FOREIGN CORPORATIONS.

A foreign corporation by coming into the state and complying with the laws thereof regarding foreign corporations thereby obtains no grant of power or franchise.

3. CORPORATIONS ⊜631—FOREIGN CORPORATION DOES BUSINESS IN STATE BY COMITY.

A foreign corporation is permitted to do business and exercise its corporate franchises in another state by comity only.

4. CORPORATIONS ⊂=641—STATE LAWS AS TO FOREIGN CORPORATIONS PURELY NEGATIVE AND RESTRICTIVE.

The laws of California relating to a foreign corporation are purely negative and restrictive in character, and merely forbid the exercise in the state of a small part of the corporate power it already possesses, except on the specified conditions.

5. COMMERCE ⊂=72—STATE CANNOT TAX FRANCHISE OF FOREIGN CORPORATION USED IN INTERSTATE COMMERCE.

Right of foreign corporation, after complying with California laws as to foreign corporations, to carry on interstate business, and to acquire and convey real estate necessary therefor and maintain actions to protect its rights therein, is not subject to taxation by the state, though instrumentalities by means of which it carries on such commerce, and which have a local situs as property within the state, are taxable by it.

6. TAXATION ⊂=165—FRANCHISE OF FOREIGN CORPORATION TO DO BUSINESS IN STATE TAXABLE ONLY WHEN EXERCISED.

The franchise of a foreign corporation to do business in the state, other than in interstate commerce, is not a property right therein, and so taxable there, till exercised there, and ceases to be such when its exercise is discontinued.

7. TAXATION ⊂=171½—FOREIGN CORPORATION NOT ESTOPPED TO SHOW IT EXERCISED NO FRANCHISE TAXABLE BY STATE.

A foreign corporation *held* not estopped to show that during a certain year it exercised no franchise to do business in the state, other than in interstate commerce, and so was not taxable thereon, by reason of its report in the prior year as required by tax law, nor by its payment under protest of the tax levied for such prior year, nor by its failure and refusal to make the report in the year in question, and the consequent arbitrary assessment on the claimed franchise.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the People of the State of California against the Alaska Pacific Steamship Company. Judgment for plaintiff, and defendant appeals. Reversed.

McCutchen, Olney & Willard and McCutchen, Willard, Mannon & Greene, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for the People.

SHAW, J. The defendant appeals from a judgment in favor of the plaintiff in an action to recover the sum of $675 levied by the state as taxes for the year 1912 upon a franchise which the state claims the defendant held and enjoyed during that year, described in the complaint as the right to do business as a corporation in the state of California.

The tax was levied in pursuance of the provision of the Constitution that "all franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner provided by law, and shall be taxed at the rate of one per centum each year" (article 13, § 14, subd. "d"), and of the Tax Act of 1911, enacted in furtherance thereof (Stats. 1911, p. 530). The Tax Act provides that the franchises to be taxed under the Constitution shall include "the actual exercise of the right to do business as a corporation in this state when such right is exercised by a corporation incorporated under the laws of any other state or country." Section 5.

The defendant claims that it did not have or exercise within this state any taxable franchise to do business as a corporation within this state during the year 1912, and that in consequence of this fact the tax so levied is invalid. The soundness of this claim is the only point to be determined in the case.

The defendant is a corporation organized and existing under and by virtue of the laws of the state of Maine. In the year 1906, in compliance with section 408 of the Civil Code, it filed with the secretary of state its articles of incorporation and designated a person residing within the state as the person upon whom process against it could be served, as provided in section 405. The said act of 1911 authorized the state board of equalization to determine the value of the franchises held by any person or corporation taxable under the Constitution, and to levy a tax thereon at the rate fixed, and further that the record of the assessment showing unpaid taxes against any person or corporation assessed by the state board "is prima facie evidence of the assessment upon the property and franchises, the delinquency, the amount of the taxes, penalties, and costs due and unpaid to the state, and that the company, person, or association is indebted to the people of the state of California in the amount of taxes and penalties therein appearing unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with." Section 24.

Upon the trial the state introduced in evidence the record of the assessment referred to in said section for the year 1912, showing the assessment of the taxes for which recovery was asked in the complaint. As a defense the defendant offered to prove that when it filed its articles of incorporation and designated its agent in 1906 it began the operation of steamships running between San Francisco and ports in Oregon and Washington, constituting interstate commerce, and also running between San Francisco and Los Angeles in California, that in

December, 1910, it entirely abandoned the operation of the line from San Francisco to Los Angeles, and that thereafter and ever since it has done no business in this state, except in connection with and as a part of the operation of steamships running between San Francisco and ports in the states of Washington and Oregon and engaged exclusively in interstate commerce. Upon objection on behalf of the plaintiff, the court below excluded the evidence of these facts. If the facts were material to the case, the evidence should have been admitted. As there is no dispute concerning the facts, we may consider the case on the assumption that they exist as shown by the evidence offered.

The claim of the plaintiff is that by filing its articles of incorporation with the secretary of state and designating its resident agent upon whom process against it may be served, as required by the Civil Code, the defendant acquired from the state a franchise to do business as a corporation within the state; that it thereafter at all times continued to hold and possess such franchise, whether it exercised the same or not, and that such franchise is taxable property within the meaning of the constitutional provision aforesaid.

That such a franchise, if it existed in this state, would be taxable as property therein, is not disputed. The claim of the defendant is that the right to do interstate business, so far as it is exercised in this state, is not taxable for state purposes; that such taxation would be a burden upon interstate commerce, and is not allowed by the United States Constitution and laws; that with respect to the right to carry on other business permitted by its corporate charter the defendant does not possess any franchise which can be considered as property existing within this state, except while it carries on some business here in the exercise of such corporate powers; and that, inasmuch as the defendant ceased to do any other than interstate business in 1910, and has not since engaged in any other business, it did not in 1912 possess any corporate franchise in this state, except its nontaxable franchise to carry on interstate commerce business.

[1-4] A corporation of another state derives its power to do business from its articles of incorporation and the laws of the state under which it was organized. By coming into this state and filing its articles of incorporation here and otherwise complying with our laws regarding foreign corporations it obtains no grant of power or franchise of any character from this state. Its powers are those only which it possesses by virtue of the laws of the state in which it was created. It is permitted to do business and exercise its corporate franchises and powers in this state by comity only. American, etc., Co. v. Superior Court, 153 Cal. 536, 96 Pac. 15, 17 L. R. A. (N. S.) 1117, 126 Am. St. Rep. 125; Mulford Co. v. Curry, 163 Cal. 285, 125 Pac. 236; 19 Cyc. 1222. The laws of this state relating to foreign corporations are purely negative and restrictive in character. They impose a penalty upon the corporation which does not file its articles and designate its agent as required by the Code, and merely provide that unless they do so they shall not maintain any suit or action in any court of this state or acquire or convey the legal title to any real property within this state. The state does not thereby grant to the foreign corporation any power to do business as a corporation within this state. It merely forbids the exercise in this state of a small part of the corporate power it already possesses, except on the specified conditions.

[5, 6] The defendant, when it came into this state for the purpose of doing an interstate and intrastate business as a common carrier of freight and passengers, was required by our laws to file its articles and designate its resident agent in order to enable it to maintain actions for the protection and enforcement of its rights and acquire and convey real property necessary for the business. Its right to carry on the interstate business and to acquire and convey the real property necessary therefor and maintain actions to protect its rights therein is not subject to taxes by the state.

"No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress." Leloup v. Port of Mobile, 127 U. S. 648, 8 Sup. Ct. 1383, 32 L. Ed. 311.

The tangible property situated in this state possessed by an interstate commerce company, its incorporeal hereditaments in the nature of local franchises or rights in real property or to the use thereof—in short all the instrumentalities by means of which it carries on interstate commerce and which have a local situs as property within the state—may be taxed, but the right to carry on the interstate commerce business is not taxable. Adams Express Co. v. Ohio, 166 U. S. 218, 17 Sup. Ct. 604, 41 L. Ed. 965; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 203, 5 Sup. Ct. 826, 29 L. Ed. 158; Philadelphia, etc., Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200; Galveston, etc., Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031; Wells Fargo Co. v. Nevada, 248 U. S. 167, 39 Sup. Ct. 62, 63 L. Ed. 190. It follows from this principle that the tax cannot be upheld as a tax upon

the franchise of the defendant exercised in this state for doing the interstate commerce business which it has carried on. It can be upheld only upon the theory that the defendant possesses some other franchise having a situs in this state. The franchise to do business as a corporation was possessed by the defendant before its advent into this state. Such franchise is personal property and its situs is ordinarily the place of residence of the corporation—that is, its home office. But, as its power to do business may be exercised elsewhere, it follows that when so exercised the franchise extends beyond the state from which it was obtained and acquires a substantial existence wherever it is so exercised. Consequently the only franchise of the defendant which can be characterized as property within this state is the franchise which it exercises within the state. And such franchise can remain as property within the state only so long as it is exercised therein. The only powers which it exercised within this state during the year 1912, for which this tax was levied, were those exercised exclusively in carrying on interstate commerce. This was a franchise not taxable by the state. Its potential right to exercise other powers did not become a property right here until it was exercised and ceased to be property here when the exercise was discontinued. Consequently it did not exist in this state in the year 1912.

A pertinent illustration of this principle is found in the cases relating to section 19, art. 11, of the Constitution, as it existed prior to 1911, providing that in any city where no public works were owned or controlled by the municipality for supplying water or light to the inhabitants any individual, or any domestic corporation duly authorized to do so, should have the right to use the public streets for laying pipes and conduits with which to carry on such public service. This is a general grant of the franchise to lay such pipes in the streets to every person or authorized corporation, but until it is exercised it is not property of any person or corporation. In Bank of California v. San Francisco, 142 Cal. 287, 75 Pac. 837, 64 L. R. A. 918, 100 Am. St. Rep. 130, it was said of these grants that, while these rights were of the character of a franchise, "they have value only so far as the exercise thereof contributes to the value of the capital [stock] of the corporation," and that, if the value of the franchises were limited to the cost of obtaining them, they "would be valueless and unassessable; for everybody possesses such rights under the terms of our Constitution. It is the exercise of the right that gives the value that our laws require to be taxed." Upon a similar question in Stockton, etc., Co. v. San Joaquin County, 148 Cal. 318, 83 Pac. 56, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511, the court said:

"While the right is accorded by the Constitution to the plaintiff in common with all kindred corporations and with individuals to use the streets of a city for the purpose of furnishing illuminants to it and its inhabitants, it cannot be said that any one individual or corporation possesses this right merely by virtue of the constitutional provision. The Constitution extends a potential right to those enumerated in its provisions to avail themselves of the benefit of the franchise. But this general extension of the privilege does not invest individuals or corporations with the franchise in the streets of any particular city. It is only acquired when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city. It is then owned by any individual or corporation doing so, as an accepted franchise under the general constitutional grant, exercised in the particular city where these appliances are laid or erected, * * * but they do not acquire it until they have accepted it by proceeding to its actual exercise."

In Western Union Tel. Co. v. Hopkins, 160 Cal. 111, 116 Pac. 560, speaking of the general grant to telegraph companies to construct lines of telegraph upon any public road in the state, the court said that it was a franchise "which, like the grant made by section 19 of article 11 of the Constitution regarding the use of streets for water or gas pipes, would vest only when actually accepted by the exercise of the right granted and would be assessable only in the place where such exercise is had." The theory that the potential unexercised right of a foreign corporation to do business in this state, which exists by comity only, constitutes taxable property within this state, would lead to results ridiculous and absurd. Every corporation of any foreign state or country is privileged to enter this state and do business therein. While it is doing such business it is exercising corporate powers within this state and the privilege of doing so becomes valuable, but before it exercises that power, or when it ceases to do so, it is no longer possessed in this state of anything of value. If the rule were as claimed by plaintiff, every corporation which has ever filed articles and designated a resident agent for the purpose of doing business within this state would be immediately taxable for a franchise, even if it never entered this state or transacted any business therein. No one could reasonably contend for a doctrine so extreme; yet, if the rule claimed by the state is correct, this would be the inevitable result. To refer again to the case of the use of streets for laying of water mains, the grant extends to every person and to every domestic corporation empowered by its articles to do business of that kind. If the mere right to use the street, without actually using it, constituted taxable prop-

erty, it would follow that every person in the state would be subject to taxation for the possession of the right to lay mains in the streets of every city in the state for the purpose of supplying water or light to its inhabitants. There is no substantial distinction between that case and the present case. The defendant corporation, for the purpose of carrying on its interstate business, was required to file its articles and designate its resident agent, if it desired to avoid the penalty or to maintain an action, or to acquire or convey property. It obtained from the state of its creation the power to do other kinds of business also. The case is in all respects the same as if the defendant had never at any time engaged in any other business than that of interstate commerce. The fact that prior to 1912 it did do intrastate business and was taxable for the exercise of that power as a franchise enjoyed by it during that period does not authorize the conclusion that it is taxable for that franchise during succeeding years, when it does not exercise the same, nor that it would be more liable because of the previous exercise than it would have been had it never exercised the same.

Our conclusion is that the potential right which the defendant had during the year 1912 to carry on intrastate commerce in this state, but which it did not exercise, was not taxable property within this state, and that the court below erred in excluding the evidence to show that it did not exercise such right during the year 1912, for which the tax in question was levied.

[7] We cannot agree with the contention of the plaintiff that the defendant is estopped to show the facts concerning its possession of the franchise by reason of its report made in the year 1911, as required by the said Tax Act, nor by its payment, under protest, of the tax levied for the year 1911 on the same franchise, nor by its failure and refusal to make the report in the year 1912 and the consequent arbitrary assessment made on the claimed franchise by the state board of equalization and which is the subject of this suit. No element of estoppel appears to us to arise from these facts. In fact, the protest accompanying the payment of taxes in 1911 gave to the state officers the information that the defendant claimed that it was engaged only in interstate commerce, and that its franchise to do business was not taxable.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

OLNEY, J., being disqualified, does not participate.

182 Cal. 214

TABER v. BESKE. (L. A. 5277.)

(Supreme Court of California. Feb. 13, 1920. Rehearing Denied March 11, 1920.)

1. VENDOR AND PURCHASER ⟸232(1)—PURCHASER CHARGEABLE WITH NOTICE OF FACTS WHICH INVESTIGATION AS TO RIGHTS OF PERSON IN POSSESSION WOULD HAVE DEVELOPED.

Where a person other than the vendor is in actual, open, and adverse possession, purchaser is chargeable with knowledge of all that an inquiry as to the rights and claims of such person might have developed.

2. APPEAL AND ERROR ⟸930(1) — LOWER COURT PRESUMED TO HAVE BELIEVED THE TESTIMONY SUPPORTING ITS FINDINGS.

Supreme Court must presume that lower court believed the testimony which supports its findings.

3. NEW TRIAL ⟸102(1)—SHOWING OF DILIGENCE TO OBTAIN NEWLY DISCOVERED EVIDENCE BEFORE CLOSE OF TRIAL NECESSARY.

To obtain a new trial for newly discovered evidence, the party must show that he used reasonable diligence to obtain such evidence before the close of the trial and that notwithstanding such diligence he failed to discover it.

Department 1.

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by John H. Taber against Mary Beske. Judgment for defendant, and plaintiff appeals. Affirmed.

Frederick Gros, of Los Angeles, for appellant.

William Schreider, of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant.

The complaint sets forth a cause of action to recover possession of a certain lot in Los Angeles. The defendant filed a cross-complaint alleging title in herself making John T. Dennison and C. C. Horsford parties thereto and praying that Taber, Dennison, and Horsford be compelled to convey the said lot to her, and for general relief. Judgment was given in her favor declaring her to be the owner of the lot in fee, that she was owing Taber $840 for money expended by him for the benefit of the lot and providing that upon payment thereof her title to the lot should be quieted and Taber should forthwith convey the same to her. Dennison and Horsford do not join in the appeal, and under the facts found they have no interest in the lot. The facts are sufficiently stated in the findings.

In April, 1911, Mary Beske, being desirous of borrowing $550 to defray the expenses of a contemplated journey to Europe, asked Horsford to get her a loan of that amount by means of a mortgage on the lot, and he

agreed to endeavor to do so. Thereupon, with the intent to deceive and defraud her, he informed her that he had procured a party who would make the loan and asked her to sign a paper which was in fact a general power of attorney authorizing him as her attorney in fact to sell and convey the property. To induce her to execute it, he informed her that it was a mortgage which she must sign in order to get the money she wished. She was unable to read English and could write the same but imperfectly, and she could not read the document. She did not understand its terms, or comprehend its nature, character, or effect. She trusted implicitly in Horsford and believed his statements that the document was a mortgage and, being induced thereby, she signed and acknowledged it, believing it was a mortgage. Afterwards, on April 27, 1911, Horsford, in pursuance of his fraudulent purpose, conveyed the lot to Dennison, signing the deed for her as her attorney in fact, and paid her $500, informing her that it was the proceeds of a loan he had procured upon the lot. Dennison paid no consideration for the deed and he knew that it was unauthorized. He mortgaged it for $1,000 for Horsford's benefit. On June 8, 1912, Dennison conveyed the lot to the plaintiff, Taber, who paid to Horsford and Dennison $2,680 in cash therefor and canceled a debt of $492 owing to him by Horsford. These transactions were brought about by Horsford in pursuance of his aforesaid design to defraud her. At some time in the year 1911 she returned from Europe, and ever since that time she has been continuously in open, actual, and exclusive possession of the lot. Ever since November, 1911, the premises have been in possession and occupancy of herself and her tenants from whom she collected rents therefor. Taber, at the time he purchased the premises, knew of her possession and could have ascertained by reasonable inquiry the rights which she had in the property. He was not an innocent purchaser in good faith. Although the deeds aforesaid were duly recorded, Mary Beske knew nothing of them or of the execution thereof until long afterward. Taber did not assert to her any ownership of the lot until December 27, 1915. After the execution of the deed to him, Taber made certain payments in discharge of obligations which inured to the benefit of the property and of the defendant Beske, amounting to $840. The findings also state that all the allegations of the cross-complaint are true. Among them is the statement that, prior to accepting the deed from Dennison to the lot, Horsford fully informed Taber of all the facts and circumstances attending the giving of the power of attorney aforesaid, that Dennison had paid no consideration therefor, and that Taber accepted said deed with full knowledge of her rights in the property and of the fraud that had been practiced upon her by Horsford and Dennison.

[1, 2] Appellant contends that there is no evidence to support the finding that Taber, at the time he purchased and received the deed, was informed of the power of attorney and the circumstances of its execution. The finding that Mary Beske was in actual, open, exclusive, and adverse possession of the lot, by herself and her tenants, at the time Taber bought and paid for the lot, put him on inquiry as to her rights and claims upon the property and charged him with knowledge of all that such inquiry, if pursued, might have developed. Bryan v. Ramirez, 8 Cal. 467, 68 Am. Dec. 340; Dreyfus v. Hirt, 82 Cal. 625, 23 Pac. 193; Fair v. Stevenot, 29 Cal. 489; Stonesifer v. Kilburn, 122 Cal. 664, 55 Pac. 587; Woodson v. McCune, 17 Cal. 304; Scheerer v. Cuddy, 85 Cal. 270, 24 Pac. 713; Beattie v. Crewdson, 124 Cal. 579, 57 Pac. 463. His actual knowledge is therefore not necessary to support the judgment. But the contention that the evidence does not support the finding that Taber was informed as aforesaid is based upon the theory that this court may disregard the testimony of the witness Horsford which fully supports the finding. This cannot be done. We must presume that the court believed the testimony of the witnesses which supports its findings. The fact that at one time during the trial the judge of the court below expressed a disbelief of Horsford's testimony does not change this rule. The findings constitute the evidence to this court of the final conclusion of the court below as to the facts.

Appellant further claims that the evidence shows that Mrs. Beske owed him, for money expended for the benefit of the property during the time between his acquisition thereof and the beginning of her action, the sum of $1,443.43 instead of $840 as found by the court; the difference being interest claimed on the sums paid. Mary Beske received $550 from Horsford, for which the court may have given Taber credit. Taber paid $494.35 as taxes against the property, and he claimed credit for $110 on a note purporting to have been signed by Horsford and Mrs. Beske to Taber. These sums amount to $1,154.35. Horsford paid to Taber $294 after the deed to Taber was executed, stating to Taber that it was rents received by him from the tenants of the property. Deducting this sum leaves a balance of $860. Assuming that the $110 note was valid, the amount allowed was only $20 less than this balance. Taber did not pay the $550. That was paid to her by Horsford long before Taber bought the lot. Mrs. Beske denied that she ever signed the $110 note. The findings do not show how the court below computed the sum of $840 as the balance due Taber. The record is in typewriting, and the evidence is contradictory, complicated, and confusing. Appellant does not print in his brief the testimony of

Mrs. Beske denying the execution of the note. Under all the circumstances, we cannot say that the finding does not include interest on all the sums properly awarded to Taber.

[3] Lastly, it is claimed that the court erred in denying the motion for a new trial. The only ground argued in support of the point is that of newly discovered evidence. It is obvious from the affidavits introduced at the hearing of the motion that by the exercise of reasonable diligence the plaintiff could have discovered the evidence at the time of the trial. The rule is that, in order to obtain a new trial upon the ground of newly discovered evidence, the party seeking it must show that he used reasonable diligence to obtain it before the close of the trial, and that, notwithstanding such diligence, he failed to discover it. The court was justified in refusing a trial upon this ground, if upon no other.

No other points are urged in support of the appeal. We find no ground upon which it can be sustained.

The judgment is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

182 Cal. 219

ROYAL INS. CO. OF LIVERPOOL, ENGLAND, v. CALEDONIAN INS. CO. OF EDINBURGH, SCOTLAND. (S. F. 8102.)

(Supreme Court of California. Feb. 13, 1920. Rehearing Denied March 11, 1920.)

1. APPEAL AND ERROR ⊂⊃1097(4)—LAW OF CASE AFFECTED BY AMENDMENT OF COMPLAINT AFTER REVERSAL AND REMAND.

Decision on appeal that special defense, in action on reinsurance policy, demurrer to which had been sustained, was available, is not the law of the case where after remand important change in respect to the facts was created by amendment of the complaint.

2. INSURANCE ⊂⊃679—INDORSEMENT ON REINSURANCE POLICY CONTROLLING IN VIEW OF CLAUSE OF POLICY.

By clause of general form of policy that "liability for reinsurance shall be as specifically agreed hereon," terms of indorsement placed on the policy of reinsurance by the immediate parties thereto are controlling, in case of inconsistency between them and the term of the general form.

3. INSURANCE ⊂⊃684—INDORSEMENT ON REINSURANCE POLICY MAKES VOLUNTARY BONA FIDE SETTLEMENTS BY ORIGINAL INSURER BINDING ON REINSURER.

Indorsement on policy of reinsurance that it is subject to the same risks, valuations, conditions, "and adjustments" as are or may be taken by the reinsured, and loss, if any, thereunder, is payable pro rata with the reinsured and at the same time and place, makes a voluntary, bona fide settlement by the original insurer binding on the reinsurer, where there is no question as to liability on the two policies up to the occurrence of the disaster out of which the respective liabilities are claimed to have arisen.

4. TRIAL ⊂⊃252(1)—NO INSTRUCTION NECESSARY ON UNSUPPORTED ALLEGATION IN ANSWER.

The issue of bad faith of original insurer in making adjustment of the loss, raised by defendant in action on policy of reinsurance, may be disregarded in the court's direction to the jury; no evidence having been presented on it.

5. INSURANCE ⊂⊃679—CODE MAKES RUBBER STAMP REINSURANCE CLAUSE ON POLICY CONTROLLING OVER PRINTING IN POLICY.

The rule declared by Civ. Code, § 1651, as to the written part of a contract controlling the printed part, obtains where on the general printed form of policy is placed by a rubber stamp the reinsurance clause.

6. INSURANCE ⊂⊃679—CLAUSE OF REINSURANCE POLICY MAKES RUBBER STAMP CLAUSE CONTROLLING OF PRECEDING CONDITIONS IN BODY AS TO INTEREST OF REINSURED.

That, as to reinsured, the reinsurance clause placed by rubber stamp on the reinsurance policy controls a fallen building clause in said policy, results from a succeeding condition therein, in effect that as to any one having an interest other than that of the insured, as described herein, preceding conditions shall apply in the manner provided by writing hereon.

7. TRIAL ⊂⊃46(2) — OFFER OF PROOF IMMATERIAL BY ITSELF REQUIRED TO SHOW PURPOSE OF ADMISSION.

To put the court in error in rejecting evidence, which of itself, in the state of the evidence, was immaterial, it should have been made plain to the court that it was counted on merely as a link in a chain of evidence to show bad faith by showing a violation of a supplemental agreement set out in the answer but not offered in evidence.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Royal Insurance Company of Liverpool, England, against the Caledonian Insurance Company of Edinburgh, Scotland. Judgment for plaintiff was affirmed in the District Court of Appeal on appeal, and the case was transferred to the Supreme Court. Affirmed.

T. C. Van Ness, Jr., Peter F. Dunne, and H. B. M. Miller, all of San Francisco, for appellant.

Jas. Alva Watt and Goodfellow, Eells, Moore & Orrick, all of San Francisco (Redman & Alexander, of San Francisco, of counsel), for respondent.

WILBUR, J. This cause was transferred to this court after decision by the District Court of Appeal of the First District, because

of the contention of the appellant that, the case having heretofore been heard on appeal (20 Cal. App. 504, 129 Pac. 597), the second decision departed from the law of the case as established on the first appeal. On a more extended examination of the record than was possible in considering the petition for rehearing, we are satisfied with the opinion of the District Court of Appeal written by Justice Richards, and adopt the same as the opinion of this court. It is as follows:

"This is an appeal from a judgment in plaintiff's favor for the sum of $4,595.19, alleged to have become due upon a policy of reinsurance.

"The facts of the case are briefly these: The plaintiff insured a stock of goods, furniture, and fixtures belonging to J. C. Johnson & Co. and contained in a building situated on the northwest corner of First and Minna streets in the city and county of San Francisco, to an amount not exceeding the sum of $17,500. The policy which the plaintiff issued to the insured contained a provision that if the building in which the insured property was located, or any part thereof, should fall except as the result of fire, 'all insurance by this policy on such building or its contents shall immediately cease.' After effecting this insurance, the plaintiff reinsured its risk with the defendant herein in the sum of $5,000. These two policies of insurance were as to their general provisions identical in form, and in each there is a printed provision which reads: 'Liability for reinsurance shall be as specifically agreed hereon.' Upon the policy of reinsurance at the time of its issuance by the defendant herein there was indorsed the following provision, viz.: 'This policy is subject to the same risks, valuations, conditions and adjustments as are or may be taken by the reinsured, and loss if any thereunder is payable pro rata with the reinsured at the same time and place.' The insured property was destroyed in the earthquake and fire of 1906. A dispute arose between the plaintiff and J. C. Johnson & Co. as to whether or not said building or any part thereof had fallen prior to its destruction by fire. The plaintiff investigated this question under the stress of threatened litigation, and after considering much evidence pro and con in relation to it concluded to effect and did effect a compromise settlement of the claim of J. C. Johnson & Co. against it for $16,187.50, which sum the plaintiff paid and thereupon made claim against the defendant herein for its proportion of said amount. The defendant refused to pay said claim or any portion thereof, whereupon this action was commenced by plaintiff for its recovery.

"In the original complaint in this action the plaintiff pleaded the facts respecting the original insurance by it of the destroyed property, the reinsurance of its risk by the defendant, the destruction of the property by fire, the plaintiff's payment of the loss, its demand upon the defendant for reimbursement to the extent of its reinsurance policy, and the latter's refusal to pay. The answer of the defendant to this original complaint, after denials of liability, pleaded as a separate defense that before the occurrence of the fire a material and substantial part of the building in which the insured property was located had fallen from a cause other than fire, and that the liability of the defendant upon its reinsurance policy had thereby ceased. The plaintiff interposed a general demurrer to this special defense, which the trial court sustained, and judgment having been given in favor of the plaintiff an appeal was taken to this court, the main question upon said appeal being that of the correctness of the ruling of the trial court in respect to said special defense. Said appeal was heard and decided by this court. Royal Ins. Co. v. Caledonian Ins. Co., 20 Cal. App. 504 [129 Pac. 597]. By its said decision the judgment of the trial court was reversed upon the ground of the court's error in sustaining the plaintiff's demurrer to said special defense. Upon the return of the case to the trial court the plaintiff applied for leave to amend its original complaint, and being granted such leave the plaintiff set up by way of such amendment certain additional facts going to show that the reinsurance clause which constituted the essential provision of the contract of reinsurance was superimposed upon the form of policy used for both contracts of insurance, and further setting forth the dispute which had arisen between plaintiff and the owners of the insured property as to whether any portion of the building had fallen before the fire, and as to the full investigation, compromise, and settlement of such dispute. Upon the basis of these additional facts the plaintiff, upon the retrial of the cause, contended that the special defense which this court had held in the former appeal and upon the record then before it to be allowable was no longer available to the defendant. The trial court, upon undisputed proof of the facts so averred in the plaintiff's amended complaint, so held, and directed a verdict in the plaintiff's favor for the amount of its claim, and the case is now before us upon the defendant's second appeal.

[1] "The first point urged by the appellant is that the former decision of this court constitutes the law of the case.

"We cannot give our concurrence to this contention. Conceding that the former decision of this court was correct in holding that upon the record then before it the defense that the building or a portion of it had fallen before the fire would be available to the reinsurer under the terms of its policy, we are of the opinion that an important change in respect to the facts of the case was created by the amendment to the plaintiff's complaint, which change materially affected the law of the case as applicable to such changed state of facts.

[2, 3] "In order to rightly view this matter, a brief consideration of these two policies of insurance in their relation to each other is required. The original policy of insurance is in a form in common use in this state and is known as the New York standard form. It contains numerous conditions and stipulations which are obviously applicable only to the relation existing between the original insured and his immediate insurer. The same general form of policy was made use of in entering into the contract of reinsurance between the plaintiff and the defendant herein, but it is equally obvious that as to those conditions in this general form of policy which could only have application as between the owner and its original insurer they cannot have been intended to have any force or application as between the original insurer and its reinsurer. This obvious condition intensifies

the importance to be accorded to those phrases or clauses in or on the policy of reinsurance which have special reference to it and to the relation between the immediate parties to it; such, for example, as the clause printed in the general form providing that 'liability for reinsurance shall be as specifically agreed hereon.' By this clause a controlling degree of importance is given to the terms of whatever indorsement is placed upon the policy of reinsurance by the immediate parties thereto, and in case of any inconsistency between the terms of such indorsement and the terms of the general form, the latter in so far as they are inconsistent must give way. Upon the policy of reinsurance in the instant case the following indorsement appears: 'This policy is subject to the same risks, valuations, conditions and adjustments as are or may be taken by the reinsured, and loss, if any, thereunder is payable pro rata with the reinsured and at the same time and place.' In determining the scope and meaning of the foregoing clause superimposed upon the terms of the original contract of insurance regard must be had to the purpose which such special agreements between the reinsured and reinsurer were intended to subserve. In the early case of New York, etc., Ins. Co. v. Protection Ins. Co., 18 Fed. Cas. 160, the purpose of such special agreements was quite clearly pointed out by Mr. Justice Story sitting as a circuit judge. In the absence of such agreements, says the learned justice, 'Nothing is clearer, upon principle and authority, than that, in such case, the reinsurers are entitled to make the same defense and to take the same objections which might be asserted by the original insurers in a suit upon the first policy. The consequence would seem to be that, as no voluntary payment by the original assurers would be binding or obligatory upon the reinsurers, they are compellable to resist the payment, and to require the proper proofs of loss from the assured in a regular suit against them, so as to protect themselves by a bona fide judgment to the amount of the recovery against them under their reinsurance. It was to avoid this inconvenience and delay as well as peril, that the French policies of reinsurance, as mentioned by Emerigon and Pothier, usually contain a clause allowing and authorizing the original insurers to make, bona fide, a voluntary settlement and adjustment of the loss, which shall be binding upon the reinsurers [citing cases]. This, of course, puts the whole matter within the exercise of the sound discretion of the party reassured whether to contest or admit the claim of the first assured.' Such being held to be the purpose of these superimposed agreements between the parties to reinsurance policies, the next question is as to whether this purpose is to be held to have been expressed in agreements in the substantial form of that before us in the instant case. A decision strongly in point upon this latter question is that of Insurance Co. of New York v. Associated Manuf., etc., Co. of New York [70 App. Div. 69] 74 N. Y. Supp. 1038, affirmed in 174 N. Y. 541 [66 N. E. 1110], which involved a clause in a policy of reinsurance which provided that it was 'subject to the same risks, valuations, indorsements (except transfers of location), and conditions as the original insurance, and loss, if any, to be settled and paid pro rata with the reinsured, and at the same time and place, and upon the same conditions.' The property being destroyed by fire, the original insurer proceeded to investigate and adjust the loss, and having done so demanded the pro rata payment from its reinsurer, which being refused, resulted in said action. The same precise claim was there made by the reinsurer which is made in this case. The court in dealing with such claim said: 'We think that a proper construction of the contract of reinsurance fails to sustain this claim. The defendant agreed that the reinsurance should be subject to the same risks, valuations, and conditions as the original insurance, and that the loss should "be settled and paid pro rata with the reinsured, and at the same time and place, and upon the same conditions." * * * In the absence, therefore, of fraud or bad faith on the part of the plaintiff, the defendant, by the terms of its policy, * * * is in no position to object to the mode of adjustment as made by the plaintiff. When, therefore, the plaintiff had ascertained by a proper investigation that it was legally liable to pay a certain amount to the railroad company under its contract, and such payment had been made, the defendant could not question the validity of the plaintiff's act, unless it alleged and proved that the plaintiff had acted fraudulently or collusively to its injury. * * * There is nothing to show, either by allegation or proof, that the plaintiff did not act in entire good faith in adjusting the loss and in making the payment which it did, and no reason is suggested why the defendant should not pay the plaintiff the sum which it agreed to by its contract of reinsurance; and for this reason the trial court properly directed a verdict for the plaintiff.'

"The case at bar presents an even stronger reason for the application of the principle, for the clause under construction here contains the word 'adjustments,' which was evidently inserted in the more recent forms of reinsurance contracts in order to make it clear that the adjustment and settlement of losses, when made by the original insurer after proper investigation conducted in good faith, should be binding upon the reinsurer.

"The rule as thus stated should, of course, be limited to cases where, as in the instant case, no question arises as to the liability of the original insurer and the reinsurer upon their respective policies up to the occurrence of the disaster out of which their respective liabilities are claimed to have arisen, and wherein the matter presented for adjustment is a disputed state of facts as to the origin or extent of the disaster. This will differentiate the case at bar from those cases upon which the appellant herein most strongly relies, as, for example, the case of Firemen's Fund Ins. Co. v. Aachen, etc., 2 Cal. App. 690 [84 Pac. 253], which was a case wherein the original insurer had represented to its reinsurer that the original policy covered wheat in a certain warehouse, whereas in fact the wheat affected by the reinsurance was in another building, and the court properly held that the reinsurance policy was void because there was nothing to which it could attach, and hence nothing which could be affected by any adjustment or settlement made by the original insurer.

"In the case of Commonwealth Ins. Co. v. Globe, etc., Ins. Co., 35 Pa. 475, the original insurer undertook to hold its reinsurer liable for the loss of a vessel occurring on a different voyage from that for which it was originally insured, and the court again properly held that

there must be a prior insurable interest to which the reinsurance can attach. The difference between this line of cases and the case at bar is obvious, and in conclusion upon this branch of the case we are of the opinion that under the foregoing clause of the reinsurance contract, where both contracts of insurance were admittedly valid up to the time of the occurrence of the disaster out of which the claims of liability on the part of both arose, and where the only question requiring adjustment was the disputed fact as to whether or not a portion of the building in which the insured property was located had fallen before the fire, and where the original insurer had in good faith investigated such disputed state of facts, and after such investigation had made an adjustment of the loss, the reinsurer is bound by such adjustment, and may not reopen that question in an action against it for its pro rata liability for the loss upon its policy of reinsurance.

[4] "As to the appellant's contention that it raised the issue of the bad faith of the plaintiff in making its adjustment of the loss, it is sufficient to say that no evidence is shown to have been presented upon this issue. The trial court was therefore entitled to disregard it in its direction to the jury to find a verdict in plaintiff's favor."

[5, 6] In addition to the statements contained in the foregoing opinion on the law of the case, it may be added that the special defenses contained in the defendant's answer, to which demurrer was sustained, specifically alleged that in the policy of reinsurance—

"It is stipulated and agreed by and between said parties respectively that if the building mentioned in the policies of insurance, or any part thereof, should fall except as a result of fire, all insurance under said policies on said building or its contents should immediately cease, and defendant alleges the fact to be that prior to the occurrence of the fire in or upon said building, or in or upon the property insured or reinsured under said policies respectively, a material and substantial portion of said building had fallen from a cause other than fire, and that said building had fallen within the meaning of said provisions of said policy, and that said insurance had thereby and by reason thereof at the time of the fire mentioned in the complaint ceased and terminated."

A similar allegation was repeated in the second separate defense set up in the answer. At the time of the trial on the former appeal the defendant admitted substantially all the allegations of the complaint, and being precluded from offering evidence in defense by reason of the sustaining of the demurrer to the separate defenses, judgment was entered in pursuance of the stipulated facts. Therefore the opinion on the previous appeal not only reverses the judgment because of the erroneous ruling on the demurrer, but the appellate court properly assumed in its opinion that the fallen building clause was a part of the reinsurance policy. The construction placed upon the reinsurance policy resulted from an effort to reconcile the reinsurance clause concerning "valuations," "conditions," and "adjustments" with the fallen building clause admitted by the demurrer to have been a part of the reinsurance policy. In the amendments to the complaint, made after the reversal by the District Court of Appeal, the plaintiff pleaded the reinsurance contract, according to its contention as to its legal effect, while in the former complaint it had been set out in hæc verba as an exhibit. Upon the last trial respondent proved that the reinsurance clause was stamped upon the face of the policy by a rubber stamp. This condition of the record not only emphasizes the significance of the word "hereon" in the phrase "liability for reinsurance shall be as specifically agreed hereon," but also brings to bear an additional rule of construction not available upon the record as presented on the previous appeal. This rule is contained in section 1651 of the Civil Code, which provides as follows:

"Where a contract is partly written and partly printed, or where part of it is written or printed under the special directions of the parties, *and with a special view to their intention*, and the remainder is copied from a form originally prepared *without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the parts which are purely original control those which are copied from a form.*" (Italics ours.)

Another reason for the same conclusion, as to the predominance of the reinsurance clause, results from one of the printed conditions contained in the body of the reinsurance policy, as follows:

"If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest *as shall be written upon, attached or appended hereto.*"

Among "the conditions hereinbefore contained" was the fallen building clause. As the interest of the insured in this case was that of an insuring company, this clause in effect provides that such condition shall apply in the manner expressed in the rubber stamp reinsurance clause. As was said in Welch v. British American Assurance Co., 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396:

This provision "was intended to have the effect of preventing the conditions previously mentioned in the policy from applying to such interest, unless the conditions should be again written upon, attached, or appended to the policy. No other reasonable meaning can be given to the language."

[7] It is urged by appellant that the court erred in rejecting evidence tendered by defendant to the effect that the building had

fallen before the fire. It is claimed that this evidence was relevant as one item of evidence in the chain tending to establish bad faith on the part of the respondent in settling and adjusting the claim of J. C. Johnson & Co. All of the facts concerning the adjustment were already before the court without conflict. It appeared therefrom that a claim had been made by the insured against the respondent; that this claim had been fortified by evidence; that the question of whether or not the building had fallen before the fire was one of the matters covered by the investigation of the respondent and by the evidence tendered by the insured, which included a photograph of the building afire and still standing, with the exception of some of the front wall. It was on this bona fide controversy that a settlement and adjustment were had and the money paid. In this condition of the evidence, the mere effort to show that there was evidence available tending to prove that the building had fallen before the fire was of itself immaterial. It was not made plain to the trial court, nor in the appellant's opening brief, to the appellate court, that it was counting on this evidence as merely a link in the chain of evidence to show bad faith by showing a violation of a supplemental agreement between the two insurance companies set out in the answer of the appellant but not offered in evidence. This point was therefore correctly disposed of in the concluding paragraph of the opinion of Justice Richards heretofore quoted.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.; SHAW, J.; OLNEY, J.

45 Cal. App. 366

BURROWS v. DURFLINGER et al.

(Civ. 3167.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1919. Hearing Denied by Supreme Court Feb. 26, 1920.)

1. MORTGAGES ⊂=186(5)—EVIDENCE INSUFFICIENT TO SHOW GROSS NEGLIGENCE OR CONSTRUCTIVE FRAUD OF MORTGAGEE.

In a vendor's action to have his trust deed for part of purchase price declared to be superior to a mortgage lien, evidence *held* to show that the defendant assignee of the mortgage was not negligent in assuming that the recitals of the trust deed that the land was subject to such mortgage were valid, and was not guilty of such gross negligence in the transaction as to amount to constructive fraud against plaintiff.

2. MORTGAGES ⊂=183—ESTOPPEL BY ESCROW INSTRUCTIONS AND TRUST DEED TO CLAIM LATTER'S PRIORITY OVER MORTGAGE.

Where plaintiff vendor signed escrow instructions directing that a trust deed for part of purchase price should be made subject to a mortgage, and accepted trust deed containing such recital, in the absence of fraud on the part of defendant, mortgagee's assignee, the plaintiff is estopped to deny priority of the mortgage.

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Edwin H. Burrows against William Durflinger and others. From a judgment for plaintiff, defendants appeal. Reversed.

L. G. Shelton and A. W. Ashburn, both of Los Angeles, for appellants.

Muhleman & Crump, of Los Angeles, for respondent.

KERRIGAN, J. This is an appeal by the defendant Maupin from a judgment in favor of plaintiff.

The transaction giving rise to the litigation grew out of a plan of defendant William Durflinger, who was engaged in the business of building and selling residences, and whose procedure thereunder usually was to purchase a vacant lot, make an initial payment thereon, and borrow upon a first mortgage money with which to erect a building upon the lot, giving to his vendor a trust deed to secure the balance of the purchase price, said trust deed being made subject to said mortgage. In the case at bar said defendant purchased a certain lot in the city of Los Angeles from the plaintiff Burrows for the sum of $2,400, upon which he paid him in cash $400 and caused to be executed in his favor, as will hereafter appear, a trust deed to secure the balance; the plaintiff agreeing that a first mortgage for $4,000 might be placed upon the property. There was also a general oral understanding between Durflinger and the plaintiff that the former would build a residence upon the lot, without, however, its cost being specified or when it should be built. Durflinger caused a note for the balance of the purchase price of said lot to be executed by his daughter, the defendant Faye Durflinger, and he also caused the deed thereto to be taken in her name as grantee, whereupon she executed a mortgage upon the property in favor of her brother, the defendant Neil Durflinger, as security for a purported loan of $4,000. She also executed a trust deed to the plaintiff as security for the payment of $2,000, the balance of the purchase price of the lot above mentioned, which deed contained a recital that it was subject to a mortgage of $4,000. The deed from the plaintiff to Faye, the mortgage from Faye to Neil, and the trust deed from Faye to the plaintiff were all executed on December 6, 1915, and recorded on December 15th of the same year. On February 26, 1916, William and Neil Durflinger borrow-

ed from George D. Abrams $1,750, assigning to him as collateral security therefor the aforesaid mortgage of $4,000. At that time it appears that a house was in course of construction upon the lot. Subsequently, on April 16, 1916, the appellant Maupin loaned to William and Neil Durflinger upon their joint note the sum of $2,750, part of which was applied to the repayment to Abrams of his aforesaid loan, and took from Abrams an assignment of the $4,000 mortgage as collateral security for appellant's loan. At that time said building was nearly completed, and the value thereof was estimated by Maupin at $2,000. In making the loan Maupin placed the $2,750 with a certain title company in escrow, with instructions to pay the money to William and Neil Durflinger upon a continuation of the certificate of title showing said mortgage of $4,000 to be a first lien upon the property, together with an affidavit of the maker of said mortgage that she had received the consideration mentioned therein and that there was no offset or defense to the obligation secured thereby. An affidavit to that effect was obtained from Faye, and the title company, upon examination of the records having concluded that the mortgage was a first lien upon the property, consummated the transaction. Maupin's escrow instructions further stated:

"It is understood the property is subject to $2,000 trust deed which is second to the $4,000 mortgage; therefore no mortgage statement is needed in said trust deed."

The plaintiff was represented in the transaction from its inception by a certain real estate concern through which the sale was negotiated, and a representative of that concern was with him when he executed the papers necessary to consummate the transaction. Nevertheless, the plaintiff testified that when he signed those documents he did not read them, and did not know that the trust deed was to be subject to the mortgage; that he knew that there was to be a mortgage on the property to raise money to erect a house thereon, but understood that the mortgage was to be subordinate to the trust deed; and that he did not learn to the contrary until he received the deed after its recordation.

William Durflinger failing to complete the construction of the house upon said lot, the plaintiff brought this action for the purpose of having the mortgage declared null and void and canceled as to him and to have the trust deed declared to be superior to the lien thereof.

The trial court found that the conveyance from the plaintiff was procured, and the trust deed and mortgage executed, as a part of a fraudulent scheme; that the mortgage was void as to plaintiff as to the excess thereof over the value of the building erected upon the lot; and that Maupin took an assignment of the mortgage with notice that the mortgage was without consideration and fraudulent as to the plaintiff.

Our examination of the record leads us to the conclusion that with respect to the appellant Maupin the findings of the court are not sustained by the evidence.

Faye Durflinger testified that she never met Maupin. Her brother Neil testified to the same effect. Their father admitted that he received money from Maupin on the loan, and said:

"I did not have any conversation with Mr. Maupin as to how I obtained the title to that property. I never did tell Mr. Maupin in what manner the deed was made to Faye Durflinger. He never made any inquiries as to how she came in possession of the deed. He was never told in my presence."

Maupin testified that he did not know Faye, and never had any conversation with her, nor had Neil ever told him how he or his sister came to be in possession of the property; that there was no understanding between the Durflingers and himself except what was contained in the escrow instructions. He said:

"I gave my check for the full amount on each loan to the Title Company, and gave instructions to complete the deal and turn over the money after they had guaranteed the title."

Neil Durflinger said he turned over to his sister the money received from Maupin. "The check was payable to me, and I transferred it to my sister Faye Durflinger. I received the consideration for the mortgages in the Kibbee case."

[1] After a careful examination of the record, we are unable to discover any substantial evidence tending to show that Maupin was guilty of any wrongdoing in the premises. Upon the exposure of the fraud which had been practiced upon the plaintiff by the Durflingers, it became clear that if Maupin had made further investigation into the transaction, or had inquired of the plaintiff concerning the particulars thereof, he doubtless would have learned of the fraud; but at the time he took the assignment of the mortgage nothing had occurred to arouse his suspicion that the transaction was irregular or fraudulent in any respect. It appears that he had done all that years of experience as a successful money lender had taught him was necessary or prudent to do in the matter to make a safe loan. He had examined the property, had had the title thereof brought down to date; and, the note secured by the mortgage being nonnegotiable (Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110), he caused the affidavit of the mortgagor to be taken showing that no concealed equities existed between her and the mortgagee, before he would make the loan, and he caused the transaction to be handled by a corporation whose business it

was to negotiate and consummate dealings of this character. It is apparent, too, that at least one other business man had been deceived by the Durflingers, for the appellant's assignor, who had made a loan on the security of the same mortgage, had failed to discover the fraud and deceit attaching to it. He, like the appellant, had doubtless assumed that the recitals in the trust deed were valid and binding on the plaintiff, and that he was required to make no inquiry into the validity of the transaction between plaintiff and his grantee. Certain it is that the appellant acted with infinitely greater care and caution in the matter than did the plaintiff, who even failed, according to his testimony, to read the documents executed in the transaction, and it is his own laxity which has given rise to this suit.

It is not argued, nor could it well be, that under the evidence Maupin and his codefendants had entered into a conspiracy to defraud the plaintiff, or that Maupin was to receive any benefit from the transaction other than the interest of one per cent. per month on the amount of his short-time loan. In the last analysis the plaintiff's argument amounts to no more than an assertion that Maupin was guilty of negligence in failing to make inquiries concerning the deed from the plaintiff to Faye Durflinger and the trust deed taken by him, but, even if this were true, it does not constitute gross negligence amounting to constructive fraud.

[2] It may be added, finally, that the plaintiff signed escrow instructions which, in effect, plainly directed that the trust deed should be made subject to the mortgage in favor of Neil Durflinger, and he accepted the trust deed containing such a recital. Under these circumstances, in the absence of fraud on the part of Maupin, the plaintiff is estopped to defeat or impair the mortgage by denying its priority. In National Hardware Co. v. Sherwood, 165 Cal. 1, 130 Pac. 881, it was held:

"Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, he is estopped thereby and is not allowed to defeat or impair the other mortgage by denying its priority or validity at the time he took it to the amount of it as recited in his own mortgage," and that "The beneficiary of the deed of trust stood in the same situation as a second mortgagee, with regard to the recital therein, and his subsequent purchase of the land under the power in the deed did not change his position in this respect."

And in the same case it was said:

"In the absence of anything in the language of the recital, or in the note or mortgage to which it refers, suggesting the contrary, the assignee of the note was justified in assuming that the ordinary course of business had been followed at the time of the execution of the note, and that the loan of the money was contemporaneous therewith."

It is obvious, of course, that what the plaintiff should have done was to cause a declaration to be included in the recital in the deed that the purpose of the mortgage was to raise funds for the construction of a building on the lot, and the deed might also have provided that the money to be raised on the mortgage should be advanced as the proposed building progressed. If this had been done, the plaintiff would have protected himself and the assignees of the mortgage. Plaintiff was negligent in thus allowing Faye Durflinger to possess the means of deceiving others. When one of two innocent persons must suffer, he by whose negligence it happened must be the sufferer.

It follows that the judgment must be reversed, and it is so ordered.

We concur: WASTE, P. J.; WOOD, Judge pro tem.

45 Cal. App. 794

KIBBEE v. DURFLINGER et al.

(Civ. 3166.)

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1919. Hearing Denied by Supreme Court Feb. 26, 1920.)

Appeal from Superior Court, Los Angeles County; John W. Shenk, Judge.

Action by Lucy E. Kibbee against William Durflinger and others. Judgment for plaintiff, and the defendant C. S. Maupin appeals. Reversed.

See, also, 187 Pac. 752.

L. G. Shelton and A. W. Ashburn, both of Los Angeles, for appellant.

Muhleman & Crump, of Los Angeles, for respondent.

KERRIGAN, J. The record on appeal in this case has been brought here in the same transcript as the case of Burrows v. Durflinger et al. (No. 3167) 187 Pac. 752, and the points and arguments of the respective parties in the two cases have been presented in one set of briefs, but in the interest of clearness we have deemed it advisable to consider them separately.

The facts in the two cases differ in a number of immaterial matters; such as, for example, the price of the lots, the amount of the mortgages, the condition of the lots so far as improvements are concerned, and the fact that in the present case there were two separate lots involved. In the case now being considered the appellant understood that the loan by him was for the purpose of erecting buildings upon the several lots; and in order to insure that the money would be thus used and in order to improve his security he directed the escrow holder to withhold $200 from the loan until the foundations of the buildings should be laid. In all essential respects, however, the facts in the two cases are the same, and no discussion of them in this case would serve any useful

end. On the authority of the above-mentioned case of Burrows v. Durflinger et al., No. 3167, this day decided, the judgment is reversed.

We concur: WASTE, P. J.; WOOD, Judge pro tem.

45 Cal. App. 410

YOLO WATER & POWER CO. v. EDMANDS et al. (Civ. 1857.)

(District Court of Appeal, Third District, California. Jan. 6, 1920.)

1. APPEAL AND ERROR ⊂=771 — EXCUSABLE DELAY ON PART OF ATTORNEY IN PREPARING AND FILING BRIEF.

Failure of plaintiff appellant's attorney, a candidate for Governor of the state, to prepare the necessarily lengthy brief and file it within 30 days after filing of the transcript, as required by the rules of the Supreme Court and the appellate court, in view of the particular circumstances, the attorneys for defendant appellees having agreed to as much time as was necessary for preparation of the brief, *held* excusable.

2. APPEAL AND ERROR ⊂=772—PARTY MAY BE RELIEVED FROM DEFAULT IN FILING BRIEF ON ACCOUNT OF MISTAKE OR EXCUSABLE NEGLECT.

The rights conferred upon litigants by rules of court requiring briefs on appeal to be filed within time specified are subject to the right and power of the court on proper showing to relieve a party from his default on the ground of mistake, inadvertence, or excusable neglect.

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by the Yolo Water & Power Company, a corporation, against William Otis Edmands, Harriet Lee Hammond, as executrix of the last will of Charles Mifflin Hammond, deceased, and Harriet Lee Hammond, individually. From judgment for defendants, plaintiff appealed. On motion to dismiss. Motion denied.

Theodore A. Bell, of San Francisco, Arthur C. Huston, of Woodland, and W. P. Thomas, of Ukiah, for appellant.

John S. Partridge, of San Francisco, H. E. Witherspoon, of Lakeport, Preston & Preston, of Ukiah, and Ben C. Jones, of Lakeport, for respondents.

ELLISON, Presiding Judge pro tem. The action was brought by plaintiff, a public service corporation, against the defendants to condemn certain real property situate in Lake county, Cal. After trial by jury a judgment was rendered on the 22d day of October, 1917, condemning the lands asked for by the plaintiff and fixing the defendants' damages in the gross sum of $105,600. Thereafter, on the 22d day of October, 1917, the plaintiff filed its notice of appeal from said judgment. The transcript on appeal was filed in this court on the 14th day of May, 1918. On the 6th day of September, 1919, no brief having been filed on behalf of the plaintiff and appellant, the respondents filed in this court a notice of motion to dismiss said appeal on the ground that plaintiff and appellant had failed to file any points and authorities on appeal in said action within the time required by law, the rules of the Supreme Court and the District Court of Appeal of the state of California.

The motion was based upon a formal notice, the records and files in said cause on file in this court, and a certificate of the clerk of the county of Mendocino, showing the entry of said judgment, the notice of appeal, and was also supported by the affidavit of Mr. H. L. Preston, one of the attorneys for the respondents.

The affidavit of Mr. Preston was to the effect that no brief or points and authorities had at that time been filed by the appellant and that no extension of time had ever been granted by the Supreme Court or by the District Court of Appeal for the Third District, and that the time allowed by law and the stipulation of counsel and the order of this court had long since expired for plaintiff and appellant to file its points and authorities in the above-entitled action.

It may be added that the record shows that the appellant was granted by stipulation several extensions of time in which to file its opening brief, and that the last written stipulation expired on September 15, 1918.

Mr. John S. Partridge, one of the attorneys for respondents, made an affidavit in which he stated:

"It is true that in September, 1918, said Theodore A. Bell became a candidate for Governor of the state of California, and that affiant as a matter of courtesy extended to the said appellant such additional time as might be necessary, due to the candidacy of Mr. Bell; that affiant has no recollection of any conversation with Mr. Bell after the election in November, 1918, but affiant states that, if he did state to Mr. Bell over the telephone that he might take such time as he needed after the conclusion of the campaign, it was not the idea or intention of affiant that the time should be extended for such an unreasonable period as the month of September, 1919."

Mr. Bell, the leading attorney for the plaintiff and appellant, made an affidavit in which, among other things, he averred:

"The verbal extensions of time in which to file appellant's opening brief granted to affiant by Mr. Partridge were not limited to the period of affiant's candidacy for Governor, but were unlimited in character, and affiant always believed that the time was and would remain open until such time as Mr. Partridge might object to any delay in the filing of said brief."

Affiant also stated:

"It is usual and customary in such cases for opposing counsel to make some objection to further time before presenting a motion to dismiss, and affiant at all times believed that counsel for the respondents would call the matter to affiant's attention before endeavoring to defeat a review of the appeal herein upon its merits."

Mr. Bell also averred that upon the termination of the campaign for Governor a large amount of accumulated legal business, at home and throughout the country, demanded his personal and exclusive attention, and that—

"The preparation of the brief entailed a vast amount of labor and searching of authorities, and it was not until about May 1, 1919, that affiant was able to place in the hands of the printer the manuscript, covering about 195 pages, of the brief as now filed."

He further stated—

"That after preparing about 180 pages of the typewritten brief he got Mr. Partridge on the telephone and told him that about 180 pages had been written, and that affiant would require further time to finish the brief. Mr. Partridge jokingly said, in substance: 'Why are you writing such a long brief—why do you want to make us so much trouble to answer it?' and, in substance, told affiant to take as much time as he required to conclude the work."

The record shows the brief in this case was actually filed on the 11th day of September, 1919, five days after the filing in this court of the notice of motion to dismiss the appeal. The rules of the Supreme Court and this court provide that, if appellant's points and authorities are not filed within 30 days after the filing of the transcript, the court may, on motion, dismiss the appeal.

The plaintiff is a public service corporation, and the defendants are landowners, a portion of whose lands is sought to be condemned for the purposes of appellant water company. It is thus apparent that large and important property rights are the subject of the litigation. That appellant did have written stipulations granted to it by respondents is not controverted, and that Mr. Bell had a talk with Mr. Partridge over the telephone asking for further time is not disputed, and it may well be that appellant understood from such conversation that he was to have all the time required to file the brief, and that after his gubernatorial campaign, while devoting himself to his accumulated legal business, he was resting easy in the belief that, if respondents were dissatisfied with the delay, they would call his attention to it.

That the appeal was not abandoned, and that he was endeavoring in good faith to present the appeal to this court, is apparent from the fact that a very large portion of the brief had previously been prepared and was in the hands of the printer at the time the notice of motion to dismiss was given.

[1] We are satisfied from a study of the authorities, and especially of the case of Borgmeyer v. Solomon, 178 Pac. 544, that this case presents, when all the facts are considered, one of excusable neglect, and that the appeal should not be dismissed.

[2] As said in the foregoing case:

"The rules of court requiring briefs on appeal to be filed within the time specified undoubtedly confers rights which may be enforced by litigants. (See opinion of this court in Wood v. Mesmer, Civil No. 2750, 178 Pac. 314, filed December 10, 1918, and cases there cited.) It is equally certain, however, that the rights so conferred are subject to the right and power of the court, upon a proper showing, to relieve a party from his default on the ground of mistake, inadvertence, or excusable neglect. Brooks v. Union Trust Co., 146 Cal. 134, 138, 79 Pac. 843; Santa Paula Waterworks v. Peralta, 5 Cal. Unrep. 799, 42 Pac. 239; Estate of Lakemeyer, 6 Cal. Unrep. 695, 65 Pac. 475. As was said by the Supreme Court in Estate of Keating, 158 Cal. at page 115, 110 Pac. at page 112: 'There can be no doubt that where such default is made under circumstances which would show good cause for relief under the decisions on that subject in applications under section 473 of the Code of Civil Procedure, whether that section be applicable to the Supreme Court or not, this court should grant similar relief, allow the transcript to be filed after the time fixed by the rule, and retain the appeal.'"

The appellant was undoubtedly given considerable latitude in the time needed to prepare and file its brief, and in view of the purport of the affidavits, the speedy filing of the comprehensive brief, the importance and magnitude of the questions involved, the apparent acquiescence by the respondents until their motion to dismiss was served and filed, it seems to us that counsel for appellant's assumption that he still had time to file his brief by authority of his oral understanding with respondents' attorney was not entirely unwarranted.

From a consideration of the entire case, we are of the opinion that the motion to dismiss the appeal should be denied, and it is, accordingly, denied.

We concur: HART, J.; BURNETT, J.

45 Cal. App. 347

UNION TRUST & SAVINGS BANK OF PASADENA v. ISHKANIAN.

(Civ. 3146.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1919. Hearing Denied by Supreme Court Feb. 26, 1920.)

1. CHARITIES ⊂=10—DEED IN TRUST TO AID PROHIBITION ORGANIZATION IN ATTACKING LIQUOR TRAFFIC NOT AUTHORIZED.

Decedent's deed to the "treasurer of the Prohibition National Committee, or his successor," reserving a life estate in decedent, made to aid the committee in its work of destroying the liquor traffic, was not authorized by Civ. Code, § 857, specifying the different purposes for which express trusts may be created.

2. CHARITIES ⊂=22(1)—DEED MUST INDICATE PURPOSE OF TRUST.

A deed to F., "as treasurer of the Prohibition National Committee, or his successor," is invalid under Civ. Code, §§ 852, 2221, 2253, providing that the purposes of a trust shall be declared in the instrument creating the same.

3. CHARITIES ⊂=48(2)—DEED HELD TO PUT ON INQUIRY AS TO WHETHER IT WAS ABSOLUTE GRANT OR CONVEYANCE IN TRUST.

The language of decedent's deed to defendant's predecessor as "treasurer of the Prohibition National Committee, or his successor," was sufficient to put a prudent man, buying from the treasurer, on inquiry as to whether it was an absolute grant to the treasurer, subject only to the life estate retained by the grantor, or was an invalid conveyance in trust for the uses and purposes of the committee.

4. TRUSTS ⊂=43(3) — EVIDENCE TO SHOW WHETHER DEED IS ABSOLUTE OR IN TRUST IS ADMISSIBLE.

Where parol evidence is offered to explain the intention of the parties as to whether a conveyance was a deed absolute or in trust it is admissible, unless prejudicial to a third party who, in good faith and without notice, has become a purchaser.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Union Trust & Savings Bank of Pasadena, executor of the will of Rebecca Pentz, deceased, against A. T. Ishkanian. From judgment for plaintiff defendant appeals. Affirmed.

Will D. Gould, of Los Angeles, for appellant.

Parker & Parker, of Pasadena, for respondent.

NOURSE, J. The executor of the estate of Rebecca Pentz commenced this action to quiet title to certain real property situate in the county of Los Angeles. The controversy over the title arose from the fact that about two years prior to her death the deceased executed and delivered a deed purporting to convey the property to H. P. Faris, "as treasurer of the Prohibition National Committee, or his successor." The defendant purchased the property for a valuable consideration from Faris. On the trial it was shown that the deceased executed the deed for the express purpose of aiding the Prohibition National Committee in its work of destroying the liquor traffic, reserving to herself merely a life interest in the property sought to be conveyed. This intention she announced to the attorney who prepared the deed and to one other who was interested in the same movement and who testified at the trial. The defendant was informed of all of these facts prior to the execution of the deed to him by Faris. Judgment was had in favor of the plaintiff as executor of the estate, and from the judgment defendant prosecutes this appeal.

Several points are listed by appellant in his brief as grounds for reversal, but there are only two questions which require consideration: First, whether the deed is void because it indicates the intention to create a trust in real property without complying with the requirements of the laws of this state in that respect; and, second, whether parol evidence tending to explain the intentions of the parties and to clear the ambiguities appearing on the face of the deed was admissible.

[1, 2] 1. The deed attempts to convey the property to H. P. Faris, as treasurer of the Prohibition National Committee, or his successor, without designating any purpose to which the property should be put. The fact that the grant is in the alternative to the successor of H. P. Faris, as treasurer of the Prohibition National Committee, clearly indicates the intention of the grantor to create a trust in favor of the Prohibition National Committee. If such was the intention of the grantor, there can be no doubt that the deed does not conform with the requirements of the Code relating to the creation of trusts in real property. Section 857 of the Civil Code specifies five different purposes for which express trusts may be created. It is not necessary to enumerate these, but it is sufficient to say that this deed does not meet any of them. Section 852 of the same Code provides that a trust in relation to real property must be in writing unless created or declared by operation of law. Section 2221 of the same Code provides that—

"A voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust."

Section 2253 of the same Code provides that—

"The nature, extent, and object of a trust are expressed in the declaration of trust."

In Pomeroy's Equity Jurisprudence (4th Ed.) § 1009, it is said:

"The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust. the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail."

This principle is supported in Wittfield v. Forster, 124 Cal. 418, 57 Pac. 219, where, in a case closely paralleling the present action, the court held that the trust was void because of the failure of the trustor to declare with reasonable certainty the duration of the estate, the nature and quantity of the interest which the beneficiaries were to have, and the purposes for which the trust was to be performed. To the same effect is Estate of Budd, 166 Cal. 286, 291, 135 Pac. 1131.

[3] 2. The facts appearing at the trial as to the purchase of the property by appellant are that he was a creditor of the Prohibition National Committee for personal services rendered by him to that committee, and that he accepted the deed to the property in cancellation of that indebtedness. Before he accepted the deed he was informed that the conveyance had been made to Faris for the uses and purposes of the Prohibition National Committee, but made no investigation as to the validity of the deed. The language of the deed was in itself sufficient to put a prudent man upon inquiry as to whether it was an absolute grant to Faris, subject only to the life estate retained by the grantor, or whether it was a conveyance in trust for the uses and purposes of the Prohibition National Committee. He cannot therefore be said to be an innocent purchaser.

[4] Where parol evidence is offered to explain the intentions of the parties as to whether the conveyance was a deed absolute or in trust it is admissible, unless such evidence would prejudice a third party who, in good faith and without notice, has become a purchaser. As to the admissibility of such evidence in general, the Supreme Court in Parks v. Parks, 177 Pac. 455, 456, say:

"The general rule is that the real nature of the transaction concerning property conveyed, the true intent and purpose moving parties in taking a conveyance to property in their joint names, or in that of one of them, can be investigated and determined unless where in good faith interests of third parties have intervened and would be injuriously affected. It may be shown that the taking of a conveyance in the name of the grantee, or one of them, was a mistake, or that it was a matter merely of convenience, or as security for a loan, or was taken under such circumstances as created a resulting trust or trust of some other character."

To the same effect is Taylor v. Morris, 163 Cal. 717, 722, 127 Pac. 66.

Here the language in the deed clearly indicated an intention to create some sort of a trust rather than to make an absolute conveyance. And as the appellant was not an innocent purchaser, he cannot complain of the admission of the evidence explaining the intentions of the parties in this respect.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

45 Cal. App. 286

BRETT v. VANOMAR PRODUCERS.

(Civ. 3162.)

(District Court of Appeal, First District, Division 1, California. Dec. 26, 1919.)

1. EVIDENCE ⊜450(8) — CONTRACT OF SALE NOT SO UNAMBIGUOUS AS TO PREVENT EVIDENCE OF EXTRINSIC FACTS.

Contract for sale by association of a crop of beans up to a certain amount per acre to be raised on a certain number of acres, with preference to buyer for purchase of balance of members' crop, other things being equal, *held* not so plain and unambiguous as to speak for itself unaided by extrinsic matters.

2. CUSTOMS AND USAGES ⊜15(1)—EVIDENCE ⊜448—EVIDENCE OF DETAILS OF TRANSACTION AND OF CUSTOM ADMISSIBLE ON MEANING OF CONTRACT OF SALE OF CROP OF BEANS.

Under Civ. Code, §§ 1646, 1647, to explain an ambiguous contract for sale of beans to be raised, and to enable the court to arrive at and interpret it in the sense in which the parties understood it, testimony as to the nature and details of the transaction and the custom prevailing in the community in raising and selling bean crops is admissible.

3. APPEAL AND ERROR ⊜907(3)—COMPETENCY AND SUFFICIENCY OF EVIDENCE AND ABSENCE OF OBJECTION PRESUMED IN ABSENCE OF TRANSCRIPT AND BILL OF EXCEPTIONS.

In the absence of transcript of testimony or bill of exceptions, the presumption on appeal is of competency and sufficiency of the evidence and its admission without objections.

4. CONTRACTS ⊜176(1)—CONSTRUCTION MATTER OF LAW.

Construction of a contract where it is to be arrived at from a mere reading of the instrument, or from such reading aided by extrinsic evidence of circumstances and the like, is a matter of law.

5. APPEAL AND ERROR ⊂⊃842(2)—DETERMINATION ON CONFLICTING EVIDENCE WHAT CONTRACT WAS FINDING OF FACT.

When the meaning and construction of a contract are doubtful and depend on extrinsic evidence, and there is a conflict in such evidence, the determination of that conflict results in a finding of pure fact.

6. APPEAL AND ERROR ⊂⊃704(2)—EVIDENCE NECESSARY FOR REVIEW OF FINDING OF WHAT CONTRACT WAS.

For review of the finding on extrinsic evidence of what the contract really was the evidence should be brought up.

7. TRIAL ⊂⊃396(3)—FORM IN COMPLAINT TENDERING ISSUE OF FACT SUFFICIENT FOR FINDING.

Form of statement in complaint tendering the material issue of fact of what the contract really was is sufficient for the purpose of the finding against objection of plaintiff.

8. APPEAL AND ERROR ⊂⊃171(3)—SUFFICIENCY OF ANSWER TO RAISE ISSUES NOT QUESTIONABLE FOR FIRST TIME ON APPEAL.

The case having without question or objection been tried on the theory that the answer raised issues on the material allegations of the complaint, its sufficiency to do so cannot be questioned for first time on appeal.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by L. D. Brett against the Vanomar Producers. Judgment for defendant, and plaintiff appeals. Affirmed.

Ben F. Gray and Geo. S. Hupp, both of Los Angeles, for appellant.

C. O. Whittemore and Kennicott & Williams, all of Los Angeles, for respondent.

WASTE, P. J. In this action plaintiff, assignee of the purchaser, sought damages for the alleged breach by the seller of a contract for the sale of a crop of beans. Judgment was entered for the defendant, and the plaintiff appeals on the judgment roll alone.

The reciprocal rights of the respective parties are to be determined by the construction to be placed on the contract contained in a letter written by the defendant corporation to the plaintiff's assignor, A. G. Martin & Son, under date of February 23, 1916, the material parts of which (address and signature omitted) are as follows:

"This is to confirm our understanding of the conversation between Mr. Williamson, myself, and your firm on February 17th. You are to purchase from the association the crop grown on 650 acres planted to Henderson bush lima beans not in excess of eight sacks to the acre at $4.85 per cwt. f. o. b. Owensmouth; delivery to be made and the beans to be accepted within thirty days after threshing.

"We also are to give you the preference for the purchase of the balance of the association's members crop of Henderson bush lima beans, other things being equal, and you are to exercise this option within ten days after being notified that the beans are ready for delivery."

Placing an interpretation upon the contract most favorable to itself, plaintiff's contention is that the defendant agreed to sell and deliver to Martin & Son the crop of beans grown upon 650 acres of land, not in excess of 8 100-pound sacks to the acre at $4.85 per cwt. f. o. b., and also gave the partnership a preference to purchase the balance of the association members crop of Henderson bush lima beans, wherever grown, other things being equal, said option to be exercised within ten days, upon being notified that the beans were ready for delivery. Plaintiff further alleged in his complaint that 650 acres were planted to beans and produced an average of 12 100-pound sacks of beans to the acre, or 7,800 sacks; that in addition thereto the members of said association planted, and the said association had the sale and marketing of, 380 acres of beans, which yielded an average of ten sacks to the acre, or 3,800 100-pound sacks; that of the said crop of 7,800 sacks defendant had delivered 3,000 sacks and no more, to the damage of Martin & Son in the sum of $2,530. It further alleged that before the beans were ready for delivery Martin & Son notified the defendant that they intended to exercise their option under the contract to purchase the balance of said beans, wherever grown, but as a matter of fact the defendant had sold the beans, and that by reason of its failure to deliver the remaining 8,600 sacks of beans so grown Martin & Son were damaged to the extent of $20,850, that sum being the difference between the market price of $12 for each 100-pound sack when the said beans were ready for delivery, and the alleged contract price of $4.85, the figure at which the plaintiff contends Martin & Son was entitled to purchase under its contract.

These allegations were in effect denied by the defendant, which pleaded in full the contract hereinbefore set out. It further alleged that previous to and at the time of execution and delivery of the contract the defendant advised Martin & Son that it did not have any particular acreage signed for, but that it hoped to be able to close the contracts with its members for at least 650 acres of beans; that this crop Martin & Son agreed to purchase, the sacks to weigh 80 pounds each; that it was further understood and agreed, if there was any excess over 8 80-pound sacks to the acre grown on the 650 acres for which defendants signed, Martin & Son were to be given preference on said excess, other things being equal, and were to pay for such excess the market price of said beans at the date of delivery. It alleged full performance of all the terms of the contract on its part to be performed, and denied that Martin & Son

were able to perform on their part, but were, in fact, financially unable to purchase any beans in excess of 8 80-pound sacks to the acre on 650 acres of land, and had so advised defendant previous to, and at the time of, and subsequent to the execution and delivery of the contract.

[1-3] The trial court was of the opinion, and we think correctly, that the contract was not so plain and unambiguous as to speak for itself unaided by extrinsic matters. It therefore took a large amount of testimony as to the nature and details of this particular transaction, the custom prevailing in the community in the raising of beans, and the sale of the crops, and matters incidental thereto. This testimony was admissible, not for the purpose of varying the terms of the contract, but to explain it, and to enable the court to arrive at, and interpret it in the sense in which the parties understood it. Sections 1646, 1647, Civ. Code. On the basis of this testimony the court made its findings. In the absence of any transcript of the testimony or bill of exceptions, it must be assumed that the evidence presented in support of the findings was competent to establish the allegations on which they were based, and was received without any objection, and was sufficient to sustain the facts found. Cutting Fruit Packing Co. v. Canty, 141 Cal. 692, 695, 75 Pac. 564; Damon v. Quinn, 143 Cal. 75, 77, 76 Pac. 818.

[4-7] The appellant contends that the findings of the lower court purporting to construe the contract are not findings of fact, but conclusions of law, and should be disregarded. The construction of a contract, where that construction is to be arrived at from a mere reading of the agreement itself, or from such reading aided by extrinsic evidence of circumstances and the like, is always a construction of law. Thomson, Estate of, 165 Cal. 290, 296, 131 Pac. 1045. But when the meaning and construction of the contract are doubtful and depend upon extrinsic evidence, there may be a conflict in the extrinsic evidence itself in which case the determination of that conflict results in a finding of pure fact. Aguirre v. Alexander, 58 Cal. 21, 30; Estate of Donnellan, 164 Cal. 14, 127 Pac. 166. The plaintiff has come into court asserting the contract to be as he alleged. The defendant has denied the construction, and has set forth what it contends was the real contract. The evidence given at the trial furnished the reasons for the ultimate finding, and, if the reasons were not sufficient, the evidence should have been brought here and the findings challenged. Weidenmueller v. Stearns, 128 Cal. 623, 626, 61 Pac. 374. Plaintiff selected his own terms by which to tender the material issue of fact as to what the contract really was, and the question was submitted to the court in the language which the plaintiff employed. If the form of the statement was sufficient for the complaint, it should not be held lacking for the purpose of the finding. Napa Valley Packing Co. v. San Francisco, etc., Funds, 16 Cal. App. 461, 469, 118 Pac. 469. In the present instance the court determined and found what the contract between the parties really was, and that there had been no breach on the part of the defendants. As conclusion of law the court determined that plaintiff's assignor had suffered no damage in the premises.

[8] The contention of appellant that the answer of the defendant is not sufficient to raise issues upon certain material allegations of the complaint will not now be considered. No demurrer to the answer was interposed, and no objection thereto appears to have been made at the trial. As was said in Weidenmueller v. Stearns, supra, 128 Cal. 625, 61 Pac. 375:

> "This court does not look with approval upon the practice of trying a case in the lower court upon the theory that the pleadings are sufficient, and, without making any objection to them or to the evidence, raising the point here for the first time that some of the issues were, in fact, admitted."

The court found that the contract between the parties was not as contended for by the plaintiff, but as alleged by the defendant; that pursuant thereto the defendant contracted with growers for the purchase of beans from 650 acres, and in addition thereto for the crop of beans to be grown on 321½ acres; that, according to the custom of the bean trade known to both parties to the contract, and to the various growers, each grower reserved the right to retain a part of the crop so grown for seed for the next ensuing year's crop; that after compliance with the various contracts of purchase made by the defendants and growers, and in due performance thereof, according to the custom of the trade, the crop, amounting to 529,425 pounds, was pooled, and from the pool so in the hands of the defendant Martin & Son received 403,320 pounds, which amounted to 49,103 pounds more than the specified average yield of eight sacks to the acre on said 650 acres; that the defendants in July notified Martin & Son in writing that it had the contract for the additional acreage, and asked Martin & Son for a bid on said excess crop to be raised; that Martin & Son refused to pay more than $4.85 per hundred, whereas defendant had been offered $5 per hundred for the additional crop; that again, in August, plaintiff notified Martin & Son that it still had the crop of the additional acreage for sale, whereupon Martin & Son again refused to purchase the same at any price other than $4.85 per hundred; that thereafter, the defendant sold the crop on said additional acreage to other parties, receiving the price of $5.05 per hundred.

The judgment is affirmed.

We concur: KERRIGAN, J.; WOOD, Judge pro tem.

45 Cal. App. 396

NOHL et al. v. DEL NORTE COUNTY.
(Civ. 3074.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1919.)

1. COUNTIES ⟸202 — SUFFICIENT VERIFICATION OF CLAIMS OF ROAD CONTRACTORS BY THIRD PERSON AND BY THEIR ATTORNEY.

Three claims by a firm of road contractors against the county, two of which were verified by a third person and one of which was verified by the attorney for the firm, were sufficiently verified under Pol. Code, §§ 4075, 4076, which do not require claim shall be verified by the claimant.

2. COUNTIES ⟸202—OBJECTION TO VERIFICATION AND FORM OF CLAIMS WAIVED.

Objections that road contractors had not properly verified claims, and that they had not been approved by road commissioner before presentment, were waived by passing on and rejecting them without objection to their form until after commencement of action.

3. HIGHWAYS ⟸113(4) — ROAD CONTRACTORS MAY SUE ON REJECTED CLAIMS.

Where claims of road contractors were rejected by the county, they had a right, under Pol. Code, § 4078, to bring suit thereon.

4. CONTRACTS ⟸337(3) — ALLEGATION OF NONPAYMENT OF DEMANDED DAMAGES NOT NECESSARY IN ACTION FOR BREACH.

In an action for damages for breach of contract, it is sufficient for the purposes of demurrer to aver in the complaint the contract, the breach complained of, and general damages, and an allegation of nonpayment is not necessary; the demand for damages sufficiently indicating they have not been paid.

5. HIGHWAYS ⟸113(4) — ALLEGATION OF BREACH OF CONTRACT SUFFICIENT TO WITHSTAND GENERAL DEMURRER.

In an action by road contractors against the county, allegation of breach in the complaint that contrary to the wishes and will of plaintiffs defendant did wrongfully and without cause fail and refuse to perform the agreement according to the terms thereof, etc., *held* sufficient to withstand general demurrer.

6. HIGHWAYS ⟸113(2) — COUNTY SUPERVISORS AUTHORIZED TO CONTRACT FOR ROAD WORK.

Supervisors of a county acted within the scope of their authority as its agents in contracting for road work, and had power to bind the county for such work; the contract being one which they were empowered to make.

7. APPEAL AND ERROR ⟸957(1)—JUDGMENT ⟸139—MOTION TO SET ASIDE DEFAULT ADDRESSED TO DISCRETION.

Motion to set aside default judgment is addressed to the sound discretion of the court, and while appellate courts will listen more readily to an appeal from an order refusing to set aside a default, the determination of the trial court will not be disturbed in the absence of a showing of abuse of discretion.

8. JUDGMENT ⟸138(2)—DENIAL OF MOTION TO SET ASIDE DEFAULT PROPER IN VIEW OF DEFENDANT'S NEGLECT.

In an action by road contractors against the county, defendant's motion to set aside its default *held* properly denied; the trial court having found that the attorneys for defendant were willfully, grossly, and inexcusably negligent in their failure to prepare and file answer before the default was entered—a conclusion sustained by the facts.

Appeal from Superior Court, Del Norte County; John L. Childs, Judge.

Action by C. W. Nohl and Herbert V. Price, a copartnership, etc., against the County of Del Norte. From judgment for plaintiffs by default, and from an order denying its motion to set the default aside and to permit it to file and serve answer, defendant appeals. Judgment and order affirmed.

Hersch & McNulty, of Crescent City, for appellant.

Nathan B. McVay, of Crescent City, and Daniel W. Hone, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal from a default judgment entered in favor of the plaintiffs after the overruling of the defendant's demurrer to the complaint, and from the denial of defendant's motion to set aside the default and to permit it to file and serve its answer.

The complaint contains three separate and distinct causes of action growing out of an alleged violation of a certain contract for road work entered into between plaintiffs and defendant. The first cause of action consists of a demand for the sum of $103.87 for hauling and dumping rock; the second for damages in the sum of $2,000 for the wrongful refusal of defendant to perform its contract; and the third for damages sustained by plaintiffs on account of the purchase by them of certain machinery and supplies for the purpose of performing the contract in the amount of $2,407.51.

Defendant filed a general demurrer to each count, alleging that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant having failed to answer within the time allowed, its default was entered and judgment rendered against it for the sum of $4,500.38, together with costs amounting to $8.

As ground for reversal it is first claimed that defendant's demurrer should have been sustained as to all three causes of action. The first cause of action is claimed to be defective for the reasons: (1) That it does not appear therefrom that any claim, duly verified to be correct, was ever presented to the supervisors of the county; and (2) that the

demand was not approved, before filing, by the road commissioner having charge of the work, or by any other officer having knowledge that the work had been performed as required by section 4076 of the Political Code. These same objections are urged against the second cause of action, together with the further objections that it does not contain an allegation that the debt sued upon has not been paid, or one showing in what respect defendant failed to perform its part of the contract. It is also claimed that if the acts of the officers were unlawful and unauthorized they alone are liable and not the county. The same objections are presented against the third cause of action.

[1-3] With reference to the form of the claims presented to the supervisors, it appears from the record that plaintiffs, in support of the demands alleged in their first two causes of action, presented their claims, duly verified by one Drury Rice, and that the demand for the expenditures alleged to have been made under the third cause of action was verified by their attorney, Nathan V. McVay. It is appellant's contention that, the plaintiffs constituting a partnership, the claims should have been verified by one of its members, and not having been so verified it fails to meet the requirements of sections 4075 and 4076 of the Political Code. Aside from any question as to whether or not these provisions are mandatory or directory, or whether they apply to the character of claims here involved, we are of the opinion that the verification was sufficient. The sections referred to do not require that the claim shall be verified by the claimant. Aside from this, the claims were passed upon and rejected, and no objection was made to the form until after the commencement of the action. Whatever merit, if any, there may be in these questions, defendant has waived it. The same may be said with reference to the objection that the claims were not approved before presentment. The claims having been rejected, plaintiff had a right, under the provisions of section 4078, to bring suit thereon. Parker v. Grant County, 1 Wis. 414.

[4] The contention that the second cause of action contains no allegation that the debt sued upon has not been paid is without merit. This cause of action alleges a contract, a breach thereof, and a statement of damages therefor. In an action for damages for breach of contract, it is sufficient for the purposes of a demurrer to aver in the complaint the contract, the breach complained of, and general damages. Barber v. Cazalis, 30 Cal. 93, 97. An allegation of nonpayment is not necessary; the demand for damages sufficiently indicating that they have not been paid. Belt v. Washington Power Co., 24 Wash. 387, 64 Pac. 525.

[5] Equally without merit is the objection that the second cause of action does not show how or in what respect respondents failed to perform their part of the contract. The ultimate fact of the refusal of the defendant to perform its contract is set out in the complaint. It alleges that—

> "Contrary to the wishes and will of plaintiffs, defendant did wrongfully and without cause fail and refuse to perform said agreement according to the terms thereof or at all, to plaintiffs' damage," etc.

This allegation of a breach is sufficient to withstand a general demurrer. The objection should have been taken by special demurrer. Cox v. Western P. R. R. Co., 47 Cal. 87; Eachus v. Los Angeles, 130 Cal. 492, 496, 62 Pac. 829, 80 Am. St. Rep. 147.

[6] Upon the question that the county is not liable, for the reason that the supervisors acted without authority, it is sufficient to say that the supervisors acted within the scope of their authority as agents of the county, and had the power to authorize the acts complained of and to bind the county therefor; the contract being one which they were empowered to make. Weisshand v. City of Petaluma, 174 Pac. 955.

[7] And, finally, appellant contends that the motion to set aside the default should have been granted. A motion of this character is addressed to the sound discretion of the court, and while appellate courts will listen more readily to an appeal from an order refusing to set aside a default, still the determination of the trial court will not be disturbed in the absence of a showing of an abuse of discretion. No such showing is here presented. It appears from the record that the complaint was filed on the 26th day of November, 1917. The demurrer was filed on the 27th of December, 1917. On the 21st day of January, 1918, argument was postponed upon request of the defendant until January 28th. On that day argument was again postponed on motion of the defendant. On the 4th of February the matter was submitted, with the understanding that defendant should have a reasonable time to present authorities. On the 8th of April the court made an order limiting the time for filing said authorities to April 15, 1918. The authorities were never filed. Finally, on May 13, 1918, the court overruled the demurrer and allowed the defendant 30 days in which to answer. After the expiration of the 30 days and before default was finally entered the plaintiffs, through their attorney, requested and demanded several times in open court that answer be made by defendant. On the 17th day of September, 1918, the attorney for plaintiffs had default entered. On the 28th day of September, 1918, defendant filed an affidavit on its motion to vacate and set aside the default. On the 3d day of October, 1918, attorney for plaintiffs filed a

counter affidavit, on which the matter was submitted.

[8] Defendant's affidavit in support of the motion charges that plaintiffs' counsel had given assurance that no default would be taken. This is denied by counter affidavit. After hearing argument the trial court denied defendant's motion to set aside the default. The order contains the recital that the court had heard the attorney for plaintiffs several times, weeks prior to the entry of the default, demand in open court that answer be made and filed, and concludes with the statement that the attorneys for defendant were willfully, grossly, and unexcusably negligent in their failure to prepare and file answer prior to the time default was entered, and we see no escape from this conclusion. This being so, the relief sought for was properly denied.

For the reasons given, the judgment and order are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 283

MILLER v. MOORE. (Civ. 3075.)

(District Court of Appeal, First District, Division 1, California. Dec. 26, 1919. Hearing Denied by Supreme Court Feb. 24, 1920.)

1. VENDOR AND PURCHASER ⊂=65(2) — "SALE IN GROSS" OF LAND; "CONTRACT OF HAZARD."

A sale in gross is one without regard to quantity, sometimes termed a contract of hazard, and where land is sold without any specification of quantity, described as a certain farm, tract, lot, or parcel by street and number only, the sale is in gross, and does not bind vendor to convey any particular quantity.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale in Gross.]

2. VENDOR AND PURCHASER ⊂=65(2)—WHETHER SALE IS ONE "IN GROSS" DEPENDS ON INTENTION.

The distinction as to whether a sale is in gross or not does not entirely depend upon whether or not payment is to be made in a lump sum or at so much per foot or acre, or upon the mode of specifying the quantity of the land, but is governed by the intention of the parties as shown by a proper construction of the contract.

3. VENDOR AND PURCHASER ⊂=65(2), 113 — SALE OF CITY LOT SALE OF CERTAIN QUANTITY; RIGHT TO RESCIND FOR SHORTAGE.

Where city property to be conveyed to defendant in exchange for defendant's business, described as a "certain lot, 37.6x80," was found to be only 75 feet deep, defendant was justified in rescinding the contract, for the deficiency was a marked and important one in a small city lot, and the transaction did not come within the doctrine of a sale in gross; a purchaser of a city lot being largely influenced by its dimensions.

Appeal from Superior Court, Alameda County; William M. Conley, Judge.

Action by C. E. Miller against Gussie H. Moore. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. O'Neill, of Yreka, and Emilio Lastreto, of San Francisco, for appellant.

E. E. Keyes and J. C. Thomas, both of Oakland, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of the defendant in an action for damages for refusal to perform an agreement to transfer to the plaintiff a certain business, its good will, and the personal property used in connection therewith in consideration of the conveyance by plaintiff of a lot of land with the improvements thereon.

The plaintiff's property was described in the contract of exchange as follows:

"That certain lot, 37.6x80, situated on the northeasterly corner of Ninth street and Hayes street, in the city of San Jose, improved with a frame building, containing four apartment flats of four rooms and bath each, partially furnished, commonly known and designated as 66 and 70 South Ninth street and 407 and 409 Hayes street, in the city of San Jose."

At the same time the defendant was the owner of a certain business conducted in the city of Oakland. On September 13, 1918, these parties agreed in writing to an exchange of their respective properties. It is admitted that the plaintiff's lot is five feet less in depth than stated in the agreement, and that the apartments in the building situated thereon, instead of containing four rooms and bath each, were each composed of three rooms and bath only. However, prior to October 2, 1918, the defendant was made aware of this discrepancy in the makeup of the apartments; nevertheless on that date she signed and mailed to plaintiff a letter, prepared by their joint agent, for the exchange of the properties, in which she stated that she was ready, willing, and able and offered to carry out the agreement. Subsequently on the 11th day of October, 1918, defendant again inspected plaintiff's building and apartments and was shown the boundary lines of the property. Later on that day she visited the office of the San Jose Abstract Company, inspected the deed which plaintiff had placed there in escrow after receiving defendant's letter of October 2d, and then for the first time learned that the depth of plaintiff's lot was 75 feet only. Thereafter, on the same day, she stated to the plaintiff that she would return to Oakland, execute a bill of sale of her property, and place it in escrow with plaintiff's deed.

Seven days later, however, through a letter written by her attorneys, she refused to consummate the transfer upon the ground "that the size of the property that you proposed to deed to Mrs. Moore is larger than that which is actually included in the deed which you desired to deliver, and in many other respects it is not as you represented it." It is apparent that after the defendant learned of the size of the apartments in the plaintiff's building she was still willing to proceed with the trade, and for a time she was even willing to do so, it appears, after discovering that the lot was smaller than represented, but subsequently, and apparently after receiving legal advice, she repudiated the transaction, which, it is conceded in effect, she had a right to do, unless it can be said that this was a contract of hazard or a sale in gross, in which both parties assumed the risk of an excess or deficiency in quantity. We are of the opinion that this was not such a case.

[1-3] A sale in gross is one without regard to quantity, sometimes termed a contract of hazard. A sale of a specified tract of land without any specification of the quantity of the land contained in such a tract is a sale in gross, and does not bind the vendor to convey any particular quantity, as where the land is described as a certain farm, or a certain tract, or a certain lot in a block, or where the sale is of a parcel of land by street and number only. It should be remarked, however, that the distinction as to whether a sale is in gross or not does not entirely depend upon whether or not payment is to be made in a lump sum or at so much per foot or acre, or upon the mode of specifying the quantity of the land, but is governed by the intention of the parties as shown by a proper construction of the contract. 39 Cyc. 1311; 29 Am. & Eng. Ency. of Law, 625. From the facts in the case at bar we think it was intended that this should be a sale of a specific quantity of land—i. e., a lot 37.6x80 feet—five feet more in depth than the plaintiff offered by his deed to convey, and that the deficiency is a marked and important one in a small city lot. It is manifest that the purchaser of a city lot is largely influenced by its dimensions. Here at the very outset of the negotiations the dimensions of plaintiff's lot were specifically set forth. The size of the lot was material, and doubtless influenced the defendant in agreeing to the exchange. Under the circumstances we think it cannot be said that the transaction comes within the doctrine of a sale in gross, and that the defendant was therefore justified in rescinding the contract.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 270

MARIN MUNICIPAL WATER DIST. v. MARIN WATER & POWER CO. et al.

(Civ. 3058.)

(District Court of Appeal, First District, Division 1, California. Dec. 24, 1919.)

1. EMINENT DOMAIN ⟸235—EFFECT OF RESERVATION BY RAILROAD COMMISSION OF POWER TO REVALUE MISCELLANEOUS EQUIPMENT.

Where, in a proceeding by a municipal water district to take by eminent domain the property of a corporate water company, the Railroad Commission, under Public Utilities Act, § 47, reserved the right to redetermine the item of miscellaneous equipment, and on the municipal district's appeal to the Supreme Court no objection was made, it is bound, the report of the commission having been confirmed, by the provision.

2. EMINENT DOMAIN ⟸243(2)—DECISION OF RAILROAD COMMISSION FIXING VALUE OF WATER COMPANY'S PROPERTY FINAL.

Under Public Utilities Act, §§ 65, 67, the decision of the Railroad Commission fixing the value of miscellaneous equipment of a corporate water company whose property was condemned by a municipal district *held* conclusive; the Railroad Commission in its first report having reserved the right to revalue such equipment at the time of purchase.

3. EMINENT DOMAIN ⟸243(2)—DECISION OF RAILROAD COMMISSION FIXING VALUE OF WATER COMPANY'S PROPERTY CONCLUSIVE ON MUNICIPALITY.

Where a municipal water district, which proposed to condemn the property of a corporate water company, by its failure to object, submitted to the decision of the Railroad Commission the question of the value of miscellaneous equipment at the time of purchase, the district is bound by the commission's decision.

4. EMINENT DOMAIN ⟸262(1)—MODIFICATION OF JUDGMENT IN ACCORDANCE WITH AGREEMENT OF PARTIES WILL NOT BE DISTURBED ON APPEAL.

Where the modification of a judgment in eminent domain proceedings, whereby the value of defendant's miscellaneous equipment was to be fixed by the Railroad Commission at the time of the purchase, was the result of agreement between the parties, such modification will not be disturbed on appeal.

Appeal from Superior Court, Marin County; E. T. Zook, Judge.

Action by the Marin Municipal Water District against the Marin Water & Power Company and others. From a judgment and orders in eminent domain proceedings, plaintiff appeals. Affirmed.

See, also, 173 Pac. 469.

George H. Harlan, of San Rafael, for appellant.

Lilienthal, McKinstry & Raymond, of San Francisco, for respondents.

WASTE, P. J. Under proceedings, and judgment in eminent domain, plaintiff took possession of the property of the defendant so condemned, upon depositing the sum of $100,000, as required by the court, under the provisions of section 1254 of the Code of Civil Procedure. Thereafter the lower court modified its judgment, by increasing the amount allowed the defendant for a portion of the property taken. Plaintiff appeals from this modified judgment, and from two orders, made in connection with the disposition of the deposit.

Plaintiff, the Marin Municipal Water District, preparatory to a proceeding in eminent domain, filed with the Railroad Commission of the State of California a petition under the provisions of section 47 of the Public Utilities Act, asking the commission to fix and determine the compensation to be paid by the district for all the lands, property, and rights of defendant, the Marin Water & Power Company, connected with its business of selling water for domestic and other uses in Marin county. After due proceedings had, the commission filed its findings, wherein it determined that the just compensation to be paid for the property to be condemned was the sum of $1,200,150. The lands, property, and rights of the defendant, for which said compensation was fixed, were described in a schedule attached to and made a part of the findings which became final on May 10, 1915. On the 5th day of June, succeeding, plaintiff filed its complaint in condemnation.

The commission valued the structural properties of the water and power company as a unit, but, in arriving at the sum total of the compensation to be allowed, considered various portions thereof as different items. It fixed the value of the "miscellaneous equipment" of the concern at $25,000, "subject to change at the time of purchase."

The defendant applied to the Supreme Court for a review of the decision of the commission, on the question of value, one of the points urged being that the commission had valued the plant and property as a unit, and had failed to make a separate finding as to the value of each parcel of property for which reason it was claimed the proceeding for valuation was void. The Supreme Court affirmed the determination of the commission, and held that the failure to make such detailed findings did not cause a loss of jurisdiction, or make the proceedings void; that, at the most, the making of a general finding was but an irregularity. Marin Water & Power Co. v. Railroad Commission, 171 Cal. 706, 717, 154 Pac. 864, Ann. Cas. 1917C, 114. The condemnation action was thereupon proceeded with.

On May 23, 1916, the superior court entered its judgment in condemnation, wherein it fixed the value of the property, lands, and rights condemned at the sum of $1,200,150, as determined by the Railroad Commission. It further decreed, pursuant to the provisions of section 47 of the Public Utilities Act (St. [Ex. Sess.] 1911, p. 42) that the judgment was subject to modification on account of any unreasonable depreciation or deterioration of the value of the property taken, or on account of any loss which might be suffered by the defendant through being required to properly take care of the property. Defendant appealed to the Supreme Court from this judgment. While the appeal was pending, plaintiff asked to be put into possession of the condemned property, under section 1254 of the Code of Civil Procedure. The court granted the application, requiring that plaintiff deposit, and pay into court, $1,200,150, the full amount of the judgment, together with the sum of $100,000, as a fund to pay any further damages, and costs, that might be recovered by the defendant in the proceedings, as well as all damages which might be sustained by the defendant, if, for any cause, the property might not be finally taken for a public use.

It was further provided in the order for possession that of this sum of $100,000, so deposited, a portion thereof should be made applicable to the payment to the defendant of such sum as should be fixed by the Railroad Commission as compensation to be paid by plaintiff, for property acquired, and added to its plant by defendant, subsequent to the date of the fixing of the valuation of the property by the Railroad Commission, including all extensions, which the plaintiff stipulated should be paid for by it in addition to the amount of the judgment. The order, like the judgment, also provided for the payment from the fund for any loss suffered by defendant, in order to preserve the property condemned.

Plaintiff took possession of the property, the amount of the judgment was paid to the defendant, the sum of $100,000 was deposited with the court, and, by stipulation, placed on deposit in a bank agreed upon. Thereafter, on November 29th, defendant petitioned the Railroad Commission to revalue the company's miscellaneous equipment, and a portion of its physical structures. There appears also to have been pending at the time a prior supplemental petition asking the commission to determine the amount of loss alleged to have been suffered by the defendant in connection with certain betterments, improvements, and additions and extensions to the property during the condemnation proceedings. The final action of the commission on these supplemental petitions resulted in its determination that defendant should be paid the sum of $11,775.76, which amount seems to have been stipulated to between the parties, for the additions and betterments installed subsequent to April 9, 1915, and the further sum of $8,778.53, as additional compensation for miscellaneous equipment, which amount the commission found was in excess

of the tentative allowance theretofore made for such purpose, in arriving at its original determination of the value of the defendant's property.

In the meantime, the Supreme Court affirmed the judgment in condemnation. Marin Municipal Water District v. Marin Water & Power Co., 173 Pac. 469. By consent of the parties, plaintiff then withdrew $79,465.71 of the $100,000 theretofore deposited. It also made a motion for an order of the court authorizing it to withdraw the additional sum of $8,778.53 from the fund upon the ground that the award of that amount to the defendant for its additional equipment was made in excess of the jurisdiction of the Railroad Commission and consequently void. The court denied the motion. From that order, one of the appeals is taken.

The court then entered a modified judgment changing its former decree in conformity with the revaluation order of the commission, by adding to the amount awarded defendant for the condemned property the agreed item of $11,775.76 for extensions to its distributing system, and $8,778.53, the additional compensation for the miscellaneous equipment. On the same day it made an order granting the application of the defendant to withdraw from the deposit the remaining sum of $20,554.29, covering these payments. Plaintiff also appeals from this order, and from the modification of the judgment.

[1] It is the contention of the appellant that the proceedings had by the Railroad Commission, resulting in the revaluation of the miscellaneous equipment of the defendant, were void, for two reasons: First, because taken after the amount to be allowed, as compensation for the condemned property, had been transferred to the Supreme Court by appeal from the judgment in the condemnation action; and, second, it contends that the judgment of valuation by the Railroad Commission of defendant's property had on the original application before condemnation brought, became final when that valuation was affirmed by the decision of the Supreme Court; that under the provisions of section 47 of the Public Utilities Act the Railroad Commission only had jurisdiction to act further in the premises to decide and fix the amount of the loss which the owner of the public utility may have suffered between the time when the judgment in condemnation has become final, and the time of the payment of the compensation, in order to preserve the property; that that is the limit of the power conferred upon the commission to increase the award for the public utility, once it has been determined. As authority for its position, appellant quotes from the decision by the Supreme Court in Marin Municipal Water District v. Marin Water & Power Co., supra, wherein it is said:

"Section 47 creates a special proceeding in eminent domain. The ascertainment of value by the Railroad Commission, and the subsequent action in the superior court, in which the previous finding of value is made conclusive, are both parts of that proceeding. The hearing by the commission on the question of value is merely a step in the litigation prosecuted to enforce the right of eminent domain. In effect, therefore, the value is fixed as of the date of the institution of the condemnation proceeding, as it is in cases prosecuted under the Code sections alone."

Appellant argues, therefore, that the Railroad Commission had no jurisdiction after it once fixed the valuation, and the same having been affirmed by the Supreme Court, and adopted by the superior court in the condemnation proceedings, to modify its judgment which fixed the value of the property to be condemned as of the date of the institution of the condemnation proceedings. It further contends that the deposit of the sum of $100,000 required by the court under section 1254 of the Code of Civil Procedure was a fund to pay further damages and costs that might be recovered in said proceeding, as well as the damages that might be sustained by defendant, if, for any cause, the property should not be finally taken for public use, which special purpose did not include the revaluation of the property theretofore valued.

Another point made is that the superior court had no power to modify its judgment in condemnation after the same had been affirmed by the Supreme Court.

Respondent takes the position that the parties were before the Railroad Commission in a judicial capacity; that, when before it, the parties entered into two stipulations, one for the valuation of certain extensions and for the modification of the judgment of the superior court to include their value, the other for a final valuation of miscellaneous equipment to be thereafter delivered, and for a modification of the judgment accordingly. It contends that the record shows such stipulations to have been made; that both valuations were made pursuant to the stipulations, and were certified to the superior court for the purpose of modifying the judgment while the appeal from the original judgment was pending.

Some difficulty might be had in arriving at a correct determination of the questions thus presented, were it not for the fact that we are satisfied the contention of the respondent should be upheld.

According to the petition filed by plaintiff, asking the Railroad Commission to value defendant's property prior to condemnation, as set out in the complaint in condemnation, the "miscellaneous equipment" of defendant's plant consisted of "tools and appliances, materials and supplies on hand, furniture and office fixtures, and a private telephone line; also all maps, map books, block books, records, pipe lists, inventories and all data and equipment pertaining to the construction and

operation of the water plant of said Marin Water & Power Company which was the result of the surveying, planning or other office work which was necessary for or actually engaged in the construction and maintenance of said work." Much of this equipment would naturally require replacement during the time occupied in the condemnation proceedings. A valuation as of the time of the commencement of the condemnation action might be far from the value existing at the time the property was taken over. In view of the fact that the Railroad Commission retained jurisdiction in this proceeding, under section 47 of the Public Utilities Act, to fix and determine the loss, if any, incurred by the defendant in order to preserve the property between the time the judgment of condemnation should become final, and the time of the payment of the compensation awarded, it appeals to us as being more than probable that the parties to the proceeding would stipulate that the item of "miscellaneous equipment" should also be the basis of future consideration by that tribunal. Respondent and appellant did enter into a stipulation that the question of the amount to be paid defendant by the plaintiff to reimburse it for the extensions to and betterments of the plant made by respondent during the proceedings, should be left to and be determined by the Railroad Commission. Appellant asserts in its briefs that it did not agree that the commission should revalue the miscellaneous equipment. It has brought to the court's attention, however, no evidence that such was really the case. There is strong showing to the contrary. Mr. Commissioner Thelen, who wrote the report and findings for the Railroad Commission in the matters considered by it, in the supplemental proceedings, says:

"The item 'Miscellaneous Equipment,' as shown in Table I in said Decision No. 2279 of April 9, 1915, contains the following note: 'This item is subject to change at time of purchase.' No complete inventory of miscellaneous equipment was presented to the Railroad Commission in the original proceeding herein and the compensation allowed under this head was only tentative. Entirely apart from the question whether, under a strict interpretation of section 47 of the Public Utilities Act, an additional allowance for this item can be made as of the time of the purchase, the parties have all assented to and acted upon this disposition of the matter. I believe that good faith now requires that the matter be disposed of as indicated in said decision, and I shall pursue this course."

[2, 3] As respondent made no objection, so far as the record discloses, to the original report of the commission containing the reservation that the valuation of $25,000 for the "miscellaneous equipment" was "subject to change at time of purchase," either by seeking a review of the finding by the Supreme Court, or by objecting to the matter being considered by the court in the condemnation proceedings, we feel it is bound by the report. Again, the record does not disclose that plaintiff took any steps to have the supplemental report of the commission reviewed by the Supreme Court, as it should have done if aggrieved thereby, or dissatisfied therewith. Consequently, the order of the commission has become final. Public Utilities Act, §§ 65 and 67. Having, as the commission found, submitted the matter to that tribunal for final arbitration, it may not now escape from the legitimate consequences of its own act.

[4] As the modification of the judgment was the result of the agreement of the parties, it follows that it should not be disturbed. In view, also, of the reservations contained in the original decree concerning the deposit of the $100,000, and of the suggested attitude of the parties towards the whole matter, which the record does not negative, we are of the opinion that the disposition by the court of that fund was well within the scope of the agreement, and intention of the parties.

The judgment and orders appealed from are affirmed.

We concur: KERRIGAN, J.; WOOD, Judge pro tem.

45 Cal. App. 377

DU VAL v. BOOS BROS. CAFETERIA CO. et al. (Civ. 3130.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1919.)

1. APPEAL AND ERROR ⊂=772—COURT RULES AS TO TIME OF FILING BRIEF MAY BE DISREGARDED AND CASE HEARD ON MERITS.

While the rules designed to facilitate the court's business may never be disregarded with safety, yet under some circumstances case will be determined on its merits, although the opening brief of appellant was almost two years overdue, but was on file at the time of the oral argument, and respondent was given an opportunity to reply to it.

2. DAMAGES ⊂=131(2)—$7,500 NOT EXCESSIVE FOR FRACTURED PELVIS, NERVOUS SHOCK, AND OTHER INJURIES.

Where a stenographer 28 years old, earning $65 per month, was in bed in the hospital for four weeks and four weeks at home, received a nervous shock and also a fracture of the pelvis, which had not completely united, and there was medical testimony that it would take from 4 to 16 months thereafter to knit, and she was able to get around only by means of a wheel chair with assistance, an award of $7,500 damages *held* not so disproportionate as to indicate it was not the result of the jury's cool and dispassionate discretion.

3. NEW TRIAL ⊂⊃77(1)—COURT SHOULD SET ASIDE PERSONAL INJURY VERDICTS WHERE PREJUDICE OR SYMPATHY INFLUENCED THE JURY.

Precise accuracy in assessing damages for personal injuries is never attainable, and the trial court should be vigilant to set aside verdicts, where there is reason to believe passion, prejudice, or sympathy has influenced the jury.

4. DAMAGES ⊂⊃216(7)—INSTRUCTION AS TO FUTURE SUFFERING NOT ERROR.

In a personal injury action, an instruction that one of the elements entering into the measure of damages was "such reasonable sum as the jury should award her on account of any physical pain or mental anxiety she may have suffered or may certainly suffer in the future by reason of her injury" was not erroneous, as permitting the jury to speculate concerning future suffering.

5. MUNICIPAL CORPORATIONS ⊂⊃803(1), 821(20)—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN GENERALLY ONE OF FACT.

Pedestrians must use such caution as ordinarily prudent men exercise under similar circumstances, and it is only where reasonable men can draw but one conclusion that the determination of the jury on the issue of contributory negligence may be disregarded.

6. MUNICIPAL CORPORATIONS ⊂⊃821(25)—PEDESTRIAN'S CONTRIBUTORY NEGLIGENCE IN FALLING INTO HOLE JURY QUESTION.

In action for injuries, where plaintiff testified that when she was within 12 feet of sidewalk elevator she saw the doors were closed, and that her attention was then attracted elsewhere, during which time the doors were opened, allowing her to fall into opening, the question of contributory negligence was for the jury; mere abstraction not being negligence per se.

7. APPEAL AND ERROR ⊂⊃880(2)—ERROR COMMITTED AGAINST DEFENDANT RESPONDENT NOT AVAILABLE TO APPELLANT CODEFENDANT.

In action against joint defendants for injuries to plaintiff, who fell into sidewalk elevator opening, error in excluding an ordinance offered by plaintiff, on objection of one defendant, is not available to the other defendant, who failed to urge its admission; such error, if any, being against plaintiff.

8. MUNICIPAL CORPORATIONS ⊂⊃808(3)—ABUTTING OWNER AND HIS LICENSEES LIABLE FOR INJURIES CAUSED BY SIDEWALK ELEVATOR.

Independently of ordinance, the owner of property maintaining a sidewalk elevator is liable for injuries to pedestrians caused by negligence, either in its construction, maintenance, or operation under his direction or permission, and one using such elevator is liable for the results of his own negligence.

9. APPEAL AND ERROR ⊂⊃1056(2)—REVERSAL NOT ORDERED FOR ERROR IN EXCLUDING ORDINANCE WHERE DEFENDANT'S LIABILITY WAS INDEPENDENT OF ORDINANCE.

The erroneous exclusion, on objection of one defendant, of an ordinance offered by plaintiff, suing for personal injuries, if available to another defendant, who did not urge its admission, is no ground for reversal, where liability of both defendants was independent of any ordinance.

10. MUNICIPAL CORPORATIONS ⊂⊃817(2)—FACT OF ACCIDENT INJURING PLAINTIFF AFFORDS EVIDENCE OF DEFENDANT'S WANT OF CARE AS TO SIDEWALK ELEVATOR.

Where sidewalk elevator, with its doors, was under the joint management of both defendants, the occurrence of an accident which ordinarily would not happen, where proper care is used, affords reasonable evidence of want of care, in the absence of explanation by defendants.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Elaine Griffin Du Val against the Boos Bros. Cafeteria Company and others, for personal injuries. Judgment for plaintiff, and defendants appeal. Affirmed.

Haas & Dunnigan, I. B. Dockweiler, F. L. Stobbs, and Hyman Schwartz, all of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

BRITTAIN, J. The respective appellants operated and delivered meat to a cafeteria in Los Angeles. The respondent was awarded a verdict of $7,500 for personal injuries alleged to have been suffered through the concurrent negligence of the appellants, who prosecute separate appeals upon the same record. They are presented and considered together.

[1] The opening brief of the Cafeteria Company was almost two years overdue. It was on file at the time of the oral argument, and the respondent was given an opportunity to reply to it. It is contended that that appeal should not be considered. While rules of court designed to facilitate its business may never be disregarded with safety, under the circumstances the present case will be determined on its merits. From an examination of the entire record, including the evidence, the conclusion has been reached that the judgment must be affirmed, upon the grounds stated in disposing of the specific contentions of the appellants.

Between noon and 12:15 p. m. the respondent was walking along one of the most congested thoroughfares in the city. On one step she placed her right foot on the still closed door of a sidewalk elevator, and on advancing her left foot it went into the hole caused by the opening of the other door. She fell to the basement and sustained injuries.

[2, 3] It is contended the award of $7,500 was excessive. It is conceded that actual damages of $1,580 were proved. At the time of the accident the respondent was 28 years old, employed as a stenographer, at $65 per month. She was confined to her bed in the

hospital for four weeks and for a further period of four weeks at her home. She received a profound shock to her nervous system. There was a fracture of the pelvis, which had not completely united at the time of the trial, and there was surgical testimony to the effect that from 4 to 16 months would thereafter elapse before there would be a complete knitting of the bone. The respondent was able to get about only by means of a wheel chair, with assistance, or by taking hold of objects while walking about a room. It is possible that if it were the function of this court to assess damages a smaller award might have been made, but the amount is not so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury. Redfield v. Oakland, etc., Co., 110 Cal. 285, 42 Pac. 822, 1063. Precise accuracy in assessing damages for personal injuries is never attainable. Kline v. Santa Barbara, 150 Cal. 741, 90 Pac. 125. A motion for new trial was denied. The trial court should be vigilant to set aside verdicts where there is reason to believe passion, prejudice, or sympathy has influenced the jury. Bond v. United Railroads, 159 Cal. 285, 113 Pac. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50.

[4] An instruction to the effect that one of the elements entering into the measure of damages was "such reasonable sum as the jury should award her on account of any physical pain or mental anxiety she may have suffered or may certainly suffer in the future by reason of her injury" was not erroneous. Gumpel v. San Diego, etc., Ry. Co., 172 Pac. 605; Wiley v. Young, 174 Pac. 316; Richman v. San Francisco Ry. Co., 181 Pac. 769. In the case relied on by the appellants (Melone v. Sierra Ry., 151 Cal. 113, 91 Cal. 522) the jury was told, in effect, that it might speculate concerning future suffering. In this case the jury was instructed that it might award a reasonable sum for such suffering as the plaintiff might certainly suffer.

[5] Where, as in this case, it is claimed the injured person was guilty of contributory negligence, the question is generally one of fact, and the fundamental rules of law are so well known and have been so often repeated that little is gained by lengthy quotations and long lists of authorities. Pedestrians must use such caution as ordinarily prudent men exercise under similar circumstances. The law does not define or limit this ordinary care. Negligence is not absolute, but is always relative to the particular circumstances on which it is sought to be predicated. It is only where reasonable men can draw but one conclusion that the determination of the jury upon the question may be disregarded. In a case somewhat akin to this, the man who was injured had but recently passed a closed sidewalk trap. On returning he was reading from a memorandum he held in his hand, and stepped into "a yawning chasm" which had been opened in the interim. It was contended that a motion for nonsuit should have been granted, but the Supreme Court reached the contrary conclusion. Van Praag v. Gale, 107 Cal. 444, 40 Pac. 555.

[6] In the present case the respondent testified that when 10 or 12 feet from the elevator doors she saw they were closed. Her attention being attracted to something she was passing, she turned her head, and as she walked that short distance one of the doors was raised from the pitfall directly in her pathway and into which she fell. As was said in the opinion in Van Praag v. Gale:

"To some minds probably the conclusion would seem irresistible that he who, with eyes to see, in broad daylight walks into an open trapdoor in the sidewalk is lacking in that care and caution which characterizes the man of ordinary prudence. Others may well reason that plaintiff was entitled to a safe passage over a walk prepared by the public for the accommodation of all its citizens."

The fact that different minds might reach different conclusions upon the question of the respondent's caution disposes of all the contentions of the appellants based on the assumption that contributory negligence was shown as a matter of law, as well as their contentions regarding the instructions on the subject given and refused. Mere abstraction on the part of a pedestrian does not constitute contributory negligence. Robinson v. Pioche, 5 Cal. 461; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 722, 103 Pac. 190. The question of contributory negligence was properly submitted to the jury under correct instructions. Argument based on evidence which it is claimed the jury should have believed is futile. The evidence of the man who opened the door at most raised a conflict which the jury determined in favor of the respondent.

[7-9] It is contended by each appellant that it was not guilty of negligence, and each attempts to shift the liability for the injuries to the other. The Cafeteria Company maintains the Newmarket Company was an independent contractor, and the Newmarket company contends that under an ordinance excluded from evidence the sole responsibility for maintaining the elevator was placed on the Cafeteria Company as owner. Error in excluding the ordinance is claimed. The ordinance was offered by the plaintiff and excluded on the objection of the Cafeteria Company. Its admission was not urged by the Newmarket Company. If there was error in rejecting the evidence, it was against the respondent. On this appeal, even though such an error caused by the objection of its codefendant were available for the Newmarket Company, it would not cause a reversal of the judgment. Regardless of the ordinance, where the owner of property maintains a sidewalk elevator, he is liable for injuries

to pedestrians caused by his negligence, either in the construction, maintenance, or the operation of the elevator under his direction, or with his knowledge and by his permission. Also one who uses such an elevator is liable for the results of his own negligence.

[10] The elevator doors were not operated automatically from below, but were raised by hand. Each door was heavy, weighing about 250 pounds. One man opening the elevator, therefore, had to stoop over one door and raise it, then walk around the shaft to repeat the operation with the other door, leaving one-half of the shaft as an open pitfall. The doors were not hinged to open across pedestrian movement, and so to bar it, but so that when opened they were parallel to the building line. The elevator was maintained by the Cafeteria Company for the purposes of its business, and was used frequently, if not usually, for deliveries of its purchases to its basement storeroom. The delivery about to be made by the Newmarket Company was upon the order of the Cafeteria Company. The truck driver went first to the basement and talked with employés of the Cafeteria Company concerning the delivery. He then, alone, started to open the elevator doors. He testified that before doing so he looked up the street and saw no one within 30 feet of him, yet the respondent testified that when she was within 10 or 12 feet of the elevator the doors were closed, and that she did not see a man with a white apron, such as the truckman wore. The jury believed her. Under the rule that every reasonable inference is to be drawn in support of the verdict, it may be that the jury believed the construction of the doors to open in the way they did was negligent, and that, permitting the use of the elevator with the knowledge of the servants of the Cafeteria Company, without its requiring one of its own employés to aid in the opening of the doors or, at least, to guard pedestrians from the peril, were acts of negligence concurring with that of the employé of the Newmarket Company in attempting in so busy a place and at so busy an hour alone to open the trap. At the time of the accident the elevator, with its doors, was under the joint management of both defendants, and the accident was such as in the ordinary course of things does not happen if those having the management and control of such an instrumentality use proper care. In such a case, in the absence of explanation by the defendants, the fact of the accident affords reasonable evidence of want of care. Shearman & Redfield, Negligence, par. 60; Bowley v. Mangrum & Otter, 3 Cal. App. 229, 84 Pac. 996.

The landlord and tenant cases merely hold that, where there is no negligence in the construction of a device which the landlord delivers to the tenant of leased premises, the landlord is not responsible for the tenant's negligent operation. They have no real relationship to the facts of this case, which are more nearly akin to those where an owner has been held liable for injuries resulting from the construction of a pitfall by a contractor. Barry v. Terkildsen, 72 Cal. 254, 13 Pac. 657, 1 Am. St. Rep. 55; Spence v. Schultz, 103 Cal. 208, 37 Pac. 220. A closely analogous case is one where a pedestrian was injured by falling over an unguarded rope across a sidewalk. The rope was used in connection with a block and pulleys for hoisting supplies from a wagon to the second floor of the defendant's building. The court in that case said:

"Every person using the sidewalk for the purposes of trade and business conducted upon his premises is charged with the duty of taking reasonable care to protect the public from injury resulting from such use of the walk. The contract with the truckman contemplated the use of the rope across the sidewalk, and charged upon the defendant the duty of seeing that the rope was used with due regard to the safety of pedestrians." Langevin v. Schaller, 163 App. Div. 52, 148 N. Y. Supp. 534.

The only remaining contentions are minor ones, which are merged in the conclusions reached on the matters already discussed. As a whole, the instructions were clear, and fairly stated the law. The evidence was sufficient to support the verdict, and no errors of law, if any there were, resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 358

HIRST v. MORRIS & CO. et al. (Civ. 3193.)

(District Court of Appeal, First District, Division 2, California. Dec. 31, 1919.)

1. MASTER AND SERVANT ⊂⊃302(6)—AUTOMOBILE DRIVER'S NEGLIGENCE NOT IMPUTABLE TO EMPLOYER.

Where a chauffeur who had purchased an automobile from his employer, to be paid for in installments, and to be used in the employer's business, advertising and selling its products, had no samples or advertising matter with him and no duties to perform when he drove to his home in another town where he collided with plaintiff, he was not acting within the scope of his employment so as to render the employer liable.

2. MUNICIPAL CORPORATIONS ⊂⊃706(5)—EVIDENCE IN AUTOMOBILE ACCIDENT CASE SUFFICIENT TO SUSTAIN A FINDING OF NEGLIGENCE OF DRIVER.

In an action for damages sustained by plaintiff while riding a bicycle in a collision with an automobile driven by defendant, evidence that

defendant was at the time of the collision violating the city's speed ordinances and made too broad a turn from one street to another *held* to sustain a finding of negligence.

Appeal from Superior Court, Los Angeles County; Louis W. Myers, Judge.

Action by Norman Hirst, a minor, by his guardian ad litem against Morris & Co. and L. N. Schneider. From a judgment for plaintiff, defendants appeal. Reversed as to Morris & Co., and affirmed as to L. N. Schneider.

John Murray Marshall and James S. Bennett, both of Los Angeles, for appellants.

E. B. Drake, of Los Angeles, for respondent.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them for $3,000 in an action for personal injuries sustained by plaintiff when the bicycle he was riding collided with an automobile being driven in the city of Los Angeles by the defendant Schneider.

[1] Morris & Co. was joined as a defendant upon the theory that Schneider was in its employ at the time of the accident and was in the course of his employment when the accident occurred. We shall consider first the contention of appellant Morris & Co. that the negligence of Schneider, if any, cannot be imputed to it, because Schneider, at the time of the accident, was not acting within the scope of his employment. The evidence upon this question is uncontradicted. It consists in a contract between the defendants covering the ownership of the automobile involved in the case and the employment of Schneider by Morris & Co., together with the testimony of Schneider himself with regard to his employment and duties. From the written contract between the defendants, introduced in evidence by the plaintiff, it appears that the automobile which was being driven by Schneider had been purchased by him from his employer; $50 cash had been paid as the initial payment, and the balance was to be paid in installments. Schneider testified that the car was about half paid for at the time of the accident. By his contract Schneider agreed to use the car in the business of the company, in advertising and selling its products, and the company agreed to pay Schneider a specified sum per week for the use of the car, Schneider to pay all expenses of operation, repairs, etc., and the company to pay for insurance upon the car. The employé was required to take out and pay for his own license for operating the automobile, and he testified that the license had been taken out in his name. The employé kept the car in a garage at his own home. He testified that the car was his and considered as his; that he used it just as though it had been completely paid for; that the company never dictated to him about the car. Upon the question of the scope of his duties, he testified that he was employed to sell the products of the company and to attend to advertising the same; that the car had been used at times to carry samples and advertising matter, but that at the time of the accident he had no samples or advertising matter with him; that these articles were carried by him only when he was introducing and selling a new line of goods, which he was not doing at that time. Schneider also testified that under instructions from the head salesman, the person from whom he received directions, he was to work in Los Angeles on Monday, Tuesday, and Wednesday of each week and in Santa Barbara and vicinity on Thursday and Friday; that on Saturday and Sunday he had no duties to perform for his employer, unless some special request was made of him by his employer. This accident occurred on Saturday morning. Schneider testified that on Monday, Tuesday, and Wednesday of that week he had worked in Los Angeles for his employer; that on Thursday he had worked in Santa Barbara, and on Friday in Ventura; that he might have remained at Ventura over Saturday and Sunday and gone camping near by, as he had frequently done, but he desired to return to Los Angeles to his home, and accordingly left Ventura on Saturday morning at about 8:30 to return to Los Angeles, purchase some groceries for his wife, and take them to his home. On the way he met a Mr. Buttermer, a man unconnected in any way with the business of the said defendant. He invited him into his car, and on the way to take Buttermer to his destination down town, before making the purchases at the grocery, the accident happened. We can find nothing in these facts which would bring the defendant Schneider within the scope of his employment at the time the accident happened. This question has been frequently discussed in recent decisions in this state. Mauchle v. Pan. Pac. Exp. Co., 174 Pac. 400; Gousse v. Lowe, 183 Pac. 295; Maupin v. Solomon, 183 Pac. 198; Brown v. Chevrolet Motor Co., 179 Pac. 697. It would serve no useful purpose to discuss again here the theory and principles of law upon which these last-cited cases are based, as these matters are fully discussed therein. Upon the authority of these and other similar cases, we must hold that the defendant Schneider was not at the time of the accident within the scope of his employment by the defendant company, and his negligence is not therefore imputable to said company. It follows that the judgment as against the defendant and appellant Morris & Co. must be reversed.

[2] With respect to the judgment against the defendant Schneider, it becomes necessary for us to discuss the further point urged by appellants that the evidence is insufficient

to sustain the verdict, in that it shows no negligence upon the part of Schneider, and does disclose contributory negligence upon the part of the plaintiff. Because of the various elements that entered into the traffic situation at the place of the accident, the relative placement of various objects on the street about which the testimony is in dispute, and the unusual situation presented by reason of the configuration of the roadway at this place, it is extremely difficult to discuss the testimony in detail without reference to a map or chart. We have very carefully studied the maps and charts in evidence, and applied the testimony of the various witnesses thereto. Upon several vital matters which would enter into the determination of the negligence of the defendant Schneider, such as his rate of speed at the time of the accident; his position to the east of the center of the roadway (he was going south, having just turned to his right from Sunset boulevard into Broadway, just in front of the approach to the Broadway tunnel), there was conflicting evidence. It is sufficient to say that there is evidence in the record from which the jury might reasonably have believed that said defendant was going at the rate of 25 miles an hour. A city ordinance was introduced in evidence permitting a speed of only 12 miles an hour at this point. There is evidence in the record from which the jury might have believed that said defendant was to the east of the center of the street, having made a broad turn from Sunset boulevard. There is evidence from which the jury might have believed that at the time said defendant first appeared to the view of the plaintiff he was coming in a southeasterly direction, having not as yet straightened his machine after making a very broad curve; that at this time he was but a short distance from the plaintiff and was "rushing at him" directly, and that the plaintiff had no means of escape. If the jury believed this from the evidence, the boy thus confronted with a sudden danger cannot be held responsible for turning suddenly to his left in an attempt to avoid the collision, even though it does appear that the defendant did succeed in a short distance in straightening out his machine. The boy may well have believed, as he testified he did believe, that the machine could not be straightened in its course within the short distance between him and it, and that a collision was inevitable if he continued in his regular course. He also testified that the situation of automobiles to his right was such as to cut off his escape in that direction. It is not a question of determining now with maps and charts and measurements what would have been the very wisest thing to do under all the circumstances. Such a standard cannot be applied to the conduct of a boy of 15 years of age, caught suddenly in a position of great danger which would require almost instantaneous action. The verdict of the jury against the defendant Schneider is sustained by the evidence

The judgment is reversed as to the appellant Morris & Co., and affirmed as to the defendant L. N. Schneider.

We concur: BRITTAIN, J.; NOURSE, J.

45 Cal. App. 159

J. I. CASE THRESHING MACH. CO. v. COPREN BROS. (Civ. 1925.)

(District Court of Appeal, Third District, California. Dec. 20, 1919. Hearing Denied by Supreme Court Feb. 16, 1920.)

1. LIMITATION OF ACTIONS ⟸127(4)—AMENDMENT OF SELLER'S COMPLAINT ON NOTES TO FORECLOSE MORTGAGE SECURING THEM DOES NOT SET UP DIFFERENT CAUSE OF ACTION.

In an action by the seller of an engine to recover an alleged balance due upon three notes given by the buyers for the price, amendment of the complaint to change the nature of the action to a suit in equity to foreclose the mortgage given by the buyers on the engine sold to secure payment of the notes was not improper as setting up an entirely different and distinct cause of action, barred under Code Civ. Proc. § 337; the only change being in the remedy.

2. CHATTEL MORTGAGES ⟸255—DOCTRINE OF ELECTION NOT APPLYING TO PREVENT SELLER FROM AMENDING COMPLAINT IN ACTION FOR BALANCE ON NOTES TO SEEK FORECLOSURE OF MORTGAGE.

Where the seller of an engine took three notes for the price, secured by mortgage on the engine sold, which mortgage provided that in event of default in payment the seller could take possession of the engine with or without notice, and after deducting expenses of sale apply the balance on the notes, and the seller attempted to do so, but in its action to recover the balance on the notes failed to prove that it had sold at public sale, the doctrine of election of remedies did not apply to prevent the seller from amending its complaint so as to seek in equity to foreclose the mortgage on the engine.

3. CORPORATIONS ⟸34(4)—ESTOPPEL OF MORTGAGOR TO COMPANY AS SUCH TO DENY ITS CORPORATE CAPACITY.

A mortgagor of personal property who has dealt with the mortgagee as a corporation and received from it the consideration for the mortgage note is estopped to deny its corporate capacity in an action by the corporation to foreclose the mortgage.

4. JURY ⟸14(4)—NO RIGHT TO JURY TRIAL IN SELLER'S SUIT TO FORECLOSE MORTGAGE.

In an action by the seller of an engine to recover a balance due on the purchase-money notes secured by mortgage, changed into a suit

in equity to foreclose the mortgage, the trial court did not err in denying defendant buyers' application for trial by jury; a jury being allowable in equity only as a matter of grace, while foreclosure suit involves an equitable remedy.

5. TRIAL ⟸374(2) — VERDICT OF JURY IN EQUITY CASE ADVISORY.

The function or office of the jury in equity, when permitted by the chancellor, is advisory only, and the chancellor may disregard even arbitrarily its conclusion or verdict in making contradictory findings.

6. APPEAL AND ERROR ⟸1097(4) — DECISION ON PRIOR APPEAL CONSTITUTES LAW OF CASE DESPITE SUBSEQUENT AMENDMENT OF COMPLAINT.

Decision on prior appeal, in an action on purchase-money notes by the seller of an engine, on the question whether the order for the engine contained a warranty, became the law of the case as to such question, and is controlling on subsequent appeal, though the seller has been permitted to amend complaint to change the suit from one at law for a balance due on the notes to one in equity for foreclosure of the mortgage on the engine securing them.

7. EVIDENCE ⟸434(8), 441(9)—PROOF OF ORAL WARRANTY OF AND MISREPRESENTATIONS AS TO ENGINE SOLD INADMISSIBLE AS VARYING WRITING.

Under Code Civ. Proc. § 1856, and Civ. Code, § 1625, in suit by the seller of an engine to foreclose mortgage thereon given to secure purchase-money notes, the order for the engine having contained no warranty that it was of a certain capacity or horse power, testimony for defendant buyers tending to prove an alleged oral warranty and misrepresentations by the seller's agent *held* inadmissible as varying a writing; the fraud sought to be shown not being connected with the agreement as made, or tending to vitiate it.

8. SALES ⟸50—WAIVER OF FRAUD OF SELLER'S AGENT BY RETENTION OF CHATTEL WITHOUT COMPLAINT.

Under Civ. Code, § 1691, requiring prompt rescission, where the buyers of an engine, obligated by the contract to give notice of breach of warranty within ten days, on discovering the falsity of representations by the seller's agent nevertheless retained the engine and did not give the required notice of defects, they waived the alleged fraud and misrepresentations of the agent, or waived the right to raise the question of fraud.

Appeal from Superior Court, Sierra County; Stanley A. Smith, Judge.

Action by the J. I. Case Threshing Machine Company, a corporation, against Copren Bros., a copartnership, William J. Copren, and C. A. Copren. From judgment for plaintiff defendants appeal. Affirmed.

John V. Copren, of San Francisco, and W. I. Redding, of Downieville, for appellants.

Dunn, White & Aiken, of Oakland, for respondent.

HART, J. The action was by plaintiff to recover an alleged balance due upon three certain promissory notes, executed by defendants to plaintiff as part payment of the purchase price of a certain 30 horse power traction engine sold by plaintiff to defendants, and to have foreclosed a certain chattel mortgage on said engine given to secure the payment of said promissory notes. From a judgment in favor of plaintiff defendants prosecute this appeal.

This case has been before us twice before. The first appeal was from a judgment in favor of plaintiff, which judgment, on November 25, 1916, was by us reversed. J. I. Case T. M. Co. v. Copren Bros., 32 Cal. App. 194, 162 Pac. 647. In the opinion therein will be found a full statement of the facts of the case. The second appeal was from an order changing the place of trial from Sierra county to Plumas county, and we reversed the order. J. I. Case T. Co. v. Copren Bros., 35 Cal. App. 70, 169 Pac. 443.

The original complaint in the action was filed September 11, 1914, and the prayer of said complaint was for judgment in the sum of $900.99, the amount of the principal and interest due on said notes on June 22, 1914. The nature of the action, as originally brought, and the contents of the original complaint, may be given here as they are briefly stated in the opinion on the former appeal of this case (32 Cal. App. 194, 162 Pac. 647) as follows:

"Action to recover a judgment for money claimed to be due and unpaid upon three certain promissory notes. The complaint alleged that the notes were executed on July 5, 1912; that they were secured by a mortgage of even date on certain personal property; that the mortgage provided in the event of default in the payment of the notes the plaintiff could take possession of the mortgaged property and sell the same with or without notice, and after deducting the expense of the sale apply the balance on the notes secured by the mortgage; that the balance remaining unpaid on said notes after crediting the proceeds of such sale should at once become due and payable; that, acting under the terms and provisions of the mortgage, the plaintiff, upon default in the payment of the notes, and on June 22, 1914, took possession of and sold the mortgaged property for $500, and, after deducting $20 expenses, credited $480 on the notes; that there had been paid on one note before that time $74.45, which, with the credit of $480, left a balance of principal due of $684.30, and judgment was asked for this amount and interest as provided in the notes. The court, at the conclusion of the taking of the testimony, instructed the jury to find a verdict for the plaintiff for the amount sued for, and it did so. This appeal is from the judgment following such verdict. The defendants filed a general and special demurrer to the complaint, which was overruled."

On a rehearing of the case this court said, among other things:

"But plaintiff having elected to enforce its rights by public sale, and having brought its action upon the assumption that there was such a sale, there was an entire failure of proof. So, also, was there an entire failure of proof that any sale was made."

On May 4, 1918, plaintiff served a notice of motion for leave to file an amended complaint. The motion was opposed by defendants on several different and distinct grounds, some of which will hereafter be given special attention herein, since they involve the principal points upon which a reversal of the judgment is asked. After hearing the motion the court granted plaintiff leave to file the proposed amended complaint, and the same was filed on June 3, 1918. Defendants demurred to the amended complaint and, the demurrer having been overruled, filed an amended answer.

The amended complaint changed the nature of the action from that of one at law for the recovery of the balance due on the promissory notes given by defendants to plaintiff to that of a suit in equity to foreclose the mortgage given by defendants to plaintiff on the engine sold to the former by the latter to secure the payment of the notes in suit.

The amended complaint is in three counts, in two of which it is alleged that no payment has been made upon the notes and that the principal of each of said notes and the interest are now due. In the other count credit is given on the note for the sum of $74.45.

The grounds of the opposition by the defendants to the order permitting the plaintiff to file the amended complaint which are principally urged here as those upon which insistence for a reversal of the judgment is predicated are: (1) That the amended complaint sets up entirely different and distinct causes of action from those set up in the original complaint, and that said causes of action are barred under the terms of section 337 of the Code of Civil Procedure; (2) that the plaintiff, by the mortgage in question, was expressly given two different, distinct, and inconsistent remedies, by either of which it was at liberty to enforce payment of the promissory notes in suit, that it was therefore put to its election as to which of said remedies it would adopt, and that, having in the first instance elected to adopt and pursue one of the remedies, it waived the right to employ the other remedy for the enforcement of its demands, to wit, by foreclosure of the mortgage, and is therefore now estopped from invoking that remedy.

[1] 1. We cannot concur in the view that the effect of the amendment of plaintiff's pleading in the particular mentioned was to state therein causes of action different from those set up in the original complaint. Indeed, to our minds it is obvious that the amendment had no such effect. The complaint, as amended, proceeds upon precisely the same causes of action or seeks the establishment of precisely the same rights as those which were claimed by or asserted in the original complaint. The amended complaint does not change the character of the obligations sought to be enforced, but merely changes the remedy by which it is sought to enforce the obligations, and therefore does not change the causes of action set forth in the original complaint. Frost v. Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53. In the case just named, the complaint in an action on a promissory note was filed two days before the time at which action on the obligation would have become barred by the provisions of section 337 of the Code of Civil Procedure. Some six days after the complaint was filed, and four days after suit on the obligation would have been barred, an amended complaint was filed, and, in addition to the matter set up in the original complaint, it alleged that the note was secured by a mortgage of even date with the note, and declared, also, upon the mortgage. One G. W. Witter was also made by the amended complaint a party to the action as claiming some interest in the mortgaged premises. The trial court decreed a foreclosure of the mortgage, and on appeal it was argued, as it is here, that there had been a change effected in the cause of action by the amended complaint, and that the action, as made by the latter pleading, was barred under the section of the Code above named. Replying to that argument, the Supreme Court said, quoting the syllabus:

"An amendment of the complaint in an action upon a promissory note, so as to set up a mortgage made by the defendant, which is an incident to the note, and to seek its foreclosure, is permissible. It is not a departure from the original cause of action, but merely cures a statutory defect in the complaint, and gives the plaintiff an additional remedy to enforce the obligation of the note against the defendant."

This is decisive of the point now under consideration. It may be added, however, that it is quite obvious that the plaintiff could not have established a case under the original complaint. As seen, it took possession of the mortgaged property and undertook to sell the same under the provision of the mortgage authorizing it to take that course in case of a default in the payment of the notes, or any default by the defendants in that particular. As above shown, this court held, on appeal, that there was no public sale of the property; that is, that there was an entire failure of proof of a sale. Manifestly, had the plaintiff gone to trial after the judgment of this court upon the original complaint, it would, of course, have

failed to prove that a sale had taken place. Upon the theory upon which it made its case by the original complaint, it would have been but a futile or idle act to go on with the trial of the action. Of course, by these observations we are not to be understood as intimating that a party may by amendment so change his complaint as to effect a departure from the cause of action originally stated therein.

[2] 2. We do not think this is a case where the doctrine of election between remedies applies. The cases where that principle has been successfully invoked are generally where a party, having two different and distinct remedies available to him for the enforcement of a single right or obligation, has adopted one of the remedies and through it has pressed his action to final judgment, and, finding that he has failed to adopt the course or the remedy which would have rendered the execution of his judgment the more effectual, attempts to invoke the other remedy. Where, for illustration, the holder or owner of a promissory note, which is secured by a mortgage, elects to proceed at law and so sues upon the note, without relying upon the security of his mortgage, and has obtained judgment which has become final, it has been held that in such case the plaintiff waives his security and cannot go into a court of equity and secure relief by way of a foreclosure. This proposition is an essential corollary of one of the underlying or fundamental concepts of the reformed procedure, to wit, the prevention of a multiplicity of suits. Ould v. Stoddard, 54 Cal. 613.

The case of Parke & Lacy Co. v. White R. L. Co., 101 Cal. 37, 35 Pac. 442 (cited by appellants here), was just such a case as the one first above hypothetically stated. It involved an action to recover certain personal property or its value; said property having been sold or leased to the defendant by the plaintiff under a written instrument characterizing itself as a "lease," providing that the property should be transferred to the possession of the defendant, that the latter for the use of the property should pay the lessee the sum of $3,064, payable in full on a day named in the future, and that the property should become the property of the lessees if they paid the full amount stated by the time designated, or, if said lessees failed to pay said amount at the time to which they were limited by the agreement for that purpose, or failed to comply with any other of the covenants of the "lease," they should lose all and any interest in said property and the lease become void and of no effect. It appears that at the time of the execution of the so-called lease a mortgage was given by one Hilton, upon certain real property, to secure, with another obligation, the money to be paid by the defendants for the property in question. Prior to the commencement of the action involved in the appeal in that case the plaintiff brought an action on the note and mortgage, and therein the court gave plaintiff judgment for the amount of the indebtedness due under the alleged lease, but denied a foreclosure of the mortgage. The Supreme Court held that the instrument involving the transfer of the possession of the property to defendants was not a lease, but either a completed or conditional sale, in either of which cases the plaintiff could not prevail, since, if it was a completed sale, it should have sued for the recovery of the purchase price, but, if a conditional sale, it should have rescinded the agreement and sued for the recovery back of the property. The plaintiff, of course, could not claim the right both to the property and to the purchase price, "and," proceeded the court, "an action brought to recover the purchase price, as was done in this case, is a ratification of the sale."

This case, it is very clear, does not come within the above case.

The case of San Bernardino Invest. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487, also cited by the appellants here upon the doctrine of election, aside from a few general observations as to the nature of that doctrine and the occasions on which it may be invoked, has absolutely no application to the case now before us.

We conclude that the court below made no mistake in allowing the plaintiff to amend its complaint (Crittenden v. St. Hill, 34 Cal. App. 107, 166 Pac. 1016), nor do we think it is shown that there was an abuse of judicial discretion in doing so. To the contrary, under the peculiar circumstances of the situation, the allowance of the amendment was eminently proper as in the interest of justice. Alden v. Mayfield, 33 Cal. App. 684, 693, 694, 166 Pac. 377.

[3] 3. It is next contended that the corporate capacity of the plaintiff was not properly shown. It is a well-settled rule that—

"A mortgagor of property who has dealt with the mortgagee as a corporation, and received from it the consideration of the mortgage note, is estopped from denying its corporate capacity in an action by the corporation to foreclose the mortgage." Syllabus in Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337.

The following cases and authorities also declare the rule to be as thus stated: Grangers, etc., Ass'n v. Clark, 67 Cal. 634, 8 Pac. 445; Oregonian Ry., etc., Co. v. Oregon Ry., etc., Co., 22 Fed. 245, 10 Sawy. 464; Cowell v. Springs Co., 100 U. S. 61, 25 L. Ed. 547; Close v. Greenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. Ed. 408; Bigelow on Estoppel, pp. 527–529; Morawetz on Private Corporations, § 750; Spelling on Corporations, § 44; Raphael Weill & Co. v. Crittenden, 139 Cal. 488, 73 Pac. 238; Fresno Canal & Irr.

Co. v. Warner, 72 Cal. 379, 14 Pac. 37; Camp v. Land, 122 Cal. 167, 54 Pac. 839.

That the defendants dealt with the plaintiff as a corporation is indubitably shown by the fact that the notes and the mortgage which they executed in favor of plaintiff and upon which this action is founded and the affidavit attached to the mortgage were signed and presumably read by them.

[4, 5] 4. The court made no error in denying the application of the defendants for a trial by jury. A proceeding or action instituted for the purpose of foreclosing a mortgage, either on real or personal property, involves an equitable remedy, and it is about as elementary a proposition as is to be found in the whole body of the law that juries are allowable in the equity courts, if at all, only as a matter of grace and not of right. Where a jury is invoked and is allowed in an equity case, it is merely because the chancellor desires its assistance in the solution of the questions of fact at issue, but the function or office of the jury in such a case is in nature and scope advisory only, and the jury's conclusion or verdict upon the facts may be disregarded, even arbitrarily, by the chancellor, and findings of fact may be made by him contradictory to those implied from the verdict, and if there be testimony supporting the findings by the judge, the decree will stand immune from disturbance, so far as the findings are concerned. Mitchel v. Gray, 8 Cal. App. 423, 429, 430, 97 Pac. 160; Downing v. La Du, 82 Cal. 471, 473, 23 Pac. 202; Carroll v. Daniel, 95 N. Y. 254; Van Valkenburgh v. Oldham, 12 Cal. App. 572, 579, 108 Pac. 42.

5. It is next contended that the court erred in not permitting the defendants to prove an alleged oral warranty made by the plaintiff's agent before the execution of the written order or contract of sale as to the capacity or horse power of the tractor, and also by not allowing testimony in support of the charge (introduced for the first time in this case through the amended answer) that the plaintiff's agent, fraudulently and with intent to deceive and defraud the defendants, made false representations to the defendants as to the character, quality, and capacity of the engine and its ability to perform certain specified service, and by which representations the latter, so it is alleged, were solely influenced and induced to enter into the contract of sale.

The defendants, on the close of plaintiff's case, proceeded to introduce testimony in support of the averments of their answer as to the alleged oral warranty and the alleged fraudulent representations by which they were induced to enter into the contract of sale, whereupon counsel for plaintiff objected to any testimony addressed to those matters of defense, but suggested that the court overrule the objections, which were based upon the usual general and also certain special grounds, and so allow the testimony to go in, subject to the objections made against it and to a motion by plaintiff to strike it out after it was all before the court. With this understanding, testimony in support of the special defenses referred to was admitted, but was later stricken out on motion. It is now urged that the ruling of the court on this motion was not only erroneous but highly prejudicial to the rights of the defendants in the trial of the action, as certainly it would be if it had been offered in support of proper issues presented by the pleading of the defendants.

But there are several ready answers to the contention that the action of the court in striking from the record the testimony mentioned was erroneous.

This court held, in its opinion on the former appeal of this case (32 Cal. App. 194, 200, 162 Pac. 647, 650), that the contract in question contained no warranty that the engine was of 30 horse power, or would, in its operation, develop that power; that the only warranty written in the order blank for the engine was that it would be made of good material, "and durable with care, and be capable of doing more and better work than any other machine made of equal size and proportions, working under the same conditions on the same job, if properly operated by competent persons, with competent steam or horse power, and the printed rules and directions of the manufacturers intelligently followed." Acting Justice Ellison, who wrote the opinion in that case, further said therein:

"It [the order for the machinery] would seem to have been carefully drawn for the purpose of expressly excluding all other warranties. It contains no warranty as to the horse power of the engine. The pleading [answer of defendants] did not allege any rescission or offer to rescind the contract, and we conclude the court did not err in excluding evidence as to the horse power the engine would develop."

[6, 7] The decision in that case upon the question whether the order contained a warranty that the engine was of a certain capacity or horse power embodies the law of the case as to that question and is controlling on this appeal, notwithstanding that the plaintiff was permitted to amend its complaint and so set up some additional facts. Weller v. Brown, 25 Cal. App. 216, 143 Pac. 251; Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Wallace v. Sisson, 114 Cal. 42, 45 Pac. 1000; People v. Hamilton, 103 Cal. 488, 37 Pac. 627; Allen v. Bryant, 155 Cal. 256, 100 Pac. 704. It follows that the effect of the testimony stricken out by the court would have been, if it had been allowed to stand, to introduce into the order or contract a provision which that instrument does not contain. In other words, the effect of the testimony, if allowed to remain in the record, would have been to vary the terms of a valid written instrument, which the law will not permit to

be done, the presumption being, where the terms of an agreement have been reduced to writing by the parties, that such writing contains all those terms, from which it follows that, as between the parties and their representatives, or their successors in interest, there can be no evidence, other than the contents of the agreement itself, of the terms of such agreement. Code Civ. Proc. § 1856. That section, it is true, specifies certain exceptional instances in which evidence other than the contents of the contract may be given, to wit, where a mistake or imperfection of the writing is put in issue by the pleadings, or where the invalidity of the agreement is the fact in dispute, or where parol evidence is necessary to explain an extrinsic ambiguity or to establish illegality or fraud. This case, however, does not come within any of those exceptions. So far as the question of warranty is concerned, it is not claimed that the agreement is invalid in the sense in which that word is used in the section of the Code, nor is it claimed that there is any mistake or imperfection in the agreement, or any question as to the meaning of the words or language thereof. There is no claim, nor could there be, that the contract is not precisely what the parties themselves made it. The sole contention is that the plaintiff, prior to the execution of the written agreement, made an oral warranty of the horse power and capacity of the engine and that the defendants are entitled to a judicial decree incorporating such oral warranty into the written agreement. To this proposition a further reply is to be found in the declaration of section 1625 of the Civil Code, as follows:

"The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

In Peterson v. Chaix, 5 Cal. App. 525, 537, 90 Pac. 948, 952, this court, through Presiding Justice Chipman, stated the rule, in applying it in that case, as follows:

"The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

See, also, Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 Pac. 369; Germain Fruit Co. v. Armsby Co., 153 Cal. 585, 96 Pac. 319; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Dollar v. International Banking Corp., 13 Cal. App. 331, 109 Pac. 499; Yuba Manufacturing Co. v. Stone, 179 Pac. 418.

The rule is with singular clearness stated in the last-named case (Yuba Mfg. Co. v. Stone) by Justice Burnett. The following pertinent excerpts may with advantage be incorporated herein:

"It is not disputed by appellant that an additional warranty cannot be shown to that contained in the written contract, but it is contended that the offer constituted an effort to prove fraud which operated as an inducement to the execution of said agreement, and which, if shown, would avoid the whole contract and relieve the appellant from the apparent liability on said promissory notes. * * * An 'express warranty' means simply an undertaking or covenant that the thing which is the subject of the contract is or is not of a certain quality or capacity. It is difficult, therefore, to resist the conclusion that appellant sought to add to the warranty contained in said written instrument. Of course, the significance of the said parol assurance was not changed by reason of the fact that it is claimed to have been fraudulently given. Whether the promise was made with or without a deceitful intent, its importance to appellant arose from the consideration that it related to the character of the tractor which was to be furnished. Its quality as a warranty would not be changed or affected in the least by alleging that the representation was fraudulently made."

Again, it is said in that case, referring to the rule that prior representations and negotiations are to be considered as having been merged in the written agreement and cannot be shown or proved in any other way than by the instrument itself:

"Manifestly, this consideration does not preclude either party from showing fraud that might vitiate the apparent contract of the parties. The fraud, however, must relate to and be connected with the agreement which is the basis of the action. Herein, as we have seen, the supposed fraudulent representation is entirely disconnected from the actual contract of the parties and cannot be considered a material element, since it was entirely ignored and superseded by the written instrument. If appellant had made a similar allegation as to any of the facts recited in said instrument, or had shown by proper averment that his signature to the contract was obtained fraudulently or that he was deceived as to the contents or that it did not contain the full intent of the parties, a different situation would, of course, be presented."

The opinion in question then concludes with these observations, which have pertinent and cogent application to the case before us:

"Manifestly, the court, as far as possible, should protect an innocent party against the fraud of one seeking to take an unconscionable advantage; but in this class of cases, when the parties have deliberately reduced their contract to writing and have undertaken to set forth the

character of the contrivance which is sold, and there is no mistake or fraud connected with the execution of said instrument, it is reasonable and in accordance with the law to hold that the contract shall not be avoided by reason of some false representation as to the quality of the machine, which representation the vendee has seen fit to completely ignore in the written instrument. It is true, of course, that a defrauded party cannot by the simple 'device of a written instrument' be deprived of the right to prove the fraud, but it is equally true that he cannot be permitted to nullify the rule in relation to written instruments by the specious claim that he was deceived by certain oral representations."

Nothing can be added to what is said in the case last above considered with regard both to the question as to the alleged oral warranty of the engine and the claim and allegations of fraudulent representations by the agent of plaintiff to the defendants to induce them (and which they allege did induce them) to enter into the contract of sale involved herein. We may, however, with propriety here refer to some very recent California cases which declare the law to be as it is stated and applied in the case last above considered, namely: Heffner v. Gross, 178 Pac. 860; the opinion by Mr. Justice Shaw; Madera Sugar Pine Co. v. Livermore, 175 Pac. 456; De Laval Dairy Co. v. Talbott, 175 Pac. 83.

[8] But we may further suggest that according to the facts of this case and the authorities, the defendants waived the alleged fraud and misrepresentation as to the capacity and power of the engine which they charge were made by the agent of plaintiff who negotiated the sale, and which they allege and attempted to prove influenced and induced them to enter into the contract, and are estopped from raising the question of fraud in this case.

The evidence which was presented by the defendants, but which was stricken from the record, shows that they received the engine on the 5th day of July, 1912, and immediately put the engine to use; that they then discovered that it not only failed to develop the 30 horse power which they alleged that the plaintiff warranted its capacity to be, but failed to work at all—at least satisfactorily. Notwithstanding their knowledge of these facts, they retained the engine, and it is not made to appear that they made any complaint of the failure of the engine to measure up, as to power, to the representations which they claim were falsely made by the plaintiff as to the capacity or power of the tractor until the 17th day of November, 1912—a period of over four months after they had received the engine and attempted to work it—when they addressed to the plaintiff a letter in which they said:

"As we have had a very poor year with our contracts, we will not be able to pay note due on November 1, 1912. We would like to arrange if possible to have all payments extended one year, as that will give us a chance to get some kind of work for the tractor, as it was a total failure on our wood contract and by trying to haul with it, we only got out about 1/5 of our contract this season."

The letter then proceeded to say that the engine would not do the work as guaranteed, etc., but this is not material to the present consideration.

The defendants, by the contract, were given ten days within which to test the engine, and if within that time they discovered that it failed to meet the terms of any warranty contained in the contract, they likewise agreed to give plaintiff written notice thereof at once. The contract, after provisions relating to the duty of the plaintiff on receiving such notice from the defendants and obligating the former to make its warranty good, further provides:

"Failure to so make such trial or to give such notice in any respect shall be conclusive evidence of due fulfillment of warranty on the part of said company and that the machinery is satisfactory to the purchasers, and the company shall be released from all liability under the warranty."

There is not in the record or there was not offered any evidence whatever that the defendants gave plaintiffs any written notice of the defectiveness of the tractor in any respect except such notice as may be extracted from their letter of November 17, 1912, above referred to, and manifestly that was not the notice required by the agreement of the parties.

It is very clear from the foregoing statement of the situation that the defendants waived any fraud which they claim might have characterized the transaction before it culminated in the execution of the written contract, or, perhaps, more properly speaking, waived the right to raise the question of fraud.

"A defrauded party," says the Supreme Court, in Ruhl v. Mott, 120 Cal. 668, 677, 53 Pac. 304, 307, "has but one election to rescind, and he must exercise that election with reasonable promptness after discovering the fraud. Dennis v. Jones, 44 N. J. Eq. 513 [14 Atl. 913], 6 Am. St. Rep. 899. Delay in rescission is evidence of a waiver of the fraud and of an election to treat the contract as valid. Any acts evincive of an intent to abide by the contract are evidence of an affirmance of the contract and of a waiver of a right of rescission. Delano v. Jacoby, 96 Cal. 275 [31 Pac. 290], 37 Am. St. Rep. 201; Marten v. Burns Wine Co., 99 Cal. 335 [33 Pac. 1107]; Bailey v. Fox, 78 Cal. 389 [20 Pac. 868]; Bach v. Tuch, 126 N. Y. 53 [26 N. E. 1019]; Crooks v. Nippatt, 44 Minn. 239 [46 N. W. 349]; Pearsoll v. Chapin, 44 Pa. St. 9."

The above is only declaratory of the rule of our Code (Civ. Code, § 1691), applied, however, to a situation such as we find here. The section says that a party to a contract "must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind." There is no question of undue influence, menace, or like obstacles to the free exercise of the will mentioned by said section in this case. The letter of the defendants of November 17, 1912, cannot justly be construed to be less than an affirmance of the contract. In other words, said letter and the expressions it contains were "evincive of an intent to abide by the contract," and therefore constituted evidence of a waiver of the right of rescission.

It is wholly unnecessary to multiply cases illustrating the application of the principle under discussion. In our own state reports may be found many such cases other than those cited above.

We can perceive no possible ground upon which the appellants may expect to prevail in this case under its circumstances as they are shown here and as they were shown by the record in the case on the former appeal. If they became parties to a bad bargain, it is, of course, to be greatly deprecated that they were not fortunate enough to relieve themselves from the ill consequences thereof. But when a person is lured or otherwise led into a business engagement or a contract which is, as to him, unconscionable or inequitable (and we are not to be understood as intimating that upon the record we are justified in saying that this is of that class), he must, before he can justly expect equity to extend to him her protecting hand, exercise a proper degree of vigilance and act promptly after he has discovered that an unconscientious advantage has been taken of him in the transaction, to the end that not only may the wrong which has thus been inflicted upon him be redressed but that the rights of the other party to the agreement, if rights he has, may be preserved, or he be restored as near to statu quo as the circumstances of the situation will permit and in equity justify. The defendants here, as we have shown, not only slept upon their rights, but by their conduct gave the plaintiff the right to believe that the bargain was satisfactory to them. They knew what their contract was and had ample opportunity to subject to a practical test the machinery they had purchased, and, indeed, did try out the engine on numerous occasions; yet they took no timely steps looking to a rescission, but, after testing the capacity and power of the tractor, they kept the machine and asked for an extension of the times for payments on the purchase price. Thus they failed to bring themselves even within the shadows of a court of equity, and it does not lie in their mouths to complain of a dilemma into which they alone have brought themselves, assuming that the merits of the transaction as such are on their side.

The judgment appealed from is affirmed.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

45 Cal. App. 72

ANTHONY v. TARPLEY. (Civ. 2972; S. F. 9054.)

(District Court of Appeal, First District, Division 1. California. Dec. 17, 1919. Opinion of Supreme Court, In Bank, Denying Hearing Feb. 13, 1920.)

1. JUDGMENT ⟸818(7)—RECORD OF FOREIGN JUDGMENT MAY BE IMPEACHED BY EVIDENCE OF LACK OF JURISDICTION.

The record of a judgment rendered in another state may be impeached by extrinsic evidence that the facts necessary to give the court pronouncing it jurisdiction did not exist, and this is true although the record sought to be impeached may recite the jurisdictional facts.

2. EVIDENCE ⟸80(1)—LAWS OF FOREIGN STATES PRESUMED TO BE SAME AS THOSE OF FORUM.

When not made to appear to the contrary, the laws of another state are legally presumed to be the same as those of the forum.

3. DIVORCE ⟸64—RESIDENCE OF PLAINTIFF MUST BE BONA FIDE.

In order to entitle one to maintain a divorce action, residence must be bona fide, and the mere going into another state with the intention of returning when the divorce has been procured is not the establishment of a bona fide residence or domicile there.

4. DIVORCE ⟸329—FOREIGN JUDGMENT SECURED BY FRAUD NOT BINDING.

Where a resident of California went to Oregon and did not take up a bona fide residence there, but remained there only for the purpose of obtaining a divorce, with the intention to return after the divorce was granted, a decree of divorce rendered in Oregon is not binding and is not conclusive in California; there being no evidence to show that the laws of Oregon differ from the laws of California on the subject.

On Hearing in Supreme Court.

5. PARENT AND CHILD ⟸2(3)—GOOD OF CHILD IS CONTROLLING FORCE IN DIRECTING ITS CUSTODY; "PROPERTY."

A child is not property, but is a citizen of the state, and the good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this rather than to the whims and caprices of its parents.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

6. JUDGMENT ⟸818(1)—FOREIGN JUDGMENT AS TO CUSTODY OF CHILD DOES NOT PRECLUDE INQUIRY AS TO BEST INTERESTS.

Child being within the jurisdiction of the state courts, they are not precluded by any judgment or order of a sister state from inquiring into and determining in its own behalf what are the best interests of the child as regards its custody.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Thomas M. Anthony against Effie Tarpley. An order granting a temporary injunction is reversed in the District Court of Appeal, First District, Division 1, and a hearing is denied in the Supreme Court.

Donahue & Hynes and J. W. Dignan, all of Oakland, for appellant.

W. B. Rinehart, of Oakland, for respondent.

WASTE, P. J. The plaintiff and defendant were formerly husband and wife. The defendant, as plaintiff, procured a decree of divorce in the circuit court of the state of Oregon, in 1918, whereby she was awarded the custody of Dorothy Anthony, the 7 year old minor child of the parties. By the decree, also, the defendant, the plaintiff here, was granted the privilege of visiting the child, and having her with him at reasonable times, he to contribute the sum of $15 per month for her maintenance and support until she should arrive at the age of 18 years. Plaintiff commenced this action, alleging that the defendant has not complied with the provisions of the decree and that she is preparing to leave California and intends to take the child with her to reside permanently outside the state. He asks the court to fix the rights and privileges of the parties pursuant to the decree of divorce rendered in the Oregon court, and prays for an order prohibiting and enjoining defendant from removing the child from this jurisdiction.

On an order to show cause the lower court, after requiring a bond in the sum of $1,000 from plaintiff, granted a temporary injunction restraining the defendant from removing the child from the state of California during the pendency of the action and until the further order of the court. From this order the defendant appeals, contending that the complaint wholly fails to state a cause of action for equitable or any relief and that the court erred in granting the injunctive order herein. This contention, we think, must be upheld.

It appears from the complaint that for several years after their marriage the plaintiff and defendant resided in the county of Alameda, in this state, and were so residing on September 20, 1917. On that day defendant went to the state of Oregon to remain temporarily for the purpose of attending to business affairs in which she was interested. It was understood between plaintiff and her that she would return to Alameda county, Instead of returning to California, however, on May 22, 1918, she commenced an action against her husband, plaintiff here, in the circuit court of the state of Oregon, in and for the county of Multnomah, seeking a decree of divorce, together with alimony and the custody of the minor child. Plaintiff, as the defendant in the divorce action, so he alleges in his complaint, although—

"a resident of the state of California, appeared in such action in the state of Oregon by and through counsel duly authorized for the purpose, and, in order that the plaintiff in that action might obtain a decree of divorce, and such relief by way of alimony and otherwise, as more fully appears from the decree of the said circuit court of the state of Oregon, hereinafter mentioned and referred to, authorized his counsel to enter into an understanding and agreement with counsel for the plaintiff in that action, and did agree with plaintiff that she might be allowed to take a decree of divorce in said action uncontested, upon the condition and with the understanding that the plaintiff in that action, defendant herein, should have and should be given the custody of said minor child, Dorothy Anthony, and the defendant, plaintiff in this action, should be granted the privilege of visiting said child and having her with him at reasonable times and that he should contribute the sum of $15 per month for the maintenance and support of said child until she should arrive at the age of 18 years; it being always understood and agreed between the parties that plaintiff intended to, upon receipt of such decree, and would and should, return to the county of Alameda, state of California, the place of residence of plaintiff; and plaintiff now avers that defendant's residence within the state of Oregon during the period above mentioned wherein said divorce proceeding was had was temporary only and always with the intention and understanding that she should and would return to the state of California."

Pursuant to this understanding and agreement, so the plaintiff further alleges, the decree of divorce was duly given and entered in the Oregon court in the wife's favor, and the custody of the child was awarded to her. Upon the entry of this decree the defendant at once left the state Oregon and returned to Alameda county, when she immediately remarried, and where she and the child have since resided.

[1] Appellant contends that these allegations clearly show that the divorce was procured by the parties through a collusive and fraudulent agreement while neither party was a resident of the state of Oregon. The respondent places reliance upon the provisions of the Constitution of the United States, which provides that "full faith and credit shall be given in each state to the * * * judicial proceedings of every oth-

er state" (U. S. Const. art. 4, § 1), and upon section 1913 of the Code of Civil Procedure, which provides that "the effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and, except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority." Such provisions, however, says the Supreme Court of the United States—

"establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered, or of the court in which it is offered in evidence. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. Hanley v. Donoghue, 116 U. S. 1, 4 [6 Sup. Ct. 242, 29 L. Ed. 535]." Andrews v. Andrews, 188 U. S. 14, 36, 23 Sup. Ct. 237, 242 (47 L. Ed. 366).

Jurisdiction must exist as a fact. The record of a judgment rendered in another state may be collaterally impeached by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction did not exist; and this is true although the record sought to be impeached may recite the jurisdictional facts. In re James, 99 Cal. 374, 377, 33 Pac. 1122, 37 Am. St. Rep. 60; In re Culp, 2 Cal. App. 70, 81, 83 Pac. 89.

[2, 3] We are unable to agree with respondent that the Oregon court had jurisdiction of the parties and of the subject-matter of the divorce action. The allegations of the complaint before us clearly show that it did not. When not made to appear to the contrary, the laws of Oregon are legally presumed to be the same as ours. Wills v. Wills, 166 Cal. 529, 532, 137 Pac. 249. In order to entitle one to maintain a divorce action the residence must be bona fide. Going into another state with the intention of returning to this when the divorce has been procured is not the establishment of a bona fide residence or domicile. Bennett v. Bennett, 28 Cal. 600. As distinguished from legal domicile, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a nonresident defendant. Haddock v. Haddock, 201 U. S. 562, 583, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1. The Supreme Court of the United States has held in a number of cases, in which it was sought in one state to enforce a decree of divorce rendered in another state, and in which the authority of the due faith and credit clause of the Constitution was invoked, that when it is established that at the time the divorce proceedings were commenced the plaintiff in the proceedings had no bona fide domicile within the state where the decree was rendered, the question of jurisdiction was open for consideration, and that, as in any event domicile was essential to confer jurisdiction, the due faith and credit clause did not require recognition of such decree outside the state in which it had been rendered. Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804; Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807; Andrews v. Andrews, supra; Fery v. Troy Laundry (D. C.) 238 Fed. 867, 869.

[4] It appears from the complaint in this action (and with the facts as there presented we are alone dealing) that the defendant, when she went into the state of Oregon, was merely a sojourner there until her divorce was obtained. Consequently, there is no force in the argument of respondent that the Oregon court had jurisdiction of the parties. Such assertion must necessarily rest upon the fact that the plaintiff appeared as defendant in the divorce action and consented to the making of the decree. In the two cases cited, Bell v. Bell and Streitwolf v. Streitwolf, supra, jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit. In Andrews v. Andrews the court held:

That the decision, in the former cases, "that there was no jurisdiction because of the want of a bona fide domicile was a ruling that in its absence there could be no jurisdiction over the subject-matter irrespective of the appearance of the party by whom the suit was brought"; and that "it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject-matter not resting on consent includes necessarily the want of power of both parties to endow the court with jurisdiction over a subject-matter which appearance or consent could not give."

As, according to the complaint, neither of the parties to the divorce action had a legal domicile in the state of Oregon, the want of jurisdiction in the court of that state to entertain the divorce action is clear. Hubner v. Hubner, 67 Or. 557, 560, 136 Pac. 667.

For another reason the position of the appellant must be upheld. The plaintiff is not in court asserting that the welfare and best interests of the minor require the interposition of the strong arm of the chancellor, but is seeking to "enforce" the divorce decree lest he, the father, be caused "great and irreparable injury." He asks that his own

"rights in the premises" be fixed and determined. He seems to rely on the assumption that parents have some property rights in children, a doctrine justly repudiated by the courts. Case of Bort, 25 Kan. 215, 37 Am. Rep. 255. The order made by the Oregon court is impotent for the desired purpose. A foreign decree has no efficacy outside the jurisdiction in which it was given. It will not be enforced here, unless a judgment thereon may be recovered in this state. Brown v. Campbell, 100 Cal. 635, 646, 35 Pac. 433, 38 Am. St. Rep. 314; Lynde v. Lynde, 181 U. S. 183, 187, 21 Sup. Ct. 555, 45 L. Ed. 810. No judgment can be predicated upon an order of the court of another state contained in a decree of divorce, in relation to the custody of a child. Such order is not a finality in any sense of the word. It does not preclude the court granting the order, as long as the minor is within its jurisdiction, from varying or modifying its decree in that respect, from time to time, as circumstances change. It was therefore not in any sense a final judgment. Lynde v. Lynde, supra. In such matters the court is vested with an extensive discretion. The good of the child is regarded as the controlling force in directing its custody, and the courts will always look to this, rather than to the whims and caprices of the parties. Crater v. Crater, 135 Cal. 633, 634, 67 Pac. 1049; Mack v. Mack, 91 Or. 514, 516, 179 Pac. 557. The child is not property, but a citizen of the state of California, and as such is peculiarly under its guardianship and subject to its supervisory control. The child being within this jurisdiction, the courts of the state are not precluded by any judgment or order of a sister state from inquiring into and determining in its own behalf what are the best interests of the child. In re Alderman, 157 N. C. 507, 512, 73 S. E. 126, 39 L. R. A. (N. S.) 988; Avery v. Avery, 33 Kan. 1, 5 Pac. 418, 422, 52 Am. Rep. 523; In re Culp, 2 Cal. App. 70, 83 Pac. 89, and particularly the concurring opinion of Mr. Justice McLaughlin.

The precise question we are now considering was before the Supreme Court of Texas in Wilson v. Elliott, 96 Tex. 472, 75 S. W. 368, 97 Am. St. Rep. 928. It was there held that courts of that state should not be hampered in matters respecting the custody of a child by a previous decision in another state or territory, but such questions should be determined in accordance with the rules and policy of that state in such matters. The action of the lower court in giving effect to a decree of the territory of New Mexico was therefore reversed. See, also, Legate v. Legate, 87 Tex. 248, 28 S. W. 281; Allen v. Allen, 105 N. Y. 628, 11 N. E. 143.

The contention of appellant that the complaint is insufficient in its statement of facts is correct, and the lower court erred in granting any relief based thereon.

The order appealed from is reversed.

We concur: RICHARDS, J; KERRIGAN, J.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. [5, 6] The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division 1, is denied upon the ground last discussed in the opinion, and entirely without reference to any question of the validity of the Oregon decree. No question whatever was raised in the briefs as to the validity of this decree, the discussion relating thereto in the opinion is not essential to the decision, and we are not prepared to approve what is said in the opinion on this question.

45 Cal. App. 317

JOHNSON et al. v. HENDRICK. (Civ. 3125.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1919.)

1. MUNICIPAL CORPORATIONS ⟸706(5)—EVIDENCE SUFFICIENT TO SUPPORT RECOVERY FOR INJURIES FROM AUTOMOBILE COLLISION AT STREET INTERSECTION.

In action for injuries in automobile collision at a street intersection, evidence *held* sufficient to support a verdict negativing contributory negligence of plaintiff, and establishing negligence of defendant, under a traffic rule giving plaintiff the right of way.

2. APPEAL AND ERROR ⟸1002—VERDICT ON CONFLICTING EVIDENCE CONCLUSIVE.

A verdict of a jury based upon conflicting evidence is conclusive on appeal.

3. DAMAGES ⟸131(3) — $695 NOT EXCESSIVE FOR INJURIES TO ARM AND BRUISES.

A verdict of $695 was not so excessive for bruises and an injury to an arm of a female, which rendered it difficult to flex and extend the arm, as to show that the jury was improperly influenced by passion or prejudice, in that the defendant was a saloon keeper.

4. HUSBAND AND WIFE ⟸238(2)—NO RECOVERY BY HUSBAND FOR LOSS OF WIFE'S SERVICES IN ACTION BY HUSBAND AND WIFE FOR INJURIES TO WIFE.

In an action by a husband and wife to recover for injuries sustained by the wife, there can be no recovery of damages to the husband for loss of services.

5. HUSBAND AND WIFE ⟸209(2)—HUSBAND NECESSARY PARTY IN ACTION BY WIFE FOR PERSONAL INJURIES PRIOR TO AMENDMENT OF STATUTE.

Prior to the amendment of Code Civ. Proc. § 370, in an action for injuries to the

wife the husband was a necessary party, but since such amendment (St. 1913, p. 217) the wife may sue alone.

6. PARTIES ⊂=14—ALL PERSONS HAVING INTEREST MAY BE JOINED.

All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as parties, except when otherwise expressly provided under Code Civ. Proc. § 378.

7. HUSBAND AND WIFE ⊂=260—MONEY RECOVERED FOR INJURIES TO WIFE "COMMUNITY PROPERTY."

Money recovered for personal injuries to the wife is community property, because it was not owned by the wife before marriage, nor acquired afterwards by gift, devise, or descent, under Civ. Code, § 162.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Community Property.]

8. HUSBAND AND WIFE ⊂=270(1)—HUSBAND PROPER PARTY PLAINTIFF IN ACTION FOR PERSONAL INJURY TO WIFE.

Since damages for personal injuries to wife are community property, the husband has an interest in the subject of an action brought by the wife for personal injuries, and is a proper party.

9. HUSBAND AND WIFE ⊂=270(9)—VERDICT IN FAVOR OF HUSBAND AND WIFE PROPER IN ACTION FOR INJURIES TO WIFE.

In an action for personal injuries to wife, in which the husband was joined as party plaintiff, a verdict in favor of the "plaintiffs" was proper; such damages being community property in which the husband had an interest.

10. APPEAL AND ERROR ⊂=1072—ORDER DEPRIVING PARTY OF RIGHT TO PRESENT ARGUMENT ON SUFFICIENCY OF EVIDENCE HARMLESS IN VIEW OF CORRECTNESS OF VERDICT.

Assuming that it was error for the court to refuse to make an order on motion for new trial requiring the phonographic reporter to read from his notes all the evidence taken at the trial, thus depriving the defeated party of his right to present argument on the sufficiency of the evidence, such error was harmless, where an appeal was taken by the alternative method and the reporter's notes were transcribed in full, and there was sufficient evidence to sustain the verdict.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Jennie E. Johnson and another against E. W. Hendrick. Judgment for plaintiffs, and defendant appeals. Affirmed.

Shreve & Shreve and H. N. Ellis, all of San Diego, for appellant.

Chas. H. Forward, E. L. Davin, and Sweet, Stearns & Forward, all of San Diego, for respondents.

BRITTAIN, J. The defendant appeals from a judgment for $695, damages and costs, on a verdict of the jury for injuries sustained by Mrs. Jennie E. Johnson, when she was thrown from an automobile in which she was riding with her husband when that car was struck by an automobile driven by the defendant.

The collision occurred at the intersection of Crosby street and Logan avenue, in the city of San Diego, in the afternoon of a clear day. Logan avenue, which was paved with asphalt, runs east and west, and is 52 feet wide between curbs. Parallel lines of street railway track are on either side of the center line, and the distance from the curb on each side to the nearest rail of the car track is 18½ feet. The sidewalks are 14 feet wide. Crosby street runs into or across Logan avenue from the north. It is 40 feet wide between curbs, and its sidewalks are 10 feet wide. The traffic runs west on the north side of Logan avenue and east on the south side. On Crosby street the traffic runs north on the east and south on the west side. At the northeast corner of the street intersection is a large building which cuts off the view of drivers running west on the north side of Logan avenue. At the time of the collision there was an automobile standing in front of this building near the corner of Crosby street. Crosby street was unpaved. There had been rains, and on the east side of the street there was, or had been, a puddle of water or mudhole, and on the west side there were ruts. There was a smoother, beaten roadway covering a portion of the center of the street. Johnson, with his wife and another passenger, was in a Maxwell machine proceeding south on Crosby street, and Johnson intended to turn east on Logan avenue. Hendrick, with whom were his wife and daughter, was driving a large Hudson car west on the north side of Logan avenue. Johnson and other witnesses testified that he drove straight out of Crosby street onto Logan avenue, and because of two fast-moving machines proceeding east on Logan avenue, slowed down to about one mile an hour, he having cut off his gasoline supply and depressed the foot lever operating the clutch, so that the machine was slowly moving forward by its own momentum. He said, or it was suggested to him by a question, that he was then "coasting," but the fact appears to have been as stated. Johnson testified positively that he was west of the center line of Crosby street at all times while he was in Logan avenue and that he had proceeded straight across Logan avenue to a point where the front part of his machine had nearly, if not quite, reached the center line of Logan avenue before he was struck. Hendrick and his daughter testified that he was driving at the rate of about 12 miles an hour and that shortly before he reached the corner of Crosby street Johnson came into Logan avenue on the east side of

Crosby street, turning towards the east, so that the Maxwell machine appeared to be facing him or turning towards him; that he immediately put on his brakes, and the machine he was driving skidded until the left front mudguard struck the left hind wheel of the Maxwell machine. Under the traffic law it is conceded by the appellant that Johnson, coming into Logan avenue from the right, had the right of way, but it is claimed that Johnson violated the traffic law in driving into Logan avenue east of the center line of Crosby street.

[1] From the foregoing statement it appears that the evidence upon the question of whether Johnson entered Logan avenue east or west of the center of Crosby street was sharply in conflict. From the appellant's evidence it appears that if the Hudson machine had not been slowed almost to the stopping point the collision would have wrecked the Maxwell machine and probably the Hudson car, and that the fact that the Maxwell machine was not moved west very far, if at all, by the impact of the collision, would indicate that the argumentative statement just made was correct. After the collision the Maxwell car was lying on the north car track, extending diagonally into the space between the tracks, with the front end pointed towards the east. It is conceded that by the collision the rear end of the Maxwell car was moved some distance, but not very far, to the west. The broken rear wheel was lying on the ground about two feet north of the outside rail of the north car track and some distance west of the center line of Crosby street. After passing the machine which stood on Logan avenue, near the east side of Crosby street, and near which the appellant's machine was when, according to his testimony, he saw the Johnson machine approaching him, Hendrick might have turned north towards Crosby street to pass back of the Johnson machine, unless the Johnson machine was so close to the east curb line of Crosby street that there was not room to pass. If it had been so close as that, to have reached the point where it was found immediately after the accident it would have been necessary for the impact to be sufficiently strong to shove or throw the Maxwell machine at least 15 feet, and there is no evidence to support any such deduction. From the place where Hendrick applied the brakes to the Hudson car, the burned tracks of the sliding hind wheels made straight lines from about the east curb of Crosby street to the place where the rear wheels of the Hudson car stopped at the time of the impact, a distance of 15 to 18 feet. If he had swerved to pass back of the Maxwell car, the track would not have been in a direct line. There was sufficient evidence to support the verdict of the jury negativing any claim of contributory negligence on the part of Johnson and establishing negligence on the part of Hendrick under the traffic rule by which Johnson had the right of way.

[2, 3] It is further contended that the evidence is insufficient to support the verdict because the appellant claims that the award of $695 was excessive, and that it must have been given under the influence of prejudice and passion, of which the appellant contends a contributing cause was the fact, developed on his cross-examination, that his business was that of a saloon keeper. Mrs. Johnson was seated on the front seat of the Maxwell machine at the time of the collision. By the impact she was thrown out over the door of the machine, stunned, and received numerous bruises, the most serious of which appeared to be some injury to the soft part of her right arm, near the elbow. She also testified to some injury to her hip, from which, she testified, she continued to suffer at the time of the trial. An X-ray plate of the elbow, taken about a month after the accident, failed to show injury to the bone, but the evidence, both of Mrs. Johnson and her medical attendant, showed that there was difficulty in flexing and extending the right arm, and that the swelling of the elbow continued for a period of some weeks. On behalf of the appellant it was sought to be shown that the pains of which Mrs. Johnson complained might have been caused by rheumatism. The most that can be said upon this point also is that the evidence was conflicting and the verdict of the jury is conclusive upon the subject. Mr. and Mrs. Johnson carried on a business together as bathhouse keepers on one of the piers in San Diego. Prior to the accident she had been able to attend to the necessary washing of the articles used in the business and to clean the bathhouses. After the accident she was unable to do this work. She got employment in a fish market, but after five days found that she could not use her arm in the work she was given to do. The amount of damages awarded is not such as at first blush to cause that shock to the conscience which is said alone will warrant the inference that the jury has been improperly influenced by passion or prejudice, nor does it appear that the jury was in any way improperly influenced by learning the nature of the business in which the appellant was engaged.

[4-9] Jennie E. Johnson, who was injured, was joined as plaintiff by her husband, P. C. Johnson. The verdict of the jury was in favor of the plaintiffs and assessed their damages at $695. It is argued that the award of a lump sum to both plaintiffs, when the evidence showed but one plaintiff in fact was entitled to recover, rendered the verdict contrary to law. The allegation of the complaint was that plaintiff Jennie E. Johnson had been damaged in the sum of $3,000. There was no claim for special damages, and

a claim on the part of the husband alone for damages for loss of services of his wife during the time she was incapacitated from work could not have been joined in the suit for the direct damages to her. Easton v. United, etc., 173 Cal. 199, 159 Pac. 597, L. R. A. 1917A, 394. Prior to the amendment of section 370 of the Code of Civil Procedure in 1913 (St. 1913, p. 217), in an action for injuries to the wife the husband was a necessary party. In such an action, since the amendment, the wife may sue alone, but she is not required to sue in that manner. All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as parties, except when otherwise expressly provided. Code Civ. Proc. § 378. Money recovered for damages to the wife in this state has always been held to be community property, because it was not owned by the wife before marriage, nor acquired afterwards by gift, devise, bequest, or descent. Civ. Code, § 162; Moody v. Southern Pac., 167 Cal. 786, 141 Pac. 388. The husband therefore had an interest in the subject of the action and was a proper party plaintiff. The form of the verdict is correct.

It is contended that the court erred in stating, when ruling upon a question of the admissibility of evidence, that he was inclined to the view that the husband was a substantial party to the action, and not a mere and purely formal party, being joined only because of his being the husband, and in instructing the jury upon that theory of the law. The answer to the appellant's second proposition would seem to dispose of this contention. The instructions given to the jury, considered as a whole and in reference to the facts in evidence, appear to be without fault.

[10] The appellant lastly contends that the court erred in denying the defendant's motion for a new trial, which was noticed upon all the statutory grounds. Except as to the matter of the sufficiency of the evidence to sustain the verdict, the points presented to the trial court were the same as have already been determined in the foregoing parts of this opinion. In regard to them there was no error on the part of the trial judge in denying the motion. It is urged, however, that the appellant was deprived of his right to present argument on the sufficiency of the evidence by reason of the refusal of the trial judge to make an order requiring the phonographic reporter to read from his notes all the evidence taken at the trial. The appellant bases his right to have the notes so read on the amendment of section 660 of the Code of Civil Procedure, adopted in 1915, which in terms provides that on the motion for a new trial if the phonographic notes have not been transcribed, "the reporter must upon request of the court, or either party, attend the hearing of the motion, and shall read his notes, or such parts thereof as the court, or either party, may require." The Code prescribes specific fees to be paid to the phonographic reporter for his services in taking the report and for transcribing his notes. It does not provide fees for reading those notes, which in some cases might occupy many days. The judge of the trial court, in refusing to make the order requested by the appellant, expressed the view that in so far as the section requires the reporter to read his notes without providing a method of compensation it is unconstitutional. It is not necessary to determine that question in this case. The present appeal was taken by the alternative method. The reporter's notes were transcribed in full, and are before this court. They have been read and considered in their entirety, and the court has concluded that there was sufficient evidence to sustain the verdict. The court cannot presume that if the same matter had been read to the trial judge he could have reached any other conclusion. Furthermore, if the trial court was in error in this particular, this court is unable, upon an examination of the entire record, including all the evidence, to determine that there has been any miscarriage of justice in this case.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

45 Cal. App. 396

MAY v. NEW YORK MOTION PICTURE CORPORATION. (Civ. 3032.)

(District Court of Appeal, Second District, Division 2, California. Jan. 5, 1920.)

1. MASTER AND SERVANT ⊂=30(5) — OBEDIENCE TO REASONABLE ORDERS REQUIRED.

A servant is bound to obey all reasonable orders of the employer not inconsistent with the contract of employment.

2. MASTER AND SERVANT ⊂=30(5)—DISOBEDIENCE OF REASONABLE ORDER JUSTIFIES DISCHARGE.

Disobedience of a reasonable order is a violation of duty which justifies a rescission by the master of contract of employment and peremptory discharge of the servant. Civ. Code, § 2000.

3. MASTER AND SERVANT ⊂=30(5) — MASTER HAS UNQUALIFIED RIGHT TO MAKE REASONABLE ORDER.

The master has the right to make a reasonable order, though he knows it will be distasteful to the servant, and even though he gives the order with the expectation that the servant will leave his employ rather than obey.

4. MASTER AND SERVANT ⟸30(5)—"WILLFUL DISOBEDIENCE" AND "WILLFUL" DEFINED.

A "willful disobedience," justifying discharge of a servant, is an intentional disobedience; the word "willful" not necessarily implying anything blamable or any malice or wrong.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful.]

5. MASTER AND SERVANT ⟸43 — REASONABLENESS OF ORDER QUESTION OF LAW OR FACT.

Where the reasonableness of the master's order involved in action for wrongful discharge depends upon undisputed facts, and the inferences from the facts all point one way, the question as to its reasonableness is one of law for the court, but where different inferences can be deduced it is a question of fact for the jury.

6. MASTER AND SERVANT ⟸30(5) — ORDERS REQUIRING MOTION PICTURE ACTRESS TO REPORT DAILY NOT INCONSISTENT WITH CONTRACT OF EMPLOYMENT.

Where plaintiff, a motion picture actress, alleging wrongful discharge, agreed to abide by the rules and regulations of the producing company, and to report for rehearsals promptly when notified so to do, and to act in such parts and at such places as she might be instructed, an order, requiring her to report daily at the studio not later than 8:30 a. m., irrespective of whether she was cast in a part or not, was not inconsistent with the contract of employment.

7. MASTER AND SERVANT ⟸30(5) — ORDER REQUIRING MOTION PICTURE ACTRESS TO REPORT EVERY MORNING REASONABLE.

If plaintiff, a motion picture actress, was frequently tardy and her employer at times had difficulty in reaching her by telephone to notify her to be present to enact her rôles, an order, requiring her to report at the studio every morning not later than 8:30, irrespective of whether she was cast in a part or not, was reasonable, and a willful disobedience was ground for discharge.

8. MASTER AND SERVANT ⟸41(1)—SERVANT WRONGFULLY DISCHARGED ENTITLED TO RECOVER UNDER OPTION FOR RE-EMPLOYMENT.

A moving picture actress, under contract to receive a salary of $75 a week and $1,300 payable in weekly installments of $25 each as a consideration for option to employ her for another year, is, if entitled to recover for wrongful discharge, entitled to recover at the rate of $100 per week for the remainder of the term of service, less such sum as she might have earned by exercising reasonable diligence to secure other employment of the same or a substantially similar character.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Lola May against the New York Motion Picture Corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Arthur Wright, of Los Angeles, for appellant.

Peyton H. Moore, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action by a motion picture actress, employed by defendant, to recover for an alleged wrongful discharge, alleged to have occurred about 21 weeks before the expiration of the term of her employment. From a judgment for plaintiff for $2,123.60, based on the verdict of a jury, defendant appeals.

The only controversy between the parties is whether the discharge was wrongful, and, if not, whether the damages awarded plaintiff were excessive. In the main, the questions presented by this appeal are concerned with certain instructions to the jury.

Plaintiff and defendant entered into a written contract, which, so far as material to our purpose, is as follows:

"The party of the first part [defendant] hereby engages the party of the second part [plaintiff] as motion picture actress to enact rôles in the motion picture productions of the party of the first part in its company and such companies as the party of the first part may hereafter form, for a period of one year, commencing June 16, 1915, and ending June 16, 1916, for a salary of $75.00 weekly. * * * The party of the second part agrees to abide by the rules and regulations of the producing company to which she may be assigned, and to report for rehearsals promptly after notification to do so, and to direct or act in such parts and at such places as she may be instructed."

The contract, as modified by a subsequent written agreement, likewise provides that—

The "party of the second part [plaintiff] further, for the consideration of $1,300.00, which is to be paid in weekly installments of $25.00 by the party of the first part, does hereby grant an option to the party of the first part [defendant] to continue this contract for the following year at a salary of $125.00 weekly, commencing June 16, 1916, and ending June 16, 1917."

Plaintiff commenced work for defendant on June 16, 1915, at defendant's camp or studio at Inceville, in Los Angeles county, about 3½ miles from the city of Santa Monica, and continued in its employ until discharged on January 27, 1916. During all this time plaintiff made her home at Santa Monica. The last day she worked for defendant was December 24, 1915. On that day defendant finished a picture in which plaintiff had been cast, and in which she had worked for some weeks. Except when specifically notified and sent for, plaintiff never went to the camp or studio, except weekly to draw her weekly pay check. Witnesses for defendant testified that prior to December 24, 1915, and during the time when plaintiff was acting parts in which she had been cast, she frequently arrived on the ground so late that her tardiness caused exasperating delays that threw the whole working organization out of joint, causing

defendant considerable financial loss. Other actors and actresses, and persons employed in connection with rehearsals and work before the camera, arrived on the ground, as a rule, not later than 8:30 o'clock in the morning; while, according to defendant's witnesses, plaintiff frequently was as late as 10 and 11 o'clock in arriving on the scene of her duties. When not actually working for defendant, plaintiff did not remain in her home at Santa Monica all day long so that she might readily be communicated with by telephone or other convenient means of communication, in the event that she might be needed at the studio to enact some rôle. Upon a number of occasions, according to defendant's witnesses, when plaintiff's presence at the camp or studio was urgently needed in order that she might take part in a scene in which she had been cast, she could not be reached by telephone, although defendant's employés called up her Santa Monica residence in vain attempts to communicate with her. Defendant's manager testified that in December "there was a scene which required Miss May's presence in order to rephotograph it, and it was spoiled, and Mr. Swickert, the director, was unable to proceed for a period of at least two days, endeavoring to get Miss May out to the grounds." Defendant's superintendent of production testified that on very many occasions plaintiff was late in arriving at the studio, and that on one occasion she failed to appear after she had been notified over the telephone. Clearly, the absence of one actor or actress necessarily deranges the work of the entire organization. The effect of the absence of even one actor or actress is graphically described by defendant's superintendent as follows:

"One actor is a wheel. It is a wheel within wheels. And if one of the wheels is missing, we cannot go on with the machine; that is all."

Needless to say, the testimony of defendant's witnesses respecting plaintiff's tardiness did not go entirely uncontradicted. Plaintiff testified that she reported promptly for all rehearsals when notified so to do. Our sole purpose in calling attention to defendant's evidence respecting plaintiff's tardiness and the difficulties experienced in communicating wth her by telephone is to show that, if the situation was as described by defendant, the order given to plaintiff on January 22, 1916, and presently to be referred to, was a reasonable order, made necessary by the conduct of plaintiff herself.

On January 7, 1916, defendant's manager sent for plaintiff and told her the company was cutting down expenses; that defendant might not be able to continue giving her leading parts; that she might have to take second parts; and suggested to her that she might think it to her advantage to take her two weeks' salary and return to New York. The next day plaintiff wrote defendant's manager that she fully realized that the written contract required her to act in such parts as might be assigned her, and that she expected to comply with her agreement in all particulars.

On January 22, 1916, defendant caused to be delivered to plaintiff a letter—written and signed on the 13th—which is as follows:

"Miss Lola May: In the future it will be absolutely necessary that you report at the studio every morning not later than 8:30 A. M., *irrespective of whether you are cast or not*, and not absenting yourself when you think you are not cast, as you have taken upon yourself to do in the past. Yours very truly, E. H. Allen, Manager."

This order we shall designate as the order of January 22, 1916—the date of its delivery—though it was written and signed on the 13th. Whether this order is consistent with the written contract of employment, and whether it is a reasonable order, are the principal questions presented on this appeal.

It was stipulated at the trial that defendant had no printed general rules or regulations. Nor is there any evidence to show that defendant had any kind of general rules or regulations applying to actresses in its employ, enacting rôles or parts in the producing company such as plaintiff was employed to enact, and requiring such actresses to report at defendant's studio every morning irrespective of whether they were cast in a part or not. Indeed, defendant does not claim ever to have promulgated any such general rule or regulation. On January 24, 1916, plaintiff wrote defendant a letter acknowledging receipt of defendant's order of January 22, 1916. In this letter to defendant plaintiff said:

"I stand ready to comply with all reasonable requirements, as prescribed by your rules and regulations, applicable to persons employed to perform the same class of work for which I am engaged."

Plaintiff did not report at defendant's studio on the 24th, 25th, or 26th days of January, 1916. She was discharged on January 27th. On January 24th she had been cast in a play called "Beatrice of St. Cecile," but had not been notified thereof before her discharge on January 27th, although, according to defendant's director, he would have liked to see her as early as January 18th or 20th, in order to go over her part with her, but, according to the manager's assistant, she could not be reached on the telephone at that time.

On cross-examination plaintiff testified that she did not make any attempt to go to defendant's studio after receiving the order of January 22, 1916, for the reason that, as she claims, her contract did not require her to report at the studio if she was not cast

for a part. On January 27, 1916, defendant discharged plaintiff by delivering to her a letter which reads:

"Dear Miss May: This is to notify you that you have automatically discharged yourself by refusing to report to work for the past three days. You can obtain the salary due you by applying to our cashier. Yours truly, New York Motion Picture Corp., by E. H. Allen."

The court instructed the jury that it was for them "to consider whether the order for her to appear at 8:30 a. m. after the 22d, when she received that notice *was within the terms of the contract*, and was a reasonable order under the circumstances." This instruction was, we think, erroneous and clearly prejudicial.

[1] The relation of master and servant which in contemplation of law existed between these parties, cast certain duties upon plaintiff, as the servant, which she was bound to fulfil and discharge; the principal one was that of obedience to all reasonable orders of the defendant, the master, not inconsistent with the contract. "A promise by the servant to obey the lawful and reasonable orders of his master within the scope of his contract is implied by law." Lacy v. Getman, 119 N. Y. 115, 23 N. E. 452, 6 L. R. A. 728, 16 Am. St. Rep. 806. The following passage from Fraser on Mast. & S. is worth quoting:

"Of course the master cannot compel him to obey further than has been agreed between them, or than is consistent with law; but at the same time the servant is not entitled to enter upon a minute measurement of the exact limits of his service, or to weigh in too nice a balance the precise kind and quantity of labor which he can in strict law be compelled to perform. While the servant will be protected from harsh treatment, on the one hand, it is, on the other, incumbent upon him to render a cheerful and ready obedience in all points which, in the judgment boni viri, cannot be considered any departure from the contract." Page 71.

[2] Disobedience of a reasonable order is a violation of duty which justifies a rescission by the master of the contract of employment and peremptory discharge of the servant. Jerome v. Queen City Cycle Co., 163 N. Y. 351, 57 N. E. 485; Peniston v. John Y. Huber Co., 196 Pa. 580, 46 Atl. 934; Von Heyne v. Tompkins, 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524; School Directors v. Hudson, 88 Ill. 563; Standidge v. Lynde, 120 Ill. App. 418; Wiley v. California Hosiery Co., 3 Cal. Unrep. 814, 32 Pac. 522; Civ. Code, §§ 1981, 2000. The law is thus summarized in Fraser on Mast. & S. p. 71:

"Where a servant deliberately violates his master's orders, or refuses to obey them when given, he is clearly guilty of the grossest breach of contract. His duty is to obey the master in all things for which he became bound expressly, or in which obedience is implied from the nature of the service undertaken."

[3] Any "willful" disobedience of an order that is reasonable and not inconsistent with the contract of employment is sufficient to justify the servant's discharge. Civ. Code, § 2000. "Willful" disobedience of a specific, peremptory instruction of the master, if the instruction be reasonable and consistent with the contract, is a breach of duty—a breach of the contract of service; and, like any other breach of the contract, of itself entitles the master to renounce the contract of employment. According to the decided preponderance of authority, a single act of disobedience to a specific, reasonable order from the master to the servant is, as a matter of law, a violation of duty that justifies the master in discharging (Labatt's Mast. & S. [2d Ed.] § 291, p. 897); and whether actual injury has resulted to the master's business is wholly beside the mark (Jerome v. Queen City Cycle Co., supra; Milligan v. Sligh Furniture Co., 111 Mich. 632, 70 N. W. 133; Labatt's Mast. & S. [2d Ed.] §§ 273, 291, subd. "c"). The motive of the master in giving the order is not important. Whether the order is reasonable is the important question. The master has the right to make a reasonable order, though he knows it will be distasteful to the servant, and even though he gives the order with the expectation that the servant will leave his employ rather than obey. Development Co. v. King, 161 Fed. 91, 88 C. C. A. 255, 24 L. R. A. (N. S.) 812.

[4] A "willful" disobedience is an intentional disobedience. It does not necessarily imply any evil intent on the part of the servant or malice toward his master. In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent. Benkert v. Benkert, 32 Cal. 470; Towle v. Matheus, 130 Cal. 577, 62 Pac. 1064; 40 Cyc. 944. There are cases which go to the extent of holding that to justify a discharge for disobedience of orders, the disobedience must be perverse, but these cases cannot be vindicated on principle. McCain v. Desnoyers, 64 Mo. App. 66. See Civ. Code, § 2000.

[5] Whether the reasonableness of any particular rule or order given by the master to the servant is a question of law for the court or of fact for the jury is a matter upon which the authorities are not entirely harmonious. We think the correct doctrine, deducible from a consideration and analysis of many authorities, may be stated substantially as follows: Where the reasonableness of the master's order depends upon undis-

puted facts, and the inferences from the facts found or admitted all point one way, the question as to the reasonableness of the order or rule is one of law for the court, and not a question of fact for the jury. Where, however, the reasonableness of the order does not rest wholly upon undisputed facts, or its reasonableness is not so apparent that but one inference can reasonably be deduced from the proved or admitted facts, it is for the jury to determine whether the order is reasonable or not. Development Co. v. King, supra; note to Thomas v. Houston, etc., Co., Ann. Cas. 1913C, p. 187; note to Carpenter Steel Co. v. Norcross, Ann. Cas. 1916A, p. 1040, et seq. "Courts will not permit jurors to guess or speculate, when, from the undisputed evidence, it is *apparent* that the order of the master was reasonable." Jerome v. Queen City Cycle Co., supra. (Italics ours.)

[6] The questions, then, are: First, is the order of January 22, 1916, consistent with the contract between the parties; and second, if it is, is it, under the circumstances that were detailed by defendant's witnesses, clearly a reasonable order? If these two questions must be answered in the affirmative, then it follows that their submission to the jury, in the form in which they were submitted in the instruction complained of, was prejudicial error.

We see nothing in the contract with which the order can be said to be inconsistent. By her contract plaintiff engaged to "enact rôles in the motion picture productions" of defendant. The order of January 22, 1916, did not require plaintiff to perform service of a kind other than or different from that called for by her contract of employment, namely, the enactment of rôles in motion pictures produced by defendant. The sole purpose of the order was to insure plaintiff's presence at a certain place, near the spot where the pictures were being filmed, in order that she might readily and conveniently be notified of the times when she would be required to enact any rôle in which defendant might see fit to cast her. By her written contract plaintiff, in effect, engaged to give defendant all her services as a motion picture actress during the whole of the year from and after June 16, 1915. There can be no doubt that if she had not expressly contracted "to report for rehearsals promptly *after notification so to do*," defendant would have had the right to require her presence at or near the camp at all reasonable times, to the end that, without delaying defendant's organization, largely made up of high-salaried actors and actresses she might readily be notified when and where she would be required to act in some play in which she already had been or was about to be cast. We do not think defendant was deprived of this right merely because, by her written contract, plaintiff had expressly agreed "to report for rehearsals promptly after notification." She did not contract to "enact rôles in the motion picture productions" *only* when notified of rehearsals. She agreed both to "enact rôles in the motion picture productions" *and* "to report for rehearsals promptly after notification." Requiring her to report at the studio every morning at 8:30 o'clock was not outside the circle of duties incident to her employment. Her time was not hers to do with as she pleased; it belonged to her employer. And conceding that, as she claims, her contract obligated her to enact rôles in defendant's motion picture productions only after notification so to do, nevertheless, her employer, in order to be able to give her the necessary notice without enduring undue delay and consequent financial loss, was entitled either to have her live at some nearby place where, at all times, she could conveniently be notified when her presence before the camera would be required, or else to report daily at some suitable place, the Inceville studio, for instance, where such notice could be given her. If this were not so, then plaintiff, if she chose, might have her abode at Riverside, or even as far away as San Francisco, and claim that she was not obliged to appear at defendant's studio save when defendant might telegraph or telephone or otherwise communicate with her at such distant place of abode. This hypothetical situation, though an extreme one, is but the logical result of the position that respondent has assumed here. With or without her agreement to report for "rehearsals promptly when notified," plaintiff's engagement "to enact rôles in the motion picture productions" of defendant obligated her to be on hand to perform those services whenever needed, and to do so at such times and places, within reason, as her employer might require of her. To that end, and without adding anything to the terms of the contract, her employer was entitled to demand that she report daily at any reasonable place, in order that she might conveniently be notified, and, without harassing delays, her presence before the camera be secured if, on that day, it so happened that she was wanted in some part. It must be remembered that, under her contract of employment, plaintiff could be cast for any part. She could be assigned second parts, or even required to take part in mob scenes with the multitude or "bushwa," as those who take part in such scenes are designated in the profession. She herself, in her letter of January 8, 1916, admitted that she could be required "to act in such parts and at such times and places" as she might be instructed. This being the case, it was entirely consistent with the contract of employment to require her to be present every morning at 8:30 o'clock, when

the other actors and actresses arrived, in order that she might immediately be notified to take part even in a mob scene, if her employer saw fit so to use her. For these reasons, we think it clear that the order to report daily at defendant's studio, irrespective of whether she was cast in a part or not, was not inconsistent with plaintiff's written contract of employment.

[7] Nor was the order unreasonable if, as testified by defendant's witnesses, plaintiff frequently arrived on the ground late for rehearsals and for motion picture productions, and if defendant's servants, at times when her presence was urgently needed in order that she might enact the rôles in which she had been cast, had great difficulty in reaching her by telephone, in order to notify her that her presence was required. By her own conduct, if defendant's witnesses have truthfully and accurately described the conditions created by plaintiff's habitual tardiness and the difficulties encountered in endeavoring to communicate with her upon occasions when her presence was needed, she herself has made the order a reasonable, if not a necessary one. Plaintiff's place of abode at Santa Monica was 3½ miles from the canyon in which defendant had its camp or studio. The available means for travel between the two places, particularly during the rainy season, was none too good. Defendant's business was so conducted that it was necessary to commence work early in the morning, so as to take advantage of all possible sunlight. The other members of defendant's large organization were, as a general rule, on the ground not later than 8:30 a. m. When plaintiff was required to act in a rôle in which she had been cast, it was absolutely necessary that she should be on the ground in time to commence work with the others, if defendant was not to be inflicted with considerable financial loss. If the situation as depicted by defendant's witnesses be true—plaintiff's frequent tardiness and the great difficulty encountered at times in getting word to her—there could be neither system nor reasonable efficiency in defendant's business, unless it made some such order as that which it gave plaintiff on January 22, 1916. Defendant's business could be expedited only by a compact working entity of all its employés, commencing their work in unison and at a reasonably early hour in the day.

We conclude, therefore, that the order to report at the studio every morning not later than 8:30 was consistent with the contract between the parties; that, if the circumstances were as described by defendant's witnesses, the order was reasonable and fair; and that the court erred in charging the jurors that it was for them to determine whether the order "was within the terms of the contract" and whether it "was a reasonable order under the circumstances." The jury should have been instructed specifically that if it be true, as testified by defendant's witnesses, that plaintiff was frequently tardy, and defendant, at times, had difficulty in reaching her by telephone in order to notify her to be present to enact her rôles, then the order was reasonable, and a willful disobedience of its terms would be good ground for plaintiff's discharge. Instead, the jury was, in effect, told that a willful disobedience of the order is not a defense to plaintiff's action. In its charge to the jury the court gave this instruction:

"If the defendant did not have any general rules and regulations applying to actresses in its employment, enacting rôles and acting parts in its producing company, the same as plaintiff was enacting, which required such actresses to report at the studio of the defendant every morning not later than 8:30 a. m., irrespective of whether they were cast or not, and the defendant had not notified plaintiff to report for rehearsals on January 24th, January 25th, or January 26th, or any of such dates, and the defendant had not instructed the plaintiff to direct or act in any particular part or given to plaintiff any particular cast or assignment on January 24th, 25th or 26th, or on any other said date, then by failing to report at the studio of the defendant on said January 24th, 25th or 26th, the plaintiff did not commit a breach of the contract which she has declared on in her complaint, and the plaintiff would not on that account be prevented from recovering in this action."

This instruction entirely ignores the order of January 22, 1916, and the effect of any willful disobedience thereof. Indeed, throughout its instructions, the court, apparently adopting the theory advanced by respondent on this appeal, seems to have treated the order as wholly inconsistent with the contract of employment. In this we think the court erred.

[8] Since the case must be remanded for retrial, it is necessary that we notice one other objection. Appellant complains of an instruction respecting the amount of recovery. The action was not simply to recover plaintiff's wage of $75 a week for the balance of her term of service. It was brought to recover damages for breach of the entire contract. Under her contract with defendant, plaintiff was to receive a salary of $75 a week for her services as a motion picture actress and likewise $1,300, payable in weekly installments of $25 each, as a consideration for the optional right which she gave to defendant and which entitled it, at its option, to employ plaintiff for another year at an agreed salary. We shall assume, as contended for by defendant, that the contract is severable. That is, we shall assume that the agreement for services at a wage of $75 a week for the first year is one agreement; that the agreement whereby plain-

tiff gave defendant the optional right to re-employ her for another year, in consideration of the sum of $1,300, payable in equal weekly installments, is another and separate agreement; and that the aggregate of the amounts payable weekly to plaintiff during the first year, $100, is the total amount payable under two separate and independent divisions of the contract. But, even so, if plaintiff is entitled to recover at all, she is entitled to recover for defendant's breach of the contract as a whole, not merely for a breach of defendant's agreement to employ her for a year at a wage of $75 per week. That is, if entitled to recover at all, she is entitled to recover at the rate of $100 per week for the remainder of the term of service, i. e., from January 27, 1916, to June 16, 1916, less such sum as she might have earned by exercising reasonable diligence to secure other employment of the same or a substantially similar character. Appellant seems to think that because it was under no obligation to exercise its optional right to re-employ plaintiff for another year upon the termination of the first year's service, it, therefore, should pay no part of the $1,300 that became payable after plaintiff's discharge, even if it should be found that it breached the contract by discharging plaintiff without just cause. This, manifestly, is non sequitur. Plaintiff, in consideration of $1,300, payable in weekly installments of $25 each, gave defendant an option. Defendant, unless plaintiff herself breached the contract by insubordination or by willful disobedience of a reasonable order, must pay for this option the full amount that it agreed to pay therefor, and at the times and in the manner it agreed to pay, regardless of whether it might see fit to exercise the option that it acquired for the agreed consideration of $1,300.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 793

CROCKER WHEELER CO. v. AMERICAN BONDING CO. OF BALTIMORE.

(Civ. 3035.)

(District Court of Appeal, Second District, Division 2, California. Dec. 19, 1919.)

Appeal from Superior Court, Los Angeles County; Chas. Wellborn, Judge.

Action by the Crocker Wheeler Company against the American Bonding Company of Baltimore to recover on a contractor's bond. Judgment for plaintiff, and defendant appeals. Affirmed.

J. Crider, Jr., A. L. Abrahams, and Chas. W. Fricke, all of Los Angeles, for appellant.

Lucius P. Green, of Los Angeles, for respondent.

FINLAYSON, P. J. Plaintiff, a materialman, who had sold to a building contractor material used in the construction of a building, brought this action upon a bond that had been given by the contractor, and executed by defendant, to secure the payment of labor and material claims. From a judgment in favor of plaintiff, defendant appeals.

The bond is the same bond that was before the Supreme Court in General Electric Co. v. American Bonding Co., of Baltimore (decided July 5, 1919) 182 Pac. 444. Appellant makes the same points here that were unsuccessfully urged by it there. In every particular, this case is ruled by the decision in that case.

For this reason, the judgment must be and is affirmed.

We concur: SLOANE, J.; THOMAS, J.

182 Cal. 289

MUNDELL v. LYONS, Registrar of Voters. (L. A. 6377.)

(Supreme Court of California. Feb. 19, 1920.)

1. STATUTES ⟸89 — ACT CHANGING THE BOUNDARIES OF COUNTIES IS NOT GENERAL BECAUSE IT CHANGED THE BOUNDARIES OF SEVERAL COUNTIES.

St. 1919, p. 857, repealing Pol. Code, §§ 3909 to 3958, and adding new sections 3959 to 3966, which created eight additional counties and changed the boundaries of certain of the existing counties of the state of California, is not general legislation, within Const. art. 11, § 3, declaring that a Legislature may by general and uniform laws provide for the alteration of county lines, because the act changed the boundaries of several different counties, for, had it changed the boundary of only one, it undoubtedly would have been special.

2. CONSTITUTIONAL LAW ⟸16—WHERE CONSTITUTIONAL PROVISION AGAINST SPECIAL LEGISLATION IS NOT CLEARLY AN INHIBITION, IT MUST BE CONSTRUED IN THE LIGHT OF ITS HISTORY.

As Const. art. 11, § 3, providing that the Legislature may by general and uniform law provide for the alteration of county boundary lines, is not clearly an inhibition, but seems rather permissive in its nature, it should be construed in the light of the history of the action.

3. STATUTES ⟸89—ALTERATION OF COUNTY BOUNDARY LINES BY SPECIAL LEGISLATION PROHIBITED.

In view of the purpose of the adoption of Const. art. 11, § 3, which was to prevent special legislation changing county boundary lines and to relieve the Legislature from a series of attempts to have the Legislature divide old counties and create new ones, such section must be deemed to prohibit the changing of county boundary lines by special legislation, and hence St. 1919, p. 857, which attempted to create eight new counties and change the boundary lines of existing counties is invalid, being special legislation.

In Bank.

Application by John Henry Mundell for writ of mandate prayed to be directed against David B. Lyons, as Registrar of Voters of the County of Los Angeles. Writ denied.

Don G. Bowker, Dist. Atty., and R. M. Sheridan, Deputy Dist. Atty., both of Ventura, for petitioner.

Edward T. Bishop, of Los Angeles, for respondent.

OLNEY, J. The Legislature of 1919 passed an act (Stats. 1919, p. 857) repealing sections 3909 to 3958, inclusive, of the Political Code as they then existed and substituting other sections in their place, and also adding eight new sections, numbered 3959 to 3966. The sections repealed established and defined the boundaries of the various counties of the state existing at the time of the adoption of the Code. The new sections adopted purported to do the same thing with regard to such counties and also with regard to the eight additional counties subsequently created. In many instances the boundaries under the new sections are the same as under the old sections, or under the special acts applicable to particular counties. In other instances they are not. One boundary which was so changed was that between Los Angeles and Ventura counties.

The petitioner is a citizen entitled to be registered and to vote in the county of his residence. He resides in a territory formerly a part of Ventura county, but by the change in boundary mentioned now made a part of Los Angeles county if the act of 1919 mentioned be valid. He applied to the respondent, the registrar of voters of the latter county, to be registered, and was refused on the ground that he was not a resident of that county, but still a resident of Ventura county. He has now applied to this court for a writ of mandate to compel the respondent to register him. He is entitled to the writ if he is in fact a resident of Los Angeles county, and the sole question is whether he is or not, and this in turn depends wholly on whether the statute purporting to change the boundary between the two counties is valid. The respondent claims that the statute in this particular is unconstitutional.

[1] The constitutional provision applicable is the portion of article 11, § 3, of our state Constitution reading:

> "The Legislature, by general and uniform laws, may provide for the alteration of county boundary lines, and for the formation of new counties."

In their arguments before us it is assumed by counsel on both sides that this constitutional provision is one of limitation upon the power of the Legislature, and that the sole question is whether or not the statute of 1919 is a general and uniform law as the Constitution requires.

The answer to the latter question seems to us apparent. It could not be questioned that, if the Legislature had passed an act dealing simply with the boundary between Los Angeles and Ventura counties, it would not be a general law. Likewise, if the Legislature had passed separate acts making each of the changes in county boundaries which the statute of 1919 seeks to make it could not be questioned but that each of such acts would be a special and not a general law. Now, the only difference in this case is that all of the changes are made by a single act. But it is almost too plain for words that legislative enactments, each of which is special in nature, are not made gen-

eral in nature merely by combining them in a single act. Such an act is not a general law in any sense of the word, but merely a combination of a lot of special laws. It follows that, if the assumption of counsel that the constitutional provision is a limitation upon the power of the Legislature is correct, the act is invalid.

[2, 3] The assumption mentioned, however, presents a more difficult question. The language of the Constitution is not that of prohibition or limitation, or even of mandate, but of permission. It is that "the Legislature, by general and uniform laws, may provide," etc. Any limitation or prohibition can arise from such language only by implication. In the absence of any consideration other than the language itself, such implication would not be plain and clear and would not be a sufficient justification for declaring a statute which the Legislature had assumed to pass to be beyond its power. Fresno Nat. Bank v. Superior Court, 83 Cal. 491, 24 Pac. 157. The constitutional provision, however, must be read in the light of its history, and so read its prohibitory intent is fairly plain.

Prior to 1894 the section of the Constitution in question read entirely differently. It clearly left to the Legislature the power by special laws to create new counties and to divide and alter old ones. The result was a series of attempts, some successful and some not, to have the Legislature divide old counties and create new ones. These attempts were strongly backed on the one hand, and, on the other, aroused strong opposition and bitter feeling. The Legislature was annoyed and harassed to a degree by the importunities of those interested. Rumors, if nothing more, were current and public of the use of improper means to influence the members. The situation came to be such as to require a remedy in the judgment of both the Legislature and the people. To provide such a remedy an amendment of article 11, § 3, of the Constitution was proposed and adopted in 1894. The material portion of the section, as so amended, read: "The Legislature, by uniform and general laws, may provide for the formation of new counties."

It is at once evident that the section, as it so read, was designed to be prohibitory and a limitation upon the authority of the Legislature. If it were permissive only, so that the Legislature still retained the power to create new counties, it both failed of the very purpose for which it was adopted and was also wholly futile, since, without it, the Legislature had the power, which it had frequently exercised, to do the very thing which the amendment gave it permission to do. Under such circumstances, there was but one view which could reasonably be taken of it, and that was that the permission given was exclusive and implied a limitation that new counties should not be created in any other way. This, also, has been the construction subsequently given to the amendment in practice, at least in a negative way. The Legislature has not since endeavored, in a single instance, to create a new county by special act, and, so far as we are aware, no attempt has ever been made to have it do so. This construction also was assumed to be the true construction in Wheeler v. Herbert, 152 Cal. 224, 92 Pac. 353.

In 1910 the section was again amended so as to include within its operation the alteration of county boundary lines, as well as the creation of new counties, and in this form the section has continued to the present time. If the permission given for the formation of new counties was exclusive, and implied a limitation upon the exercise of that power, the added permission to alter county boundaries is necessarily of the same character and contains the same implied limitation. That such was the object of the amendment of 1910 is also apparent from the fact that it followed immediately upon the decision of this court in Wheeler v. Herbert, supra, that the alteration of county boundaries by special act did not come within the prohibition against the creation, in that manner, of new counties. This decision was rendered in October of 1907, and the amendment with relation to county boundaries was proposed at the next session of the Legislature and adopted at the first general election following. The only possible purpose of the amendment was to avoid the effect of that decision. Our conclusion is that the Legislature has not the power to alter a county boundary by a special act. The statute here is indubitably of that character, and is therefore void.

We would add that what we have said would by no means necessarily apply to an act which merely established and made certain boundaries theretofore uncertain. The question as to the validity of such an act is not presented, and, concerning it, we express no opinion.

Writ denied.

We concur: ANGELLOTTI, C. J.; SHAW, J.; LENNON, J.; KERRIGAN, Judge pro tem.; LAWLOR, J.

WILBUR, J. I concur in the reasoning and conclusion of Justice OLNEY. The interpretation of section 3, art. 11, is in accordance with a long line of decisions interpreting the permissive clause of section 5, art. 11. Dwyer v. Parker, 115 Cal. 544, 47 Pac. 372; Knight v. Martin, 128 Cal. 247, 60 Pac. 849.

182 Cal. 273

HAYES v. HANDLEY et al. (L. A. 6119.)

(Supreme Court of California. Feb. 18, 1920.)

1. MUNICIPAL CORPORATIONS ⊂=332 — NONCOLLUSIVE AFFIDAVIT BY STREET IMPROVEMENT BIDDER UNNECESSARY.

Los Angeles Charter, art. 20, § 207b, requiring certain bidders on city improvements to make affidavit that the proposal is noncollusive, is part of an article relating to contracts in which the city directly pays the consideration, and is inapplicable to a street improvement contract to be paid for by special assessments, especially as the charter amendment of 1917 authorizes the city to proceed under the Street Improvement Act of 1913, which provides a complete method of procedure.

2. MUNICIPAL CORPORATIONS ⊂=273 — LOS ANGELES MAY CONSTRUCT TRAFFIC TUNNEL UNDER STREET IMPROVEMENT ACT.

Const. art. 11, § 6, 8, and Los Angeles City Charter, art. 1, § 2, subd. 51, do not so isolate Los Angeles from the rest of the state as to prevent it constructing a traffic tunnel under the Street Improvement Act of 1913, as amended by St. 1917, p. 970.

3. EMINENT DOMAIN ⊂=119(10)—TRAFFIC TUNNEL IS WITHIN ORDINARY STREET USE.

Construction of a traffic tunnel is a use which may be made of city streets without additional compensation to the abutting owners.

4. MUNICIPAL CORPORATIONS ⊂=294(3)—NOTICE OF STREET IMPROVEMENT SUFFICIENT.

Los Angeles charter, authorizing president of board of public works to sign notices on order of the board, is sufficiently complied with where the president signed a street improvement notice pursuant to general authority previously vested in him by the board, since the giving of notice was mandatory upon the board, and it had no discretion in the matter.

5. MUNICIPAL CORPORATIONS ⊂=294(7)—PUBLICATION OF STREET IMPROVEMENT NOTICE SUFFICIENT.

Street Improvement Act of 1913, requiring the board of public works to cause street improvement notices to be published, but not specifically stating what body should select the newspaper, was sufficiently complied with where the board had the notice published in the newspaper designated by the city council.

6. MUNICIPAL CORPORATIONS ⊂=331—PUBLICATION OF NOTICE INVITING STREET IMPROVEMENT BIDS SUFFICIENT.

Where a city council directed the board of public works to publish a notice inviting street improvement bids in a designated newspaper, and the secretary of the board posted and published the notice, there was sufficient compliance with Street Improvement Act of 1913, requiring the city legislative body to cause the notice to be published, especially as the board had independent authority under the city charter to give the notice, and fact that secretary signed the notice pursuant to a previous general order authorizing him to post and publish notices was sufficient authority for him to perform the ministerial duty in question.

7. MUNICIPAL CORPORATIONS ⊂=328—BOARD OF PUBLIC WORKS AUTHORIZED TO MAKE STREET IMPROVEMENT CONTRACT.

Los Angeles City Charter, § 145, authorizing the board of public works to make contracts for "work * * * in or upon any streets," etc., authorizes the board to contract for the construction of a traffic tunnel.

8. MUNICIPAL CORPORATIONS ⊂=292(2) — STREET IMPROVEMENT PROCEEDINGS NEED NOT COMPLY WITH WAR FINANCE CORPORATION ACT.

A petition to require a city board of public works to execute a traffic tunnel contract need not allege that the capital issues committee had approved the issuance of the necessary securities under War Finance Corporation Act April 5, 1918, § 203 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115¼m), since the committee's powers are purely advisory.

9. MUNICIPAL CORPORATIONS ⊂=341—FAILURE TO RENDER REGISTERED LANDS LIABLE FOR STREET IMPROVEMENT LIEN NOT JURISDICTIONAL DEFECT.

A failure to render registered lands subject to the lien of street improvement assessments does not invalidate the proceedings, but merely lessens the contractor's security.

In Bank.

Application for writ of mandate by John Hayes against Lorin A. Handley, Owen McAleer, and P. P. O'Brien, as the Board of Public Works of the City of Los Angeles. Writ granted.

Albert J. Sherer and Robert Young, both of Los Angeles, for petitioner.

Charles S. Burnell, City Atty., of Los Angeles (Wm. P. Mealey, Asst. City Atty., of Los Angeles, of counsel), for defendants.

LENNON, J. This cause is a proceeding in mandamus, originally instituted in the Court of Appeal of the Second Appellate District, wherein the petitioner prayed for and was granted a peremptory writ of mandate directed to and commanding the defendants, as the board of public works of the city of Los Angeles, to enter into a contract upon behalf of the city with the petitioner for the performance of certain public work. The basic facts upon which the petition for the writ rests and the writ itself depends are succinctly stated in the opinion of the District Court of Appeal as follows:

"The city council of the city of Los Angeles, on the 26th day of October, 1917, duly passed and adopted an ordinance of intention, which was afterwards approved by the mayor, the principal purpose of which was to provide for the construction of a traffic tunnel from a point where Second street intersects Hill street in said city, westerly and under Second street as the same now is laid out and established over and across elevated ground. As an incident to this improvement, the ordinance also pro-

vided for changing of grades in portions of intersecting streets, the building of stairways and appropriate tunnel approaches, a description of which work was fully set out in the ordinance. The ordinance also described a district to be benefited by the improvement and provided that special assessments be made to pay the costs and damages. The ordinance further provided as follows: 'That the proceedings for the aforesaid improvement shall be had and taken under an act of the Legislature of the state of California, designated and known as the "Street Improvement Act of 1913," approved June 16, 1913, and under all acts supplementary thereto or amendatory thereof.' It contained a further provision that bonds should be issued in accordance with the provisions of the same act. Notice was given by the board of public works of the municipality of the contemplated work, and, after protests were made and regularly disposed of, the work was by ordinance ordered to be done, and the board of public works, pursuant to direction of the ordinance, advertised for bids for the doing thereof. The petition further sets forth that petitioner was the lowest responsible bidder, and that his bid was duly accepted by said board of public works. Petitioner alleges further that said board refused without cause to enter into a contract with petitioner or to approve the sufficient bond offered by him. Hence this proceeding."

While counsel say in their briefs that the cause was submitted for decision to the Court of Appeal upon the demurrer to the petition, the record before us does not say so, nor does the record show the interposition of a demurrer. However, in view of the fact that the record does not show the presentation of a pleading by the defendants which joined issue with the facts pleaded in the petition, we will assume, as we did in the first instance, in furtherance of expediting the termination of a controversy which so largely involves public interest, that the case did go off upon demurrer, and that therefore no questions of fact were considered by the Court of Appeal save those presented by the petition and admitted by the demurrer.

All of the points made in opposition to the writ save one were disposed of by this court upon the first hearing in favor of the contention of the defendant, and that one point related to the sufficiency of the noncollusive affidavit, which was drafted and attached to the bid of petitioner with the apparent purpose of meeting the requirements of section 207b of the charter of the city of Los Angeles. Assuming, as we were induced to believe by the original briefs of counsel, that such an affidavit was required by said section as part of the jurisdictional proceedings for the consummation of a contract of the character of that in controversy here, we did no more than consider and determine the efficacy of the affidavit measured by the requirements of the charter section. At this point it may not be amiss to note the fact that the petition for the writ, as originally prepared and presented to the Court of Appeal, made no specific mention of the making of the noncollusive affidavit required by said section 207b, but, after the case was partially briefed in the court below and before it was submitted for decision, paragraph 54 of the petition was, by stipulation of counsel, industriously amended by the addition of a paragraph which averred the making of a noncollusive affidavit and set out the language thereof. The making of this amendment to the petition by consent of counsel for the parties to the proceeding indicates very clearly that it was the then belief of all of the counsel in the case that the preparation and presentation of a noncollusive affidavit was, as a matter of law, an essential requisite to the validity of petitioner's bid and the jurisdiction of the defendant board to enter with the petitioner into the contract in controversy. This conclusion is confirmed by the fact that counsel for the defendants throughout their briefs here and in the Court of Appeal iterated and reiterated the contention, without evoking from counsel for the petitioner any contention to the contrary, that section 207b of the city charter covered and controlled contracts of the character in controversy here, and consequently compelled conformity, literally or substantially, with its provisions before such a contract could be consummated. Indeed, it may be said that counsel for petitioner conceded the correctness of this contention and sought to avoid the effect of it only upon the theory that, while the noncollusive affidavit in question was not in the exact language of the section, nevertheless its language was sufficiently comprehensive to meet the test of a substantial statement of the facts required by the section, and was therefore sufficient to confer jurisdiction upon the board to consummate the contract. The discussion in the briefs of the sufficiency of the affidavit was confined solely to a consideration of that single section of the charter as if it, and it alone, was the section of the charter which controlled the situation. No mention was made, nor hint given, of the existence of other sections of the charter to which said section 207b was rightly and inseparably related and dependent upon for a proper understanding and construction of its scope and effect. As a consequence of counsel's inexplicable neglect in this particular, we were, as doubtless was the Court of Appeal in the first instance, impressed with the belief that it was an admitted and undisputed fact in the case that section 207b of the charter was a separate, independent provision thereof, and accordingly considered it as having application to the contract in controversy. Now, upon petition for rehearing counsel for petitioner, with no pretense of apology for their failure to heretofore fully and ex-

plicitly discuss and develop this phase of their case, for the first time make the point that section 207b of the charter of the city of Los Angeles does not apply to contracts for street improvements paid for under the special assessment plan. In support of the point thus made, our attention is directed for the first time to the fact that said section is an inseparable part and parcel of article XX of the charter, and that it is only one of several sections of that article which relate exclusively to the creation and consummation of contracts with the city wherein the contract price is to be paid directly by the city.

[1] Article XX of the charter is entitled "Contracts and the Sale of Property." It originally consisted of one section only. In 1911 it was adopted as a separate charter amendment in the form in which it now exists. Stats. 1911, p. 2145. Standing alone, the provisions of section 207b are undoubtedly broad enough to cover and control contracts with the city generally, but, when considered in connection with the other sections of the same article, it seems too plain for argument that it was not the legislative intent that said section should apply to contracts initiated under the special assessment plan, which was the character of the contract here involved. The first section of article XX (section 207) requires, in effect, that, where the expenditure is over $500, with certain exceptions, the contract must be in writing, approved by the city attorney as to form. There must be an authorization by a two-thirds vote of the city council in cases of an expenditure in excess of $1,000. Section 207a prescribes certain conditions which must be complied with to render binding upon the city those contracts the form of which is regulated by the preceding sections, to wit: The publication of notice inviting proposals for the performance of contracts; furnishing of a bond for the faithful performance of the same; letting of the contract to the lowest bidder, etc. Then follows section 207b, which provides that—

"Every proposal to perform a contract with the city, or with any board, commission or officer thereof, shall have thereon, or attached thereto, the affidavit of the bidder that such proposal is genuine, and not sham or collusive, or made in the interest or in behalf of any person not therein named, and that the bidder has not directly or indirectly induced or solicited any other bidder to put in a sham bid * * * or to refrain from bidding. * * *"

By section 207c the amount of expenditure which such officer, commission, or board may contract for each month is limited to one-twelfth of the fund apportioned to such officer, commission, or board for the fiscal year. Section 207d, the last section of article XX relating to the execution of contracts, regulates the purchasing of materials for the city. Of course, it would be violating the elementary rules of statutory construction to hold that section 207b, which was adopted simultaneously with the adoption of the other sections of the same article, should have a different scope and effect than those sections with which it appears; in other words, the true meaning of section 207b can be arrived at only by a consideration of it in its connection with and relation to the statute as a whole. Construing together, then, section 207 and the succeeding sections of article XX, relating to the making of contracts, and considering their applicability to the letting of contracts for street improvements, it cannot be questioned that sections 207, 207c, and 207d deal in terms only with contracts for which the city is liable in its corporate capacity out of the public funds as distinguished from moneys raised by special assessment. We find in section 207a a scheme for the letting of contracts which includes the time of advertising, the nature and character of the advertisement, the provision that the notice must specifically reserve the right to reject any and all bids and provisions with relation to the execution of the contract and bonds, which are not only inconsistent with the Street Improvement Act of 1913 (Stats. 1913, p. 954), but inconsistent with all the various statutes for improvement of streets theretofore passed by the Legislature and with those in force in the city of Los Angeles in 1911. This leads to the conclusion that it was not contemplated by these charter amendments of 1911 to make the same applicable to street improvement contracts where the improvements were to be paid for by local assessments. It thus appears that four of the five sections under consideration apply only to general contracts of the city. So considered, the conclusion inevitably follows that section 207b of article XX of the charter of the city of Los Angeles does not apply to contracts for such improvements made under special proceedings to be paid for by local assessment.

A further consideration leading to the same conclusion results from the amendment to the charter of the city of Los Angeles which was adopted in 1917. Article 1, § 2, subd. 19, and particularly subdivision "c" thereof (Stats. 1917, pp. 1691, 1692). The city is thereby authorized to make any necessary improvements upon its public streets and to pay for the same by special assessment. The amendment, besides authorizing the city to adopt a procedure ordinance therefor, provides that such powers "shall be supplemental, additional and alternative" to the general laws of the state conferring upon municipalities the power to make such improvements. The city council was thereby empowered to adopt, as was done in the present case, the provisions of the Street

Improvement Act of 1913 as the basis for the street improvement proceeding. As this general law provides a complete method of procedure, including the method of advertising for bids and letting of contracts, if the requirements there set out are complied with, the contract executed in pursuance thereof must be upheld. It is true that an express provision of the charter requiring all contracts for street improvements, whether let by assessment methods or otherwise, to be let upon bids only where the bids are accompanied by the noncollusive affidavits, might nevertheless be held to be valid and applicable because not inconsistent with the state law. But that is not the question we have under consideration here, which is: What was the intent of the people of Los Angeles and of the Legislature in the adoption of the provisions of the charter with reference to the letting of contracts? Not only do the terms of section 207 et seq., but also the terms of the amendment just discussed, confirm us in the conclusion that there was no intention in those sections to deal with contracts for street improvements to be paid for by special assessment, and we hold, therefore, that the affidavit in question was a wholly unnecessary appendage to petitioner's bid and was in no wise an essential prerequisite to the letting of the contract.

The remaining points presented in opposition to the petition are sufficiently disposed of in the opinion originally filed here and will stand as stated in that opinion as follows:

[2] "While it is admitted that the charter of the city of Los Angeles authorized the construction of a tunnel such as that now proposed, nevertheless it is contended that the municipality is without authority to provide for defraying the cost of such improvement by special assessment. It cannot be denied that the authority to levy a special assessment for this purpose is conferred by the Street Improvement Act of 1913, and the amendatory act of 1917, pursuant to which the city council of the city of Los Angeles purported to act. The board insists, however, that the city cannot take advantage of the authority so conferred. In this behalf the board relies upon sections 6 and 8 of article 11 of the state Constitution, as amended in 1914, and upon subdivision 51 of section 2 of article 1 of the charter of the city of Los Angeles. These constitutional and charter provisions, it is contended, have the effect of so completely isolating the city of Los Angeles from the rest of the state of California that, if its charter gives it powers concerning any municipal affair, it has those powers, but, if its charter is silent as to any such power, no general law can confer it. That such, however, is not in all respects the effect of the provisions referred to has recently been declared in Cole v. City of Los Angeles, 182 Pac. 436. Adopting the decision in that case as controlling herein, we hold that, if the legislative body of the city of Los Angeles is indeed supreme by virtue of the constitutional and charter provisions above noted, and if, without affirmative action on the part of the legislative authority of the city, no general law with relation to municipal affairs has any binding effect thereon, it is nevertheless true that the legislative body of the city has power to adopt any state law applicable to its municipal affairs, and that in the matter of providing for defraying the expense of the proposed work of construction that was effectively done by the ordinance of intention and the ordinance ordering the work to be done.

[3] "It is next contended that the construction of the tunnel will create an additional servitude upon the land of abutting owners. Addressing itself to a somewhat similar question, this court said in Colegrove Water Co. v. City of Hollywood, 151 Cal. 425, 429, 430, 90 Pac. 1053, 1055 (13 L. R. A. [N. S.] 904): 'The right of the abutting owner is, of course, always subordinate to the rights of the public. In city streets the easement of the public is, as a result of the conditions of urban life, more extensive than in roads through sparsely inhabited regions. In cities it is customary to devote not only the surface of the street and the space above the street to public use, but the municipality may, and frequently does, occupy the soil beneath the surface for the accommodation of sewers, gas and water pipes, electric wires, and conduits for railroads. Where the city undertakes to occupy the space above or below the surface of the street for any purpose within the scope of the public uses to which highways may be put, the use by the owner of the fee must yield to the public use.' It is well settled that the manner and extent of such public use is not limited by any standard of methods of use in vogue at the time of dedication. 'On the contrary,' said this court, in Montgomery v. Santa Ana, etc., Co., 104 Cal. 186, 191, 37 Pac. 786, 788 (25 L. R. A. 654, 43 Am. St. Rep. 89), 'we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use subject to municipal control and limitations for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land.' While the precise question, namely, as to whether or not a tunnel for traffic is a reasonable street use, has never been determined in this state, it has apparently been assumed without question in a number of recent cases that, if the city has legislative authority to construct a traffic tunnel, the rights of abutting property owners would not stand in the way of its construction on the theory that an easement is being asserted not contemplated by the original dedication. Gassner v. McCarthy, 160 Cal. 82, 116 Pac. 73; Mardis v. McCarthy, 162 Cal. 94, 121 Pac. 389; Thompson v. Hance, 174 Cal. 572, 163 Pac. 1021.

"Authorities from other jurisdictions, moreover, confirm the conclusion that traffic tunnels must be recognized as a necessary part of a modern system of highways. We find the Su-

preme Judicial Court of Massachusetts stating its opinion as follows in a well-considered and carefully reasoned case: 'Our system, which leaves to the landowner the use of the street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, but the public rights in these lands are plainly paramount, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it, in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property abutters. The increase of requirements for the public within the streets of our large cities has probably equaled, if it has not surpassed, the increase of requirements for business along the streets. The Legislature, the guardian of public interests and of private rights, has determined that the space below the surface of certain streets in Boston is needed for travel. The question is whether action under the statutes involves an acquisition of a new right as against the landowner, or only an appropriation and regulation of existing rights. It hardly can be contended that this is an unreasonable mode of using the streets in reference either to travelers or abutters. If it is not an unreasonable mode of using them, the mere fact that it deprives abutters of the use of vaults and other similar underground structures in the streets, which they have heretofore maintained, is of little consequence. Abutters are bound to withdraw from occupation of streets above or below the surface whenever the public needs the occupied space for travel. The necessary requirements of the public for travel were all paid for when the land was taken, whatever they may be, and whether the particulars of them were foreseen or not. The only limitation upon them is that they shall be of a kind which is not unreasonable. In the present case the travel which is being provided for is from place to place within the city. There are stopping places on the subway at convenient points. In that respect it is different from a tunnel designed only or chiefly for travel for long distances. The new method is a substitution in part of a subterranean use of the streets for the use of their surface for the same general purpose. It is impracticable to have direct communication between the premises of abutters and the cars in the tunnel, but by going a short distance access to them may be had from any place. We are of opinion that this use of the streets is within the purposes for which the lands were taken, and that no additional servitude is created by it.' Sears v. Crocker et al., 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577. We concur in this conclusion and decide that the construction of the proposed tunnel will be within the right of the city as acquired under the dedication of the ground for street purposes.

[4, 5] "Defendants make several points touching the validity of the notices published by the board of public works. First, with respect to the notice of street work, it is insisted that the board failed to act in the manner required by law in causing the notice to be published and failed to properly designate the paper in which publication was to be made. The notice in question was signed by the president of the board and was published for the period of time required by law in the paper designated for such publication by the city council. It is urged by defendants that the president of the board was without authority to execute the notice, and that the board itself should have designated the paper in which it was published. With reference to the first objection, it appears that, while there was no special order passed by the board directing the president to sign the notice of street work, the board had undertaken to authorize that officer to sign such notices by a general order passed some years before. Defendants' counsel earnestly questions the power of the board to make such a general order, arguing that the charter provision authorizing the president to sign notices 'on order of the board' requires independent action by the board upon each separate case as it arises. The argument that by the general order referred to the board undertook to abandon the exercise of the discretion reposed in it by law and to delegate its duties to the president would doubtless have much force were the signing of such notices a discretionary act. Meuser v. Risdon, 36 Cal. 239, 244. But the publication of such notices was mandatory upon the board, and no discretion in the matter was left in that body. In the instant case the law and the order of the city council required the board to make the publication of the notice and the act was of a perfunctory nature and of a purely ministerial character. The general order of the board authorizing the president to perform such a perfunctory and ministerial duty was clearly sufficient. Addressing ourselves to the second objection, namely, that the board failed to designate the newspaper in which the notice was published, we find it admitted that there is no provision of the Street Improvement Act or of the charter which directs that the newspaper in which the notice is to be published shall be formally designated and no provision declaring what officer shall select the newspaper. The law does, in effect, provide that the board shall cause the notice to be published, and this provision, it is true, might well be construed as authorizing the board to designate the paper. However, the publication of the notice was, in fact, made in the newspaper designated by the city council as the one in which the notice of intention should be (and was) published, and this, we think, was a substantial compliance with the requirement of the statute. Had the power to make or withhold publication of notice been vested in the board, it may be conceded that a failure to make a formal order designating the paper for publication might have created a substantial defect in the proceedings for the reason that the board would have had power to abandon the proceedings. Stanwood v. Carson, 169 Cal. 640, 648, 147 Pac. 562. But here the board had merely a perfunctory statutory duty to perform, and it performed that duty when it published the notice in the paper designated in the ordinance of intention.

[6, 7] "Similar objections are made to the notice inviting bids. The city council directed the board of public works to give the notice and designated the paper for the publication. The secretary of the board signed and posted the notice and caused it to be published in the designated newspaper. It is first contended that this procedure did not amount to a compliance with the requirement of the Street Improvement Act that the legislative body of the municipality should cause the notice to be published in a

paper designated by it. The obvious answer is that the legislative body of the city of Los Angeles did designate the newspaper in which the notice was published, and that it did cause the posting and publication by directing the board of public works to perform the ministerial acts connected therewith. This direction was natural and proper in view of the fact that the board was the body which had charge of the street improvement work in the city, and which, moreover, had independent authority, under section 145 of the charter, to perform those acts. It is further objected, however, that the board failed to make an order authorizing the notice to be given, and that the notice should have been signed, not by the secretary, but by the president of the board. The notice was signed by the secretary pursuant to a general order of the board which directed that officer 'to post, with specifications, and to publish all notices required by law to be posted and published, and in strict accordance therewith, whenever the city council of the city of Los Angeles shall by ordinance order any work of street improvement or sewer construction to be done under the general street law of the state of California, and shall in such ordinance direct the board of public works to post and to publish notices inviting sealed proposals or bids for doing said work.' We consider this authorization sufficient. While it is true that the formal acts of the board must in general be executed by the president (or, in his absence, by two members of the board), we are of the opinion that it was competent for the board to dispense with such formal execution and to direct the secretary to act in the matter in the case of the performance of a purely perfunctory and ministerial duty in which the board must act virtually without discretion. The existence of such authority is confirmed, we think, if further confirmance is necessary, by subdivision (e) of section 143 of the city charter, which provides that the secretary of the board shall post and publish all notices ordered by the board. The objection that the order referred to was a general one is answered by the fact that, the action of the board being purely ministerial, a special order was wholly unnecessary. It is finally objected that the general order is insufficient for the reason that it does not specifically refer to notices concerning tunnel work. The order was general in its nature, however, and its evident purpose was to include all work of improvement of the general character proposed by the ordinance here considered.

"It is next objected that the award of contract was made to the petitioner by the board of public works, whereas, it is insisted, it should have been made by the city council. Petitioner contends that the power to award the contract was vested in the board by that portion of section 145 of the city charter which reads as follows: '(a) The board of public works shall have and exercise all the powers and duties that are now or may hereafter be conferred or imposed by law upon the city council relating to: (1) The advertising for and inviting of proposals or bids for doing any work ordered by the city council to be done in or upon any streets, avenues, lanes, alleys, courts or places, or in the construction of any sewer or drain, ordered by the city council in or over the right of way granted or acquired for such purpose; (2) the examining, considering and declaring of such proposals or bids; (3) the awarding, letting or reletting of contracts for doing any of said work so ordered, the giving notice of such award, the rejection of proposals or bids for doing such work, and the granting of extensions of time for the completion thereof by the contractor therefor.' Defendants, on the other hand, deny the applicability of these charter provisions in the instant case on the ground that the words 'work * * * in or upon any streets, avenues, lanes, alleys, courts or places' are not sufficient to include the work of constructing a traffic tunnel under a street. We are of the opinion, however, that the construction of a tunnel is naturally and properly to be described as 'work in' the street and as such is sufficiently covered by the words of the charter provision above quoted.

[8] "It is also urged that the proceedings, as set forth in the petition, were in violation of that portion of the 'War Finance Corporation Act' which deals with the powers of the capital issues committee as to the issue of securities by corporations. Act April 5, 1918, c. 45, § 203, 40 U. S. Stat. at Large, 513 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 3115⅘m). In this behalf it is insisted that the demurrer to the petition should have been sustained for the reason that it does not appear therefrom that the committee had determined that the sale or offering for sale or for subscription of the bonds to be issued to pay for the proposed work would be compatible with the national interest. As we construe the statute in question, it merely conferred upon the committee power, which it might, but need not, exercise, to investigate, pass upon, and determine whether or not the sale of any securities which, at the time of the passage of the act, had not passed beyond the control of the obligor issuing the same, was compatible with the national interest. Such a determination having been made, the powers of the committee apparently terminated; Congress evidently deeming the force of public opinion sufficient to prevent the marketing of securities whose sale was considered inadvisable by the committee. Upon this view of the matter, the powers of the committee are to be regarded as purely advisory in their nature, and, had its sale of the bonds proposed herein been withheld, no legal impediment would have been placed in the way of the issuance and sale of these securities. It follows that it was not incumbent upon petitioner to allege that the committee had approved the sale of the bonds to be issued in payment for the proposed work of construction.

[9] "It appears from the petition that the boundaries of the assessment district described in the ordinance of intention included land registered under the Land Title Act of 1914 (Stats. 1915, p. 1932). Defendants contend that the land so registered has not been subjected to the lien of the assessment by reason of an alleged failure to properly file with the registrar a notice of the ordinance passed to construct the tunnel. It is not necessary to pass upon the merits of this contention; for, even assuming its soundness, it does not afford the basis for a defense in the present proceeding. We may assume that all registered land within the assessment district remains at the present moment free from any lien, and, since the petition does not state how much of the land in the district

is registered, we may further assume that it is all registered. 'On this assumption,' asserts counsel for defendants, 'there is at present no land which is legally assessable for this improvement, and since it is not proposed to pay for the improvement otherwise than by levying assessments, the whole proceeding must fall.' The conclusion that the whole proceeding must fall is unsupported by argument or authority. The failure, if any, to file the notice which would subject the registered land in the district to the lien of the assessment certainly did not affect the power of the city to proceed in the matter. The opening of the proposed tunnel is concededly a municipal affair, and no provision has been called to our attention in the charter or ordinances of the city the effect of which would be to make a failure to file a notice pursuant to the requirements of the Land Title Act a jurisdictional defect. Nor, in view of the fact that any unregistered lots included within a district containing registered land will only be assessed in accordance with benefits received, is there any necessity of considering such a failure a jurisdictional defect in the absence of a positive legislative declaration. This being so, whether or not there is any land in the district subject to the lien is merely a question of practical interest to the contractor, who must look to such liens to satisfy his claims, and if 'the whole proceeding must fall,' it must fall, not by reason of any technical legal defect, but because, as a practical matter, no contractor will take his chance on his ability to enforce the lien of the assessment on insufficient land to pay him for his work."

The peremptory writ of mandate is granted as prayed for.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

182 Cal. 238

In re FISK'S ESTATE. (L. A. 6085.)

(Supreme Court of California. Feb. 17, 1920.)

1. WILLS ⟸531(4)—BEQUEST TO BE DIVIDED EQUALLY "BETWEEN" DAUGHTER-IN-LAW AND FOUR CHILDREN NAMED OF SISTER-IN-LAW REQUIRES DIVISION IN FIVE EQUAL PARTS.

Bequest of residue to be divided equally "between" testatrix's daughter-in-law and the four children of testatrix's sister-in-law, with names of the four then given, will be construed as calling for equal division "among" the five; there being no clear indication in the will that this would do violence to the evident purpose of testatrix.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Between.]

2. WILLS ⟸527—WHERE NONE OF RESIDUARY LEGATEES WOULD TAKE IN ABSENCE OF WILL, RULE OF ASSUMING INTENT TO DISTRIBUTE ACCORDING TO LAW OF SUCCESSION INAPPLICABLE.

Rule that, where will is uncertain, it will be assumed testatrix intended distribution in accordance with the law of succession, has no application to a residuary clause, where none of the residuary legatees would take in the absence of a will, though one of them, a daughter-in-law, was regarded by testatrix as a daughter.

Department 2.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Marie Antoinette Fisk, deceased. From a decree of partial distribution, Maude Bryant Fisk appeals. Affirmed.

See, also, 178 Cal. 116, 172 Pac. 390.

A. G. Allen, of Pasadena, for appellant.

Joseph C. Finch and O'Melveny, Millikin & Tuller, all of Los Angeles, for respondent.

WILBUR, J. [1] Maude Bryant Fisk appeals from a decree of partial distribution, claiming that the interpretation placed upon the residuary clause in the will of the testatrix was erroneous, for the reason that the decree provided for an equal division of the property among five persons named in the residuary clause, whereas it should have given one-half thereof to appellant, and distributed the other half to William Dunn, Aida Furst, Charles Dunn, and Clarence Dunn; in other words, that appellant should have received $30,000 instead of $12,000 of the $60,000 distributed. The residuary clause in the will reads as follows:

"All the rest and residue of my estate both real and personal shall be divided equally between my daughter-in-law Maude Bryant Fisk, and the four children of my late husband's sister, Mrs. W. Dunn, viz., William Dunn, Aida Furst, Charles Dunn, and Clarence Dunn, except the memorandum of the following articles to be distributed by my son's widow, Maude Fiske. * * *"

Appellant's contention is largely based upon the use of the word "between" and the phrase "children of my late husband's sister, Mrs. W. Dunn." The argument advanced is that the word "between," when used with strict grammatical accuracy, applies only with reference to two things (Funk & Wagnall's New Standard Dictionary; Webster's New International Dictionary; Century Dictionary & Encyclopedia; Skeat's Etymological Dictionary of the English Language; Ghriskey's Estate, 248 Pa. 90, 93 Atl. 824), and that therefore we must search the will to discover these two things, and, doing so, find therein the daughter-in-law on the one hand and the children of Mrs. W. Dunn, deceased, on the other, and that therefore, when the will provides that the residuum be divided "equally between" the daughter-in-law and the "children of my late husband's sister, Mrs. W. Dunn," it means that the

daughter-in-law takes one-half and the children one-half.

The respondent concedes that, when the word "between" is used in strict grammatical sense, it applies to two things, but calls attention to the fact that it is frequently used in the sense of "among" and has been so interpreted in the construction of wills by many courts, including our own. Senger v. Senger, 81 Va. 687, 697, 698; Kling v. Schnellbecker, 107 Iowa, 636, 78 N. W. 673; Graves v. Graves, 55 Hun, 58, 8 N. Y. Supp. 284; Ward v. Tompkins, 30 N. J. Eq. 3; Lord v. Moore, 20 Conn. 122, 126; Myres v. Myres, 23 How. Prac. 410, 415; Estate of Morrison, 138 Cal. 401, 404, 71 Pac. 453. Giving to the word "between" all the etymological significance to which it is justly entitled, that word alone is hardly sufficient to determine the question involved in the case.

We turn, therefore, to a more complete analysis of the clause, the interpretation of which is here involved. If we take the clause down to and including the words "Mrs. Dunn," and omit the word "four," no doubt would be entertained, and we understand that the respondent concedes that the clause would require a division into two parts, as contended for by the appellant. But the injection of the word "four" into this clause at once suggests a doubt as to the intention of the testatrix with reference to the method of division. This doubt is accentuated by the fact that, following the name of the mother, Mrs. Dunn, are the names of the four children, showing that at the time the will was drawn the testatrix had in mind five individuals who were to be benefited by the residuary clause.

The respondent contends that the rule is universal that, where the description of a clause, such as "children of my late husband's sister, Mrs. W. Dunn," is followed by the names of the individual beneficiaries, that they take as individuals, per capita and not per stirpes, citing Estate of Murphy, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110; In re Barrett's Estate, 132 App. Div. 134, 116 N. Y. Supp. 756, Id., 63 Misc. Rep. 484, 116 N. Y. Supp. 756; In re Kimberly's Estate, 150 N. Y. 90, 44 N. E. 945; Moffett v. Elmendorf, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; White v. White's Guardian, 168 Ky. 752, 182 S. W. 942; Provenchere's Appeal, 67 Pa. 464, 465; Todd v. Trott, 64 N. C. 281; Williams v. Neff, 52 Pa. 326; Almand v. Whitaker, 113 Ga. 889, 39 S. E. 395; Malone v. Majors, 8 Humph. (Tenn.) 577; Wells v. Newton, 67 Ky. (4 Bush) 158.

The character of reasoning by which this conclusion is arrived at is indicated by some of the quotations from the opinions thus called to our attention. In Estate of Murphy, supra, it is said:

"If words which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers, from the designation by name and mention of the share each is to take, that the devisees are to take individually and as tenants in common, and that the descriptive portion of the clause [children of a deceased sister] is intended merely as matter of identification."

Later in the same case it is said of the general rule:

"When in a devise a class and individuals are both mentioned, and nothing appears from other clauses of the will or extraneous evidence requiring a different construction, the devise will be construed as one to devisees individually and not to them collectively—to them as tenants in common, and not to them as survivors of a class."

It should be noted, however, that the devise involved in that will was very different from that involved here. There were, in that case, practically two separate and distinct devises, one interpretative of the other. After the first provision that the residue shall "be equally divided among the four children of my late sister Catherine F. Flynn" occurs the following:

"That is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast."

In Barrett's Estate, supra, the following statement of the surrogate is approved:

"In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportion; the share of each being dependent for its amount upon the ultimate number."

In re Kimberly's Estate, supra, the gift being "unto my three sisters, Mary, Annie, and Louisa," it was held not to be a gift to a class; the court saying:

"Here the number of persons was certain at the time of the gift; the share each was to receive was also certain, was in no way dependent for its amount upon the number who should survive, and hence this case is not within the principle invoked."

In Moffett v. Elmendorf, supra, it was said:

"The courts invariably attach great importance to the designation of the devisees severally by name, and to a provision that they shall share the gift in fixed and definite proportions. * * * Necessarily, where the devisees are described as a class only, their names not being mentioned, and there is nothing to indicate a gift to individuals, the gift is to a class, as such, and not to particular persons who may compose a class."

The court, in its findings, set out practically all the evidence with reference to the relationship of the parties bearing upon the correct interpretation of the will. This was evidently done in order that we might be in as favorable a position to determine the difficult question involved as was the trial court, so far as that interpretation depends upon extraneous evidence. The most significant of this is a letter, referred to in the will, with reference to a legacy of $15,000 to the appellant, who was the widow of the only son of the testatrix. From the time of her marriage in 1900 she and her husband lived with the testatrix until the husband's death in 1902, after which appellant lived with the testatrix about one-half the time, and was there treated as a daughter until the death of testatrix. Evidently the testatrix regarded the appellant with maternal affection. If, in ascertaining the meaning of the will, it is proper to measure the feelings of the testatrix by the nature of the disposition of her property, we find abundant evidence of the affection she had for her daughter-in-law. Testatrix's home, valued at $10,000, with its contents, except in certain particulars mentioned, was left to the appellant. The testatrix also bequeathed appellant her sealskin sack, souvenir spoons collected by appellant's deceased husband, diamond ring, gold thimble, and other personal effects, which were to be distributed by appellant as her judgment dictated. Appellant was made an executrix of the will. She was also made a special bequest of $15,000, with a letter of advice of how "I wish her to use the whole or a part of the fund." This letter, thus referred to in the will, is to the effect that the appellant was to use the whole or such part thereof as might be necessary in order to make the bequest to Princeton University equal to at least $50,000.

It is argued from these considerations that the affectionate relationship between the testatrix and the appellant was such that it was her intention to give a larger proportion of the residuum of her estate to appellant than a one-fifth thereof, and in this connection it is disclosed that, while the relationship between the testatrix and the other persons mentioned in the residuary clause was friendly and to an extent affectionate, it did not partake of the same intimacy existing between appellant and the testatrix. The argument in this behalf is a most persuasive one. But, if we turn to the provisions of the will, we find that Aida Furst, one of the four persons named in the residuary clause, was given a bequest of $10,000, diamond earrings, mahogany sofa, and testatrix's watch, and that her son, Sidney Dale Furst, was given $2,500, and that by the codicil $5,000 was left for the education of her son Wolcott. If we take the amount of the legacy as the measure of affection, there is no great disproportion between the recognition of the respondent Mrs. Aida Furst and the appellant, and if these two names only were involved in the residuary disposition there is no such disparity in the provisions made for them in the balance of the will as would justify the conclusion from that fact alone that the testatrix intended, in the residuary clause, to give to one more than to the other. It should be observed, also, with reference to the other persons mentioned in the residuary clause, that while they were not given other bequests, the son of Charles Dunn was given $2,500, and the daughter of William Dunn was given $2,500 and some small tokens. Thus the three residuary legatees, Mrs. Aida Furst, Charles Dunn, and William Dunn, were recognized by gifts to their children, amounting in each case to $2,500. So that, aside from the special bequests to Mrs. Aida Furst, we find these three persons mentioned in the residuary clause treated alike, and that Clarence Dunn could not be similarly recognized because he had no children.

Upon the question of the amount left to these various residuary legatees, the bequest of $15,000 to the appellant has much significance, and in order to appreciate that significance it will be necessary to state further facts bearing upon the purpose of the testatrix. The letter of advice with reference thereto reads as follows:

"My Dear Maude: When you read this I shall be beyond the worry and strife of this world. You know well my great anxiety about the memorial in Princeton University for the dear one you and I both loved so well. I, in going to be where he is, leave you to carry out my intentions with full confidence in your integrity to carry out my wishes. It is my desire that Princeton University have $50,000 to invest as I have stated in my will. Fearing that I might, according to the laws of California, so distribute my estate as to frustrate my intentions for the bequest, I leave you $15,000, a part or all of which I expect and direct that you give to Princeton to make up the deficit which may be the result of my devising to Princeton only one-third of my estate minus the other bequests which are not to individuals, and in this manner Princeton will receive the $50,000 which I desire to leave to it. Now, my dear, I hope you will have many happy days in the home on California street and have health to enjoy the means you will have. Do not remember my faults so well as the loving interest I have always felt in you as all there was left to me of the dear son, who was my idol, even with all my failings.

Lovingly,
Mother.

"June 15, 1907.
Marie A. Fisk."

It will be observed from this letter that the cardinal purpose of the testatrix was to create a fund of at least $50,000 for the memorial at Princeton University. In giving $15,000 by this special legacy to the appellant, she was willing that the amount received by the appellant should be reduced by

such an amount as might be needed to increase the gift to the University to $50,000. The testatrix was fully advised as to the restriction contained in the law of California limiting charitable bequests to one-third of the estate. Civ. Code, § 1313. Having given charitable bequests other than that to the university, amounting to $12,000, she evidently felt that the share which the university would receive under the will might not exceed $35,000 (as thus only $15,000 would be required to make up the $50,000); that is to say, she recognized that one-third of the estate might not exceed $47,000, and that the estate in that event would be $141,000. If the estate had not exceeded this amount, and the residuary clause had been divided in five portions, appellant would have received under the will in all nearly twice as much as Charles, William, and Clarence Dunn, and an amount about equal to Mrs. Aida Furst. But this evidently was the lowest point to which, in the mind of the testatrix, the gift to her daughter-in-law could be reduced. If, however, we assume that the interest which the university would take under the will, exclusive of the $15,000, was $50,000, the entire estate would amount to $186,000, the residuum would be $100,000, and the appellant would receive $45,000, Mrs. Aida Furst would receive $30,000, and Charles, William, and Clarence Dunn each $20,000. By reason of the fact that the appellant was given a special legacy of $15,000, to be used as indicated, it followed that for every $15 added to the estate between $147,000 and $186,000, she took $7 as against $2 to each of the other residuary legatees; that is to say, she took one-third of the increase of the estate which would otherwise be required from the $15,000 for the university, and she took as a part of the residuary legacy one-fifth of the other two-thirds, making a total of seven-fifteenths, as against two-fifteenths to each of the other residuary legatees. It appears from the decree of distribution that the value of the estate is such that appellant will receive the entire $15,000, as was, no doubt, intended by the testatrix. Indeed, as the will speaks from the date of the death, it must be applied to the situation at that time, and we must assume that the testatrix intended the appellant to have the entire $15,000.

This discussion brings us to the conclusion that, notwithstanding the evident affection of the testatrix for the appellant, there is no clear indication in the will that an equal division of the residuum would do violence to the evident purpose of the testatrix. While great emphasis is placed by the appellant upon the apparent intention of the testatrix that the daughter-in-law should remain in the home and maintain it as such, and the fact that outside of the moneys coming to her from this estate she had an income of about $1,000 per annum, we cannot see that here is any clear light which will show the intention of the testatrix. She may well have felt that it would be better for her daughter-in-law to make some effort in her own behalf than to remain alone in a home and be waited upon by servants. In any event, after canvassing the various contentions of the parties, we must return to a consideration of the language used by the testatrix and find herein, if possible, the key to her intentions.

[2] In this connection appellant invokes a rule of construction which, we think, has no application to the will in question, namely, the rule that, where property is bequeathed and the will is uncertain, the court, in ascertaining the purpose of the testatrix, will assume the intent to be to distribute the property in accordance with the law of succession, and, in the absence of a clear intent to make other disposition, interpret the will accordingly. This rule is invoked upon the theory that, inasmuch as appellant was regarded by the testatrix as her daughter and the other residuary legatees as more distant relatives, connected only by marriage, we should apply this rule of construction. The insurmountable difficulty in that course lies in the fact that none of the residuary legatees would take in the absence of a will. For that reason there is no room for the operation of the rule, however just such an application might otherwise seem to be.

After canvassing the whole matter, and all the arguments, so diligently and effectively presented by counsel, we are inclined to think that the strong inference to be derived from the use of the word "between" by the testatrix, who was a cultured woman and well acquainted with the use of language, is overcome by the use of the names of the residuary legatees, and that a consideration of the entire residuary clause shows that she had in mind five individuals to whom the residuary legacies were to go, and that in providing for distribution these individuals thus named were to share alike. In arriving at this conclusion we are mindful of the fact that a contrary one might well be reached, and that no human tribunal will ever be able to ascertain exactly what the testatrix meant. But courts are charged with the duty of distributing the property left by the testatrix, and, for that purpose, of ascertaining the meaning of her will by the application of such rules of interpretation and evidence as bear thereon. So construed, we hold that the decree of the trial court was correct.

The decree of partial distribution is affirmed.

We concur: LENNON, J.; KERRIGAN, Judge pro tem.

182 Cal. 294

CHAPMAN v. JOCELYN. (L. A. 4900.)

(Supreme Court of California. Feb. 19, 1920. Rehearing Denied March 18, 1920.)

1. MUNICIPAL CORPORATIONS ⊜582—STREET ASSESSMENT DEED EVIDENCE THAT NOTICE TO REDEEM WAS GIVEN.

Under the Vrooman Act with amendments in force in 1912, making street assessment deeds primary evidence of the regularity of all proceedings, such a deed, in the absence of proof to the contrary, proves the giving of notice to redeem if such notice is essential to its validity.

2. CONSTITUTIONAL LAW ⊜139—MUNICIPAL CORPORATIONS ⊜575—VALIDITY OF STREET BOND ASSESSMENT DEED DETERMINED UNDER LAW EXISTING WHEN BOND WAS ISSUED; SALE FOR STREET ASSESSMENT WITHIN CONTRACT CLAUSE OF CONSTITUTION.

Where property was sold to satisfy a street assessment bond, the validity of the sale must be determined by the statutes in force at the time the bond was issued, in view of Const. art. 1, § 16, forbidding the passage of laws impairing the obligations of contracts.

3. MUNICIPAL CORPORATIONS ⊜527—STREET ASSESSMENT A "CONTRACT."

A "street assessment" is a contract, and statutes in force at the time prescribing the manner of its enforcement are a part of such contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

4. MUNICIPAL CORPORATIONS ⊜485(1)—STREET ASSESSMENT BOND CONSTITUTES A "CONTRACT."

A bond issued upon a street assessment after the owner's failure to pay the same within the prescribed time constitutes a "contract."

5. MUNICIPAL CORPORATIONS ⊜575—POWERS OF CITY TREASURER IN STREET ASSESSMENT SALES ARE LIMITED.

In proceedings to sell property for street assessments under St. 1893, p. 33 (St. 1899, p. 40), a city treasurer is bound by the rules applicable to special agents, and his unauthorized acts do not bind the parties concerned.

6. MUNICIPAL CORPORATIONS ⊜575—STREET ASSESSMENT SALES MUST FOLLOW PRESCRIBED PROCEDURE.

The same rules apply in testing the validity of street assessment sales as in sales for ordinary taxes, and the prescribed mode of procedure, so far as it is specific and of possible benefit to the owner, must be followed.

7. MUNICIPAL CORPORATIONS ⊜575—STREET ASSESSMENT NOTICE OF SALE MUST STATE AMOUNT DUE AT DATE OF NOTICE.

Under St. 1899, p. 43, § 5, providing that notice of street assessment sales shall state "the amount due thereon," the amount due on the assessment bond at the time the city treasurer gives the notice of sale must be stated.

8. MUNICIPAL CORPORATIONS ⊜575—FAILURE TO CORRECTLY STATE AMOUNT DUE IN NOTICE OF STREET ASSESSMENT SALE IS FATAL.

The requirement under St. 1899, p. 43, § 5, providing that notices of sale in street assessment cases shall state the amount due, is mandatory, and stating a smaller amount of interest than was actually due was not a substantial compliance with the statute, and rendered a sale made upon such notice void.

9. MUNICIPAL CORPORATIONS ⊜575—UNDERSTATEMENT OF AMOUNT DUE IN STREET ASSESSMENT NOTICE OF SALE IS PREJUDICIAL TO OWNER.

Where a city treasurer understated the amount due for street assessments in a notice of sale given under St. 1899, p. 43, § 5, requiring the amount due to be stated, the misstatement cannot be declared nonprejudicial to the lot owner, since the bondholder might complain if the sale was for too small an amount, and nothing will be presumed against an owner whose property is sold to enforce a lien for a tax or assessment.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action to quiet title by Homer Chapman against Harriet M. Jocelyn. Judgment for defendant, and plaintiff appeals. Affirmed.

Crouch & Crouch, of Los Angeles, for appellant.

Carter, Kirby & Henderson and Albert Lee Stephens, City Atty., all of Los Angeles, James H. Howard, City Atty., of Pasadena, John P. Dunn, City Atty., of Los Angeles, Albert Barstow, City Atty., of Alhambra, W. E. Evans, City Atty., of Glendale, Victor R. McLucas, City Atty., of Santa Monica, William Hazlett, City Atty., of South Pasadena, Frederick Baker, City Atty., of Los Angeles, and Edgar S. Van Meter, City Atty., of Fresno, for respondent.

SHAW, J. The plaintiff appeals from a judgment in favor of the defendant. The plaintiff was the grantee in a deed executed by the treasurer of the city of Los Angeles, in pursuance of a sale made by him to satisfy a street improvement bond issued upon an assessment for the improvement of a street in front of the lot sold. The complaint alleged a cause of action to quiet title. The defendant appeared and answered, denying that the plaintiff was the owner of the lot, and alleging that she was the owner in fee and entitled to possession thereof. Upon the trial, her defense consisted entirely of an attack upon the validity of the deed of the city treasurer under which the plaintiff claimed. The defendant offered no evidence of title in herself.

The proceeding for the street work was begun and consummated under the act of 1885, commonly called the Vrooman Act, with

the amendments in force in the year 1912. The assessment was duly made against the lot for the sum of $83.78. For this sum a bond was authorized and was duly issued on August 3, 1912, as provided in the street bond act enacted as supplemental to the Vrooman Act (St. 1885, p. 140) and the amendments thereof in force at that time (Stats. 1893, p. 33; Stats. 1899, p. 40). The bond was to run for the term of 10 years, and, as authorized in the act, the principal consisted of 10 annual installments. One installment was to be paid on the 2d of January of each year following the date of the bond. The first nine installments were each for $8.38 and the tenth for $8.36. The interest was to be paid semiannually on the 2d days of January and July of each year and was evidenced by 19 coupons, the first being for $2.43, due January 2, 1913, and the two following each for $2.64, due respectively on July 2, 1913, and January 2, 1914. The statute then in force made the bonds prima facie evidence of the regularity of all previous proceedings, including the assessment, and made the deed, when duly acknowledged, "primary" evidence of the regularity of all the proceedings. The amendment of 1913 makes the bond conclusive evidence.

The plaintiff introduced in evidence the deed aforesaid, duly acknowledged. The defendant then introduced the demand made by the bondholder for a sale of the property for nonpayment thereof, the notice of sale thereupon given by the treasurer, with the affidavit of publication thereof, and the treasurer's certificate of sale to the purchaser. It was stipulated that nothing had been paid on the bond. On this evidence the court made findings and gave judgment for the defendant. The title was thereby shown to be in the plaintiff, unless from the evidence it appears that the deed to the plaintiff was invalid.

[1] 1. The first objection offered by the respondent to the validity of the deed is that the evidence of the plaintiff is insufficient because he did not prove the giving of notice to the owner to redeem the property from the sale upon the bond. There is no force in this objection. It is conceded that the deed contained the recitals required by the statute. Hence it was primary evidence of the regularity of all proceedings preceding its execution. Therefore, in the absence of proof to the contrary, the deed proved the giving of the necessary notice to redeem, if such notice was essential to its validity. Empire Securities Co. v. Matthews, 176 Pac. 160; Tilton v. Russek, 171 Cal. 734, 154 Pac. 860.

[2-4] 2. The most serious objection is that the city treasurer did not, in his notice of sale, comply with the statute by reciting therein the amount due on the bond. The case must be determined upon the provisions of the bond act as it existed in 1912 when the bond was issued. The act then in force was enacted in 1899. Stats. 1899, p. 40. The amendments of the act in 1913 made some material changes in the requirements concerning a sale. Stats. 1913, p. 849. A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. Creighton v. Pragg, 21 Cal. 115; Houston v. McKenna, 22 Cal. 553. The bond issued upon such assessment, by reason of the failure of the owner to pay the same within the 30 days allowed to the contractor for the work to collect the same, must therefore also constitute a contract. In effect, the bond creates a power of sale whereby the contractor may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond is issued. The Constitution forbids the passage of a law impairing the obligation of a contract. Article 1, § 16. It follows that a law enacted after such contract is made, and which materially alters the remedy of the bondholder to enforce his lien by means of a sale, or the rights of the owner under the law existing at the time the bond was issued, cannot apply to previous contracts, and can have only a prospective effect. Houston v. McKenna, supra. The case in this aspect is not distinguishable from Welsh v. Cross, 146 Cal. 621, 81 Pac. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796, wherein it was held that a law extending the time for redemption from a foreclosure sale impaired the obligation of a mortgage executed before its enactment.

[5, 6] The city treasurer, being a special agent authorized to execute the power defined in the bond and the statute, is bound by the rules applicable to special agents, as in other cases. His authority is "not to be extended beyond that which is given in express terms, or which is necessary and proper to carry into effect that which is expressly given" (2 Cor. Jur. 556), and such authority "must be strictly pursued and acts beyond those which are legitimately necessary to carry the particular power into effect" do not bind the parties concerned (2 Cor. Jur. 611). Not only is the bond and the statute a contract, but it is a contract forced upon the parties by the compulsion of law enacted in pursuance of the taxing power of the state. The same rules apply to the validity of such proceedings as in sales for ordinary taxes. The prescribed mode of procedure, as far as it is specific and of possible benefit to the owner, must be followed. Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Los Angeles, etc., Assoc. v. Pozzi, 167 Cal. 456, 140 Pac. 581; Tilton v. Russek, supra, 171 Cal. 739, 154

Pac. 860; Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599.

[7, 8] The provisions relating to the sale of property under the bond act, and constituting the terms of the power under which the city treasurer must act, are found in section 5 (Stats. 1899, p. 43). Upon default in either principal or interest of the bond, the holder may demand that the city treasurer advertise and sell the lot. Thereupon "the whole bond, or its unpaid remainder, with its accrued interest, as expressed in said bond, shall become due and payable immediately, and on the day following shall become delinquent." Thereupon, on demand of the holder, the city treasurer shall publish a notice of sale, stating therein "the date, the number, and series of the delinquent bond," a description of the property, "the amount due thereon, and a statement that unless the amount of said bond and the interest due thereon, together with the costs of publication of such notice, are paid, the real property described in said bond will be sold at public auction," on the day therein fixed, at the office of the city treasurer. Subdivision (a).

The act contains no definition or anything indicating the meaning of the phrase "the amount due thereon" in the above provision. The notice of sale is to be given after the bond has become delinquent, and the statute refers to it as a "delinquent bond." The opening paragraph of the section declares that upon the demand of the bondholder the whole bond, with the accrued interest, becomes due and payable immediately, and delinquent on the following day. It is the bond which has thus reached the stage of a matured obligation which is referred to in the phrase "the amount due thereon." In view of the indefiniteness of the statute on the subject, we can perceive no reason for giving this phrase any other than its plain and literal meaning; that is, the amount due on the bond at the time the city treasurer gives the notice. The entire subdivision containing this clause speaks as of that date, and, inasmuch as the context gives no indication of an intention to refer to any other date, it should be given the meaning it expresses, and it cannot reasonably be construed to refer to any other period. The conclusion is that the treasurer, in giving the notice, should state the amount of the unpaid principal and the interest accrued at the time he gives the notice. It is not necessary here to consider the manner in which the amount should be stated, whether by computing the interest himself and stating the total amount of the principal and interest, or by stating the total amount of the principal unpaid, followed by a statement that it bears the fixed rate of interest from the date which would be required by the rules of computing interest on debts. In the present case the amount stated did not comply with either mode, and it did not state correctly the amount due on the bond at that time or at any other time.

The principal of the bond was $83.78. It was dated August 3, 1912, and bore 7 per cent. interest from date. Nothing had been paid on the principal, consequently the coupons falling due after January 2, 1913, did not represent the interest on the entire principal. Those for the year 1913 included interest only on nine-tenths of the principal, those for 1914 on only eight-tenths thereof. They were computed on the assumption that the annual installments of the principal would be paid when due. The notice of sale was dated March 26, 1914, and was published on March 27, 1914. At the latter date the amount of the principal of the bond was $83.78, the accrued interest was $9.66, making a total of $93.44, besides the costs. The notice stated:

"That the amount due on said bond is as follows: Due on principal thereof $83.78; due on amount of interest accrued on said bond $7.71; total amount due on said bond $91.49."

It appears that the city treasurer did not compute the interest, but assumed that the coupons correctly stated the amount thereof. The amount given in the notice was the amount of the matured coupons affixed to the bond, including that for January 2, 1914. As these coupons did not represent the amount of interest on the entire principal, the error is manifest. Under the rules applicable to such proceedings, as hereinbefore stated, the requirement that the notice shall state the amount due on the bond must be considered as mandatory, and it must be strictly followed. The result is that the failure to state in the notice the correct amount due on the bond, and the stating therein of an amount less than was due, was not a substantial compliance with the statute, and a sale made upon such a notice must be considered void. Landregann v. Peppin, 86 Cal. 126, 24 Pac. 859.

[9] It cannot be assumed that the mistake of the treasurer in stating in the notice an amount less than that which was due was one without prejudice to the lot owner. The notice required by the statute is not to be given by the bondholder or by any person over whom he has control. It must be given by the city treasurer. It would result that if the notice is for too small an amount the bondholder would have the right to complain and to avoid the sale, if made without his consent. The existence of such right might well operate to keep others from bidding, to the detriment of the lot owner. Nothing is to be presumed against the owner of the lot and in favor of the proceedings upon a sale of property to enforce a lien for a tax or assessment.

As the sale must be declared void for the reasons above given, it is unnecessary to notice the numerous other objections presented against its validity by the respondent.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; OLNEY, J.; LAWLOR, J.

(182 Cal. 247)

SUCKOW v. BOARD OF MEDICAL EXAMINERS. (L. A. 5340.)

(Supreme Court of California. Feb. 17, 1920.)

1. CONSTITUTIONAL LAW ⊜87 — RIGHT TO PRACTICE MEDICINE IS A VALUABLE "PROPERTY" RIGHT SECURED BY THE CONSTITUTION.

The right to practice medicine is, like the right to practice any profession, a valuable "property" right in which, under the Constitution and laws, one is entitled to be protected and secured.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

2. CONSTITUTIONAL LAW ⊜251—"DUE PROCESS OF LAW" REQUIRES NOTICE AND HEARING BEFORE SOME TRIBUNAL AUTHORIZED TO DETERMINE THE QUESTION.

Under Const. U. S. Amend. 14, prohibiting the deprivation of life, liberty, or property without due process of law, and Const. art. 1, §§ 1 and 13, guaranteeing similar rights, the term "due process of law" means that no one can be deprived of the guaranteed rights without notice and an opportunity for hearing before some tribunal authorized to determine the question.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. CONSTITUTIONAL LAW ⊜56 — BOARD OF MEDICAL EXAMINERS IN PROCEEDING TO CANCEL LICENSE WHILE EXERCISING QUASI JUDICIAL POWER IS NOT A COURT; "JUDICIAL FUNCTION."

While the board of medical examiners, in entertaining a proceeding to cancel or suspend license to practice medicine on the ground of the misconduct of the licensee, is exercising quasi judicial power at least, for the "judicial function" is to decide on the property rights of the citizens and to adjudicate and define rights, the action of the board in suspending a license is not open to attack on the ground that the statute creating the board, etc., is unconstitutional, on the theory that the board was made a court under Const. art. 6, § 1, authorizing enumerated courts, for in no event is such an administrative board deemed a court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Function.]

4. PHYSICIANS AHD SURGEONS ⊜5(3)—DECISION OF BOARD OF MEDICAL EXAMINERS IN ADJUDICATING RIGHT TO PRACTICE MEDICINE REVIEWABLE ON CERTIORARI.

A decision of the board of medical examiners in the exercise of its quasi judicial powers, whereby the board cancels or suspends the right of a licensee to practice medicine, is reviewable on certiorari.

5. PHYSICIANS AND SURGEONS ⊜11(3)—COMPLAINT ON WHICH PHYSICIAN'S LICENSE TO PRACTICE WAS SUSPENDED NEED NOT BE SPECIFIC.

Complaint on which a physician's license to practice medicine was suspended is not open to attack, where it stated the charge, because it was not as full and comprehensive as an indictment or information.

6. PHYSICIANS AND SURGEONS ⊜11(3) — IN PROCEEDING TO SUSPEND A LICENSE BOARD OF MEDICAL EXAMINERS NOT BOUND BY THE RULES OF EVIDENCE PRESCRIBED BY PENAL CODE.

A decision of the board of medical examiners suspending the license of physician to practice medicine is not open to attack, on the ground that there was no competent evidence to sustain the charge, because the evidence was elicited from persons who would in criminal prosecutions have been classed as accomplices and upon whose testimony no conviction could be based, for the board is not limited to the rules of evidence prescribed by the Penal Code.

Department 1.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Proceeding by John K. Suckow against the Board of Medical Examiners of the State of California, to review the action of the board in suspending plaintiff's license. From a judgment for defendant, demurrer to the complaint having been sustained without leave to amend, plaintiff appeals. Affirmed.

Davis & Rush, of Los Angeles, for appellant.

John W. Hart, of Los Angeles, for respondent.

SHAW, J. In a proceeding against the plaintiff of the character authorized by section 14 of the act for the regulation of the practice of medicine as amended in 1915 (Stats. 1913, 722; Stats. 1915, 196), the defendant, board of medical examiners, suspended the license of the plaintiff to practice medicine for the period of one year. Plaintiff had theretofore been duly licensed to practice medicine in California. Thereupon the plaintiff began a proceeding in the superior court to review the action of the board in suspending his license, claiming that the same was in excess of its jurisdiction. The court below sustained a demurrer to the complaint, without leave to amend, and gave

judgment for the defendant. From this judgment plaintiff appeals.

The complaint sets out in full the proceedings taken and the evidence heard by the board on which its order was based. The plaintiff presents three points in support of his claim that the board had no jurisdiction or power to suspend his right to practice medicine. They are as follows:

(1) That the provision of the statute empowering the board of medical examiners to suspend or revoke a license to practice medicine, upon finding the practitioner guilty of "unprofessional conduct," is unconstitutional. (2) That the complaint against the plaintiff, filed with the board, does not sufficiently state any cause for the revocation or suspension of his license. (3) That no sufficient evidence was produced on the hearing before the board to prove their charges or support or justify its action in suspending the license.

[1-4] The argument of the petitioner on the point that the statute is unconstitutional is that by section 1, art. 6, of the Constitution, all of the judicial power of the state is vested in the courts there named and in "such inferior courts as the Legislature may establish in any incorporated city or town, township, county, city and county," and that as this tribunal is not one of the courts particularly named in the section and is not an inferior court of any city, town, township, county, or city and county, it is an attempt by the Legislature to vest part of the judicial power of the state in a tribunal other than any that is authorized by the section. It must be conceded that the power given to the board to revoke or suspend the license of a person duly admitted to practice medicine, upon finding him guilty of charges of unprofessional conduct, as defined in said section 14, is judicial in its nature. "The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured." Hewitt v. Board of Medical Examiners, 148 Cal. 592, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315. The Fourteenth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. Article 1, § 1, of the Constitution of California, provides that all men have certain inalienable rights, among them being those of enjoying liberty and possessing and protecting property, and section 13 thereof provides that no person shall be deprived of life, liberty, or property without due process of law. The deprivation of such right without due process of law would be a violation of these provisions. The meaning of this is that no one can be deprived thereof without notice and an opportunity for a hearing before some tribunal authorized to determine the question. That a board or tribunal so authorized exercises at least quasi judicial power in so doing is well established by our decisions. The judicial function is to decide on the property or rights of the citizen (Robinson v. Board, 16 Cal. 210; Imperial W. Co. v. Board, 162 Cal. 18, 120 Pac. 780; 11 Cor. Jur. 122); to declare the law and define the rights of the parties under it (Frasher v. Rader, 124 Cal. 134, 56 Pac. 797); to determine what shall be adjudged or decreed between the parties (Rhode Island v. Mass, 37 U. S. [12 Pet.] 718, 9 L. Ed. 1233); to decide with whom is the right of the case (People v. Board, 122 Cal. 421, 55 Pac. 131); to ascertain existing rights or establish a title or to determine the rights of the controversy between the parties (Title, etc., Co. v. Kerrigan, 150 Cal. 320, 88 Pac. 356, 8 L. R. A. [N. S.] 682, 119 Am. St. Rep. 199). The determination that plaintiff was guilty and that his right to practice should be suspended comes clearly within the scope of these definitions. Nevertheless it is now well established in this state that tribunals such as the board of medical examiners or other boards empowered to revoke licenses which they have previously granted, for cause defined by the law, are not courts in the strict sense; they are not exercising "the judicial power of the State" as that phrase is used in the Constitution conferring judicial power upon courts, and that statutes creating such boards and conferring upon them such powers are constitutional. Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13; Los Angeles v. Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217; Hewitt v. Board, supra. It is also settled that, where a board has exercised quasi judicial power of the nature of that here in question, its decisions are subject to revision by way of certiorari. Imperial Water Co. v. Board, supra, and cases there cited.

[5, 6] The statute under which the proceeding was had specifies, among other things which constitute unprofessional conduct, the following: "The procuring or aiding or abetting or attempting or agreeing or offering to procure a criminal abortion." The complaint before the board charges that the plaintiff did in the county of Los Angeles, state of California "procure, aid and abet, and attempt, agree and offer to procure, a criminal abortion upon a pregnant woman," naming a certain person. The plaintiff contends that the board could not have jurisdiction unless the charge was as specific and complete as would be necessary to an indictment under the provisions of the Penal Code defining the crime of abortion. In support of its point that there is no legal evidence in support of the decision of the board, its claim is that the charges were sustained wholly by the testimony of persons who would in a criminal prosecution have

been classed as accomplices in the act charged, and that under the Penal Code no conviction can be had upon the testimony of accomplices alone.

We do not deem it necessary to discuss these points at length. Each of them was raised in the case of Lanterman v. Anderson, 36 Cal. App. 472, 172 Pac. 625, and was decided adversely to the contention of the appellant here by the District Court of Appeal of the Second District. A petition to this court for a rehearing of the cause was filed presenting precisely the same points as are presented here, and it was denied. We are satisfied with the principles stated in that case, and it must be considered as authority on the subject. The rules of pleading in criminal cases and the rules limiting the effect of evidence therein as fixed in the Penal Code do not apply to proceedings before the board of medical examiners. No other points are presented in support of the appeal.

The judgment is affirmed.

We concur: LAWLOR, J.; OLNEY, J.

45 Cal. App. 441

HIESTAND et al. v. WEST, Superior Court Judge. (Civ. 3250.)

(District Court of Appeal, Second District, Division 1, California. Jan. 12, 1920.)

EXCEPTIONS, BILL OF ⊂=50—APPELLANTS NOT AGREEING TO AMENDMENTS MUST PRESENT THE BILL WITHIN TEN DAYS.

Where appellants did not consent to proposed amendments to the bill and failed to present the bill of exceptions to the trial judge for settlement within the 10 days prescribed, they are not entitled to have the bill of exceptions settled, though they thereafter agreed to the amendments.

Petition by McClellan B. Hiestand and Lucy Hiestand for writ of mandate to be directed to Z. B. West, Judge of the Superior Court of the State of California in and for Orange County to compel settlement of a bill of exceptions. Writ denied.

William J. O'Brien, of Los Angeles, for petitioners.

Eden & Koepsel, of Santa Ana, for respondent.

CONREY, P. J. Application for writ of mandate to compel respondent judge to settle and certify a bill of exceptions.

The procedure authorized for the purpose of obtaining a bill of exceptions is prescribed by section 650 of the Code of Civil Procedure. It is provided that—

Within ten days after a proposed bill has been by one party served upon the adverse party, the latter may, within ten days, propose amendments and serve the same, or a copy thereof, upon the other party. "The proposed bill and amendments must, within ten days thereafter be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. * * * When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. * * * If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge, * * * for settlement without notice to the adverse party."

In a certain action of Snearly et al. against these petitioners, judgment was entered in favor of the plaintiffs. Thereafter the defendants presented their motion for a new trial, which motion was denied on the 11th day of July, 1919. On the 21st day of July, 1919, defendants' attorney served upon plaintiffs' attorneys a copy of a proposed bill of exceptions. On the 30th day of July, 1919, plaintiffs' attorneys duly served upon defendants' attorney their proposed amendments to said proposed bill of exceptions. Defendants' attorney did not, within ten days thereafter, present the proposed bill and amendments to the judge or deliver the same to the clerk for the judge. It is true that he did, on the 21st day of July, deliver his proposed bill of exceptions to the county clerk at his office, and requested the clerk to give it to the judge; but he never at any time left the proposed amendments with the clerk, and he did not present them to the judge except as hereinafter stated. On the 4th day of September, 1919, defendants' attorney gave notice to plaintiffs' attorneys that the proposed bill and amendments would be presented to the judge on the 12th day of September, 1919, at 1:30 o'clock p. m. At that time defendants' attorney presented to the judge the said proposed amendments, and the judge then and there had with him the said proposed bill which theretofore had been filed with the clerk. At that time the plaintiffs' attorneys objected to the settlement of the bill for the reason that the defendants did not, within ten days after the services on them of said proposed amendments, present the bill with the proposed amendments as required by law.

The facts above stated clearly show that the proposed bill and amendments, if the amendments were not adopted, were not presented within the time limited by the Code, and those facts are sufficient to justify the judge in his refusal to settle the bill if the amendments were contested. Certain additional facts appear, however, which affect the right of petitioners to have the bill settled and certified. In considering these facts it is to be understood that petitioners expressly disclaim that they have sought to be re-

lieved from default under the provisions of section 473 of the Code of Civil Procedure, but they rely directly upon their claimed right and contend that they were not in default. Some of the facts are in dispute. The evidence is in the form of affidavits, including the verified petition and the verified answer. It is stipulated that we may determine the facts from these sworn statements. The additional facts, as we find them to exist, are as follows: On the 8th day of August, 1919, which was within ten days after service of the proposed amendments, Mr. O'Brien, defendants' attorney, and Mr. Eden, one of plaintiffs' attorneys, orally agreed that they would go to the judge to have the bill settled. They found the judge presiding in the court, and Mr. Eden departed without waiting until they could be heard. After the departure of Mr. Eden, defendants' attorney stated to the judge:

"That as to all but one or two of the proposed amendments, they were undoubtedly all right, and that he had no notes to show whether the one or two about which he was in doubt should be incorporated in the bill of exceptions, but that if the notes of the said trial judge, or those of the plaintiffs' attorneys, showed that the testimony was given, he could settle the bill in accordance with plaintiffs' proposed amendments."

Thereafter defendants' attorney, having received from the judge a letter calling attention to the provisions of section 650, Code of Civil Procedure, gave the notice to which we have referred, that the proposed bill and amendments would be presented on the 12th day of September. The petition herein further alleges, and the affidavit of Mr. O'Brien states that at said hearing of September 12, 1919, and upon the presentation of Mr. Eden's objections to the settlement of the bill, defendants' attorney "then orally accepted each and all and every of plaintiffs' proposed amendments." This statement is denied by Judge West, who says that the sole question discussed related to the right claimed by Mr. O'Brien to have the bill settled, and Mr. Eden's objections thereto. The judge then took the proceeding under submission and requested the respective attorneys to present authorities bearing on the objections made. On the 15th day of September defendants' attorney mailed to the clerk his points and authorities and a written acceptance and allowance of each and all of the proposed amendments. The latter was filed by the clerk on the 16th day of September. On the 16th day of September the court entered an order declining to settle the bill. At the time when this order was made, and until the 15th day of October, when petitioners again demanded that he settle the bill, Judge West did not know that said written acceptance of the amendments had been received or filed. Upon the conflicting evidence above noted, we find that the alleged oral acceptance of the amendments on September 12th was not proved. Giving equal credit to the good faith of the witnesses, we think that the statement of Judge West is more consistent than is the opposing statement, with the conduct of Mr. O'Brien down to that time. By the statement made to the judge by Mr. O'Brien on August 8th, to which we have referred, it was necessarily implied that at that time he was opposing the allowance of some of the proposed amendments. His presentation of the bill and amendments on September 12th was made upon notice to the other party, presumably for the purpose of giving them an opportunity to defend their amendments. Since then, as we find the fact to be, the defendants did not adopt the amendments and bring such adoption to the attention of the judge until after the matter had been submitted and the court had made its order declining to settle the bill, it was then too late for them to face about and adopt the amendments.

We have given due consideration to the cases cited, including Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63, and Gay v. Torrance, 143 Cal. 14, 76 Pac. 717. In Pendergrass v. Cross the party proposing the statement, having adopted the amendments, presented the statement and amendments for settlement, after the expiration of ten days from the time of service of the amendments, without having indicated, at any time, any opposition to the amendments. The court therefore assumed that the amendments were adopted without contest, and held that the statement and amendments were presented within a reasonable time, and that the ten-day limit did not apply to the case. In Gay v. Torrance, the time for presentation of the bill and amendments, if contested, would have expired on the 29th day of February, 1904. At that time, and for some days thereafter, counsel for the parties plaintiff and defendant were engaged in conference on the amendments, for the purpose of endeavoring to agree upon them without a contest before the court. On the 7th day of March the attorney for the party proposing the bill of exceptions delivered the bill and amendments to the clerk for the judge, with a statement attached thereto, adopting all of the proposed amendments. The Supreme Court held, in substance, that "the plaintiff allowed all the amendments substantially in conformity with the intention of the statute," and that the bill and amendments were presented within a reasonable time, which, under the circumstances, was within due time. The case at bar, upon the facts here appearing, differs essentially from the cases above mentioned, in that here the parties proposing the bill were opposing the allowance of the amendments at and for some time after the expiration of the ten days allowed for presentation of a contested bill for settlement, and were so insisting upon their opposition, without

any understanding, like that in Gay v. Torrance, where, as the court found, there was a pending negotiation for settlement and a tacit understanding between counsel that the amendments "would be allowed, except in so far as the defendant might consent to withdraw or modify them."

The alternative writ is discharged, and the application for peremptory writ is denied.

We concur: SHAW, J.; JAMES, J.

42 Cal. App. 794

TURNER et al. v. TALMADGE et al.
(Civ. 2985.)

(District Court of Appeal, First District, Division 1, California. Aug. 23, 1919.)

1. FRAUDULENT CONVEYANCES ⟸95(1)—PROPERTY TRANSFERRED TO WIFE WITHOUT CONSIDERATION BY HUSBAND LIABLE FOR HUSBAND'S DEBTS FOR NECESSARIES FURNISHED TO HUSBAND AND WIFE LIVING TOGETHER.

Under Civ. Code, § 171, wife's property which has been transferred to her by husband without consideration may be regarded as the property of the husband for the purpose of satisfying any of his debts incurred for necessities furnished to both husband and wife while living together; such statute not making the wife personally liable therefor, but merely entitling creditor to regard such property as if it had not been transferred.

2. PUBLIC LANDS ⟸140 — HOMESTEAD LAND NOT LIABLE FOR DEBTS CONTRACTED PRIOR TO ISSUANCE OF PATENT.

Under Civ. Code, § 171, land taken by husband under homestead laws of United States and thereafter transferred to wife without consideration was not liable for husband's debts for necessaries furnished prior to issuance of patent, such land being treated as to such debts as the property of the husband, and being exempt from execution for such debts under Rev. St. U. S. § 2296 (U. S. Comp. St. § 4551).

3. PUBLIC LANDS ⟸140—LAND TAKEN UNDER HOMESTEAD LAWS EXEMPT FROM EXECUTION FOR PATENTEE'S DEBTS WHILE IN THE HANDS OF PURCHASER.

Land taken under homestead laws of United States is exempt, while in the hands of a purchaser, from execution upon debts of the patentee which could not have been enforced against it while the title remained in the patentee under Rev. St. U. S. § 2296 (U. S. Comp. St. § 4551).

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Essie Turner and others against John Talmadge and Frank L. Talmadge, copartners doing business under the firm name and style of Talmadge Bros., and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

C. C. Mishler, of Los Angeles (C. J. MacMillan, of Los Angeles, of counsel), for appellants.

Douglas L. Edmonds and J. Karl Lobdell, both of Los Angeles, for respondents.

KERRIGAN, J. This is an appeal from a judgment quieting title in plaintiffs to 160 acres of land located in San Bernardino county. The case was tried upon a stipulated statement of facts which shows that a patent of the United States of America to the said real property was duly issued to Essie Turner, one of the plaintiffs, on the 9th day of April, 1915, and said patent was thereafter recorded in the office of the county recorder of San Bernardino county; that on the 6th day of July, 1915, John W. Talmadge and Frank L. Talmadge, defendants here, commenced an action in the superior court of the county of San Bernardino against Essie Turner and Mary Doe Turner, his wife, plaintiffs herein, praying judgment for the sum of $372.71; that on the 6th day of July, 1915, a writ of attachment was duly issued in said action and a notice of attachment was filed in the office of the county recorder of San Bernardino county; that said action under which said real property was attached was an action for the purchase price of groceries, meats, provisions, and merchandise purchased by Essie Turner prior to April 1, 1915; that after the attachment and with knowledge thereof, on the 7th day of July, 1915, the said Essie Turner executed and delivered to Ossie Turner, his wife, a deed to the said real property, which deed was recorded on July 13, 1915; that thereafter said Ossie Turner executed and delivered a deed of trust to said property to secure a note for $125 in favor of I. R. Overell, one of the plaintiffs herein; that default of the defendants Essie and Ossie Turner was duly and regularly entered in the said action brought by Talmadge, and on October 28, 1915, execution issued and the real property was sold on November 23, 1915, at execution sale, to F. L. Talmadge.

The trial court held that the property is exempt from the levy and sale made by the sheriff, and that the purchaser acquired no title or interest therein, and gave judgment quieting title in Ossie Turner, subject to the deed of trust herein mentioned. The only question arising on appeal is whether or not section 2296, United States Revised Statutes (U. S. Comp. St. § 4551), providing for the exemption of land taken under the homestead laws of the United States from execution for debts contracted prior to the issuance of the patent is applicable to the facts presented here. Said section provides as follows:

"No land acquired under the provisions of this chapter shall in any event become liable

to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

[1-3] The debt out of which the execution and sale arose was a debt of the husband, Essie Turner. It was admittedly a debt for necessaries furnished to him and for which he, and not his wife, was liable. Section 171, Civil Code, relied upon by appellants, recognizes such debt as the debt of the husband, and does not make the wife personally liable therefor, but merely provides that, when the husband's property has been transferred to the wife without consideration, this property may be regarded as the property of the husband for the purpose of satisfying any debts of his incurred for necessities furnished to both the husband and wife while living together. The effect of this section is to regard such property as though it had not been transferred. In the present case, if the property is so regarded, it is not liable for the husband's debt contracted before patent issued to the land. Barnard v. Boller, 105 Cal. 214, 38 Pac. 728; Miller v. Little, 47 Cal. 348. Such land is also protected in the hands of a purchaser from execution upon debts of the patentee which could not have been enforced against it while the title remained in the patentee. Miller v. Little, supra; note to Sprinkle v. West, Ann. Cas. 1912D, 284, and cases there cited.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

45 Cal. App. 415

THOMSON v. LANGTON et al. (Civ. 3190.)

(District Court of Appeal, First District, Division 1, California. Jan. 9, 1920.)

1. EVIDENCE ⊂⊃441(5)—PRIOR ORAL AGREEMENT NOT TO ENFORCE MORTGAGE IS NOT BINDING.

Oral understandings between the parties, prior to and at the time a note and mortgage were executed, that the mortgage would not be enforced, constitutes no defense to a mortgage foreclosure action in view of Civ. Code, § 1625, providing that a written contract supersedes negotiations preceding or accompanying its execution.

2. ESTOPPEL ⊂⊃85—CANNOT BE BASED UPON MORTGAGEE'S PROMISES NOT TO ENFORCE MORTGAGE.

Where a mortgagor substantially improved the mortgaged property in reliance upon the mortgagee's orally expressed intention never to demand payment of the mortgage, the mortgagee was not estopped from foreclosing, since estoppel cannot be based upon the mere expression of future intention.

3. APPEAL AND ERROR ⊂⊃681—REFUSAL TO ALLOW AMENDMENT TO ANSWER NOT REVIEWABLE WHERE RECORD DOES NOT DISCLOSE AMENDMENT.

In a mortgage foreclosure action, refusal to allow the answer to be amended after sustaining plaintiff's demurrer thereto cannot be declared an abuse of discretion, where the record does not disclose the nature of the proposed amendment.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Matilda Thomson against John M. Langton, Jr., and Anna Langton and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. B. Coil, of Los Angeles, for appellants.

Samuel H. French, of Los Angeles, for respondent.

RICHARDS, J. [1] This action was instituted for the foreclosure of a mortgage executed by the defendants to the plaintiff to secure the payment of a promissory note for the sum of $6,300, payable three years after date. The defendants by their answer admitted the execution of the note and mortgage sued upon and that the said note was upon its face past due and unpaid. They undertook to deny, however, that the purpose of the execution of said mortgage was to secure the payment of said note, and in support of such denial proceeded to set forth with much of detail certain relations and oral understandings between the parties to said note and mortgage at and prior to the time of the execution thereof, and which, without attempting to recite them at length, amount, in our opinion, to nothing more than a plea that it was the mortgagee's orally expressed intention that she would never require the defendants to pay any part of the principal of said note. As to this portion of the defendants' answer, it seems entirely clear to us that, admitting the truth of its averments in respect to these matters, they cannot be availed of as a defense to this action, since everything stated therein as having occurred prior to the execution of the note and mortgage in the way of oral negotiations and understandings between the parties must be held, under section 1625 of the Civil Code, to have been merged in their written agreements in the form and effect of said note and mortgage. The presentation of similar matters was held to be no defense to an action to foreclose a mortgage in the case of Pierce v. Avakian, 167 Cal. 330, 139 Pac. 799, and in the earlier case of Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225.

[2, 3] The defendants herein further undertook in their answer to set forth that, relying upon the plaintiff's orally expressed

intention never to call upon the defendants to pay any part of the principal of said note and mortgage, they made certain substantial improvements upon the mortgaged property and otherwise placed themselves in a position which would render it inequitable for the plaintiff to be permitted to enforce her said note and mortgage. These facts are pleaded by way of estoppel, but the authorities uniformly hold that an estoppel of the character herein relied upon cannot be predicated upon the mere expression of the intention or proposed future action of the party sought to be estopped, or upon the promise of such person to do or not to do in the future some particular act. Mutual Life Ins. Co. v. Mowry, 96 U. S. 544, 24 L. Ed. 674; Langdon v. Doud, 10 Allen (Mass.) 433; Jackson v. Allen, 120 Mass. 64; White v. Ashton, 51 N. Y. 280. The rule thus established in other jurisdictions was adopted and applied in this state in the case of Banning v. Kreiter, 153 Cal. 33, 94 Pac. 246. The trial court, applying the foregoing principles to the defendants' answer herein, held upon demurrer that their said answer was insufficient to constitute a defense to the action, and it therefore sustained the plaintiff's demurrer thereto without leave to amend. The record shows that the defendants thereupon applied to the court for leave to amend their said answer, which application the court denied. This the appellants assert was an abuse of discretion on the part of the trial court, and was therefor reversible error; but the record before us discloses nothing more than a bare application to the court for leave to amend the answer without the offer of any proposed amendment or even of any statement as to what the amended answer, if permitted, would contain, or whether it would in any respect eke out the infirmities of the original answer. We cannot therefore determine whether or not the trial court abused its discretion in refusing to grant the defendants' general request for leave to amend their answer.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 475

FOX et al. v. CALIFORNIA FRUIT CO. et al. (Civ. 3214.)

(District Court of Appeal, First District, Division 1, California. Jan. 14, 1920.)

1. APPEAL AND ERROR ⟸1011(1)—FINDINGS OF FACT ON CONFLICTING EVIDENCE WILL NOT BE DISTURBED.

Where the judgment of the trial court is based on conflicting evidence, the appellate court will not disturb its findings and conclusions thereon.

2. EVIDENCE ⟸467—PAROL TESTIMONY OF WAIVER OF FORFEITURE IN DEED NOT INADMISSIBLE AS VARYING TERMS OF WRITTEN INSTRUMENT.

In an action to enforce a forfeiture clause in a deed given by plaintiff's decedent to a corporation, providing that if grantee failed to pay $150 monthly to grantor during her life, after a default of 90 days, the deed should become null and void and the property revert to the grantor, her heirs and assigns, evidence of acts showing a waiver by the grantor of certain monthly payments was not inadmissible as varying the terms of a written instrument by parol.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Gertrude E. Fox and others against the California Fruit Company, a corporation, and another, to enforce a forfeiture clause in a deed. Judgment for defendants, and plaintiffs appeal. Affirmed.

Frank T. Bates and Robt. N. McHargue, both of San Bernardino, for appellants.

Byron Waters, Holcomb & Coy, and Leonard, Surr & Hellyer, all of San Bernardino, for respondents.

RICHARDS, J. This is an appeal from a judgment in favor of the defendants in an action instituted by the plaintiffs as heirs, and by one of them as the administratrix of the estate, of Emily M. Merryfield, deceased, to enforce a certain forfeiture clause in a deed made by said Emily M. Merryfield in her lifetime to the defendant California Fruit Company. The record shows as an undisputed fact that for some years prior to January 1907, Mrs. Emily M. Merryfield, a widow with five sons and two daughters, had been the owner and in possession of several pieces of property in the county of San Bernardino which were largely planted to orange trees and were quite valuable. She was on the above date about 64 years of age, and was somewhat infirm in general health and was gradually becoming blind. She concluded to convey her said properties to her five sons upon certain conditions subsequent, in order to which conveyance and to carry out its conditions the five sons concluded to organize a corporation, to be known as California Fruit Company, to be composed exclusively of themselves as stockholders, directors, and officers. This they did, and thereupon said several properties were deeded to said corporation. This deed contained a condition subsequent to the effect that as the consideration for the conveyance the grantee agreed to pay to the grantor the sum of $150 monthly in advance as long as she should live, provided that, if the said grantee should fail to make any of said monthly payments within 90 days

after any of the same should become due and payable during her lifetime, then upon such default the deed should become null and void, and all property and rights thereby conveyed should revert to the grantor, her heirs and assigns, and all right, title, and interest of said grantee should thereupon wholly cease.

The complaint in the action, after setting forth the foregoing facts, alleges that from a time commencing about November 7, 1910, and continuing up to the time of the death of said Emily M. Merryfield in April, 1913, the said California Fruit Company had begun and continued to be quite irregular and delinquent in the matter of making the monthly payments to her in accordance with the requirements of said deed, and that at and prior to the said time of the death of said Emily M. Merryfield a sum upwards of $1,000 was past due and payable upon its said obligation, and had been so past due and payable for a period of more than 90 days prior to the said date of her death. The complaint also alleges that on the 7th day of November, 1910, the defendant Charles L. Merryfield, who was the eldest son of the said Emily M. Merryfield and who was also the president of and a large stockholder in the California Fruit Company, induced his said mother to execute and deliver to him a general power of attorney, authorizing him to transact all of her said business, and that on the 10th day of May, 1912, professing to act under the authority of said power of attorney, the said Charles L. Merryfield made and delivered to the California Fruit Company a quitclaim deed of all of the right, title, and interest of said Emily M. Merryfield in and to all of the properties covered by her said former deed to said corporation; that said quitclaim deed was made without the knowledge, consent, or permission of said Emily M. Merryfield, and was made with the fraudulent purpose of depriving said Emily M. Merryfield, her heirs and assigns, of all of her rights in said lands, and particularly of her right of forfeiture for a breach of said condition subsequent embraced in her original conveyance thereof; that at the time of the making of said quitclaim deed said Emily M. Merryfield was very ill and was expected presently to die, but that upon her recovery from such illness and upon her discovery of the making and recording of said quitclaim deed she revoked the power of attorney of said Charles L. Merryfield; that by virtue of the foregoing facts the said quitclaim deed was a fraudulent conveyance and void; that upon the death of said Emily M. Merryfield her two daughters, the plaintiffs herein, as heirs, devisees, and legatees of said Emily M. Merryfield, deceased, and as representing her estate, served upon the California Fruit Company their notice and claim of forfeiture under the condition subsequent of said original deed, and demanded a reconveyance of all of said properties, which being refused they instituted the present action to enforce such forfeiture and compel such reconveyance.

The answer of the defendants admitted many of the facts alleged in the complaint, but denied either that the power of attorney or the quitclaim deed above referred to were procured by or tainted with any fraud on the part of said Charles L. Merryfield or of said corporation, and in that behalf alleges that the said Emily M. Merryfield prior to her death and with a full knowledge and understanding of all of the acts of said Charles L. Merryfield, under said power of attorney, fully ratified and confirmed the same, and also fully ratified and confirmed the said quitclaim deed; and the defendants further allege that the said Emily M. Merryfield, with a full knowledge of the facts, fully waived any and all default in the making of the payments required by the condition subsequent in her original deed, and fully waived any forfeiture arising out of any such default, and fully waived and forgave any indebtedness due or owing to her from the California Fruit Company within 90 days prior to her death.

The cause went to trial upon the issues thus framed, and after the introduction of considerable evidence pro and con by the respective parties the court made its findings of fact and conclusions of law. As to the undisputed facts the court found them to be as above stated, but as to most of the matters in dispute between the parties the findings of the trial court are in favor of the defendants. The court expressly found that the quitclaim deed executed to the corporation by said Charles L. Merryfield under the power of attorney from his mother was void as not having been within the powers conferred upon him by the power of attorney, but the court also found that said deed was not fraudulently made, nor was the fact of its having been made fraudulently concealed from Mrs. Merryfield. The court also found that as to the power of attorney it was not obtained fraudulently or by any inducement on the part of Charles L. Merryfield, but was given freely and voluntarily to him by his mother, and that, while she did at one time revoke the same, nevertheless her said son thereafter continued to possess her full confidence and to act in important matters as her attorney in fact up to the time of her death. The court also found that, while there had been at various times lapses in the prompt payment of the monthly sums provided for in the original deed from Mrs. Merryfield to the corporation, these defaults on its part had been consented to by her, and its delinquencies and any forfeiture resulting therefrom fully waived by her for good and sufficient reasons well understood by her at the time of such waivers, and that at the

time of her death there were no existing delinquencies in said payments which had not been fully consented to by her, and hence there was no ground for declaring a forfeiture under the condition subsequent of her said deed. As to any averments in the plaintiffs' complaint hostile to these findings, the court specifically finds these to be untrue. Judgment accordingly went for the defendants.

[1] Upon appeal from such judgment the appellants direct their main assault upon the foregoing findings of the trial court upon the ground that they are not sufficiently supported by the evidence in the case. This contention is without merit. While it may be true that as to certain probative findings of the court, as, for instance, its finding with respect to the validity or purposes of the quitclaim deed, the evidence may not sufficiently support its conclusion, nevertheless as to the essential findings of the court with respect to the absence of any fraud in the dealings throughout between the corporation or its officers and members and Mrs. Merryfield, and as to the fact of the latter's waiver of any delinquencies in making the payments required by the condition subsequent of her original deed, and as to the nonexistence of any rights of forfeiture in herself or her heirs at the time of her death, the evidence is fully sufficient to sustain these findings; and whatever of conflict there may be in such evidence as to these matters having been resolved by the trial court in the defendants' favor, we are not at liberty to disturb its findings and conclusion thereon.

[2] The only other point urged by the appellants upon this appeal is that the trial court erred in admitting in evidence over their objection the statements, acts, and conduct of Mrs. Merryfield subsequent to the making of her deed to the corporation as tending to show her waiver of the requirements of the condition subsequent. The ground of these objections is that such evidence was inadmissible as tending to vary the terms of a written agreement. This contention has no merit, for while it may be conceded, as the appellants claim and as the only cases cited by them decide, that mere indulgence or acquiescence in breaches of an agreement will not suffice to amount to a waiver of its requirements, this goes merely to the effect and not to the admissibility of such evidence; on the other hand, there is ample authority to support the position that a waiver of a forfeiture may be shown by oral statements or by the acts and conduct of the party entitled to insist upon the penalty of the breach of a condition subsequent, and that the admission of such evidence is not violative of the rule against varying written contracts by parol (Wigmore on Evidence, § 2441, and cases cited).

No other points being urged upon this appeal, the judgment is affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

45 Cal. App. 451

GROVER v. WESTERN UNION TELEGRAPH CO. (Civ. 3217.)

(District Court of Appeal, First District, Division 1, California. Jan. 12, 1920.)

1. CONTRACTS ⊂=26—WRITTEN PROPOSAL ACCEPTED BY LETTER MAILED CONSTITUTES CONTRACT.

A proposal by letter and its acceptance by a letter duly deposited in the mail constitutes a contract binding on the person making the proposal.

2. TELEGRAPHS AND TELEPHONES ⊂=53—DELAY IN DELIVERY OF TELEGRAM ACCEPTING OFFER TO PURCHASE NOT CAUSE OF SENDER'S DAMAGE.

Where a written offer to purchase property and business was accepted by plaintiff by letter and telegram, and, though both were delayed in reaching the offerer, the offer was not withdrawn until after their receipt, there was a consummated contract binding the offerer when the letter was mailed, and plaintiff was not damaged by delay in delivery of the telegram, though because of the delay in hearing from plaintiff the offerer did not carry out the offer as he would otherwise have done.

3. TELEGRAPHS AND TELEPHONES ⊂=52—SENDER'S DAMAGE NOT CAUSED BY DELAY IN DELIVERY.

Where plaintiff by letter and telegram accepted a written offer to purchase a business and property, he was not damaged by delay in delivery of the telegram, though his co-owner did not sign the letter of acceptance, since if, because of this fact, the letter did not create a contract, the telegram would not have done so; and, if the letter created a contract as to the offerer and plaintiff which he could not fulfill for want of his co-owner's consent, the loss of the sale was not the fault of the telegraph company.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by L. F. Grover against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Fabian D. Brown, Elmer E. Robinson, and Robinson & Brown, all of San Francisco, for appellant.

Beverly L. Hodghead, of San Francisco (Francis R. Stark, of New York City, of counsel), for respondent.

RICHARDS, J. This is an appeal from a judgment in the defendant's favor in an ac-

tion on the part of the plaintiff to recover damages arising by reason of a delayed telegram. The case was presented at the trial and on appeal upon an agreed statement of facts, which may be briefly summarized as follows: During the month of September, 1915, the plaintiff and one Bergthold were the owners of a business at Ft. Bragg, Mendocino county, Cal., known as "Ft. Bragg Chronicle," and of certain other property connected therewith, and were negotiating a sale of said business and property to one M. J. Beaumont for the sum of $2,600. These negotiations had progressed to the extent that said Beaumont had written a letter, dated September 24, 1915, addressed to the plaintiff, offering the sum of $2,600 for said property and business. This letter was written from San Francisco, Cal., and closed with this sentence: "Advise me by return mail your decision." This letter was received by the said plaintiff at Ft. Bragg on September 25, 1915, in the regular course of the mail. On September 26, 1915, the plaintiff telephoned to the defendant at its Ft. Bragg office the following message for transmission by it by telegraph:

"Fort Bragg, California, Sept. 26, 1915.
"M. J. Beaumont, care Baldwin Hotel, San Francisco, Cal.
"Your letter received. Proposition perfectly satisfactory. Letter to follow.
"[Signed] L. F. Grover."

The defendant accepted said message and the charges for its transmission, which the plaintiff paid thereon, and undertook to promptly transmit and deliver the same to said Beaumont. On September 26, 1915, after sending said message, the plaintiff wrote a letter to said Beaumont at the same address to which said message had been directed, in which he confirmed his said telegram and accepted the offer of Beaumont. This letter the plaintiff mailed on said 26th day of September, and in the regular course of the mail it should have reached San Francisco on the evening of September 27, 1915, and been delivered to said Beaumont at his address in said city on the morning of the 28th of September, 1915. It was not, however, received by said Beaumont at his said address until the 29th of September, 1915. In the meantime the telegram had not been delivered to nor received by said Beaumont for the reason that upon its transmission from the defendant's Ft. Bragg office to its San Francisco office and its receipt at the latter on said 26th day of September, 1915, at about 10:40 o'clock a. m. of said day, it was by a mistake of the said defendant's agents at the latter place delivered to and at the Baldwin House at No. 77 Sixth street, San Francisco, instead of to and at the Baldwin Hotel, 321 Grant avenue, San Francisco, the proper place of its address and delivery, and in consequence of this error it was not received by said Beaumont at his proper address until September 29, 1915, three days later than it should have been delivered to him. Having prior to said September 29, 1915, received no response to his offer contained in his letter of September 24, 1915, Beaumont did not carry out his offer contained in said letter, although at the time of his receipt of the plaintiff's letter and telegram on September 29, 1915, he still had the means to do so, but on September 30, 1915, invested his money elsewhere. In consequence of the failure of Beaumont to consummate his said offer, the plaintiff and said Bergthold were obliged to sell and did sell their property and business at Ft. Bragg for the sum of $1,750, thereby incurring a loss of $850, for which they seek to hold the defendant responsible because of its delay in the delivery of said telegram.

The defendant in its answer, after denying the averments of the plaintiff's complaint, which purported to fix upon it the liability for the plaintiff's alleged loss, proceeded to allege as a further and separate defense to said action that the telegram in question, when presented to the defendant for transmission, was accepted subject to the terms and conditions of a certain contract in writing which is printed upon its telegraphic blanks upon which all telegrams are transcribed, the terms of which printed agreement being such as are prescribed by the railroad commission of the state of California, which is invested by law with full power over the rates, charges, facilities, classification, and practices of telegraph companies engaged in transmitting messages between points within the state of California, and that by the terms of such printed agreement the defendant's liability for damages arising out of delays in the transmission or delivery of messages or of their nondelivery was limited to $50, at which the message to be transmitted was valued unless a greater value was stated thereon in writing; and that also by the terms of such printed agreement the plaintiff's claim for damages arising out of any negligence on the part of the telegraph company must be presented to it within 60 days after the telegram was filed for transmission. A copy of the rules and regulations of said railroad commission, and also of the terms and conditions of the printed matter placed upon all telegraphic blanks by the defendant, is appended to the agreed statement of facts, and it is therein stipulated that the plaintiff's said message having been telephoned in to the defendant's Ft. Bragg office, he did not sign such message upon any such blank and was not personally apprised of the terms of the printed agreements thereon, and it is also stipulated that he did not present his claim for damages within 60 days after the date of filing such message. The trial court based its findings of fact upon the stipulated facts presented at the trial, and made its further finding based thereon that the plaintiff was

not damaged by reason of any negligence of the defendant in delaying the delivery of said telegram as alleged in the plaintiff's complaint. It further found that the plaintiff's said telegraphic message was accepted by the defendant for transmission subject to the conditions contained in the printed agreements upon its telegraphic blanks, as set forth in the defendant's answer. Its conclusion of law was, therefore, that the plaintiff take nothing by his action and that the defendant have judgment in its favor and for its costs. Judgment was so entered, and from such judgment the plaintiff prosecutes this appeal.

The only contention which the appellant makes or can make is that the stipulated facts of the case as adopted in the findings of the trial court do not sustain its further finding and conclusion that the plaintiff has suffered no damages for which the defendant can be held liable by reason of the delay in the delivery of the telegram in question.

[1, 2] We are of the opinion that this contention on the part of the appellant cannot be upheld. The undisputed facts of the case are, as found by the trial court, that Beaumont on September 24, 1915, by letter addressed to the plaintiff, offered to purchase the business and property in question for the sum of $2,600, and that on September 26, 1915, the said plaintiff by letter regularly deposited in the United States mail accepted said offer. From this evidence it indisputably appears that a written contract binding in all respects upon said Beaumont was consummated between the said parties when the letter of the plaintiff accepting the offer of Beaumont was deposited in the mail at Ft. Bragg on September 26, 1915. Civ. Code, §§ 1582, 1583; Bank of Yolo v. Sperry Flour Co., 141 Cal. 315, 74 Pac. 855, 65 L. R. A. 90. It is true that Beaumont did not receive the telegram that day presented by the plaintiff to the defendant for transmission to him until some three days later, and did not receive said letter of the plaintiff until September 29, 1915; but the admitted facts show no withdrawal of his offer and no changed conditions as to his ability to perform the same during that interval, but, on the contrary, do show that upon the said date of Beaumont's actual receipt of both said telegram and said letter he was still in the same financial condition as when he made his offer, and that it was not until the day following the receipt of both the telegram and the letter that he invested his money elsewhere. This being so, we cannot perceive how the plaintiff could have been damaged by the failure of the defendant to make a prompt delivery of his telegram. His injury, if any, was sustained through the breach on the part of Beaumont of his agreement to purchase the property, which agreement was consummated, as we have seen, by his written offer and its unqualified acceptance on the plaintiff's part through his letter duly deposited in the mail.

The appellant, however, contends that this aspect of the case is changed by the fact that it was stipulated that had Beaumont been present at the trial of the cause he would have testified that if he had received the plaintiff's telegram upon the day on which it was sent he would have completed the purchase of the plaintiff's property; but if we are correct in our above conclusion, Beaumont was already bound by the terms of his accepted offer upon the day the telegram and letter were sent, and hence, regardless of the delay in the delivery of the telegram, his statement as to what he would or would not have done had it reached him promptly becomes immaterial, since it only gives his reason, and that not a valid one, for the breach of his own consummated agreement, but gives the plaintiff no right of recovery against defendant because of such breach.

[3] The appellant in this same connection makes the further contention that his letter to Beaumont cannot be held to have created a binding contract with the latter because of the fact that the plaintiff was only the owner of a part interest in the property and business to be sold, the outstanding interest being owned by one Bergthold, who did not sign the letter, but the infirmity of this position is twofold; the first being that if the letter would not have bound Beaumont neither would the plaintiff's telegram have done so, and hence delay in its delivery did not cause plaintiff to lose his sale; and the second being that, as far as the plaintiff is concerned, Beaumont's letter to him and his reply by letter constituted as to these two a binding contract, and, if the plaintiff would have been unable later to fulfill his part of such contract for the reason that his co-owner's consent could not be obtained to the transfer, that would be the plaintiff's own default, which could by no process of reasoning be chargeable to the defendant. From any point of view, therefore, we conclude that the trial court was correct in its finding that the plaintiff had sustained no damage through any delay on the part of the defendant in the delivery of the telegram in question.

Having arrived at this conclusion with reference to the main feature of this case, we do not deem it necessary to consider or decide the points presented by the respondent's defenses based upon the printed matter on its messages by which it claims the plaintiff was bound. These present questions difficult of decision, and which we do not regard as essential to the determination of the instant case in the light of our conclusion that upon the stipulated facts the plaintiff had no cause of action.

Judgment affirmed.

We concur: WASTE, P. J.; KNIGHT, Judge pro tem.

42 Cal. App. 712

ASHER v. PACIFIC ELECTRIC RY. CO.
(Civ. 2871.)

(District Court of Appeal, Second District, Division 2, California. Aug. 16, 1919. Hearing Denied by Supreme Court Oct. 13, 1919.)

1. NEGLIGENCE ⊂⊃4—"ORDINARY CARE" DEFINED.

"Ordinary care" is such care as is exercised by ordinarily prudent persons under the same or similar circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

2. WATERS AND WATER COURSES ⊂⊃171(2)—RAILROAD MUST EXERCISE ORDINARY CARE IN CONSTRUCTING BRIDGE, TAKING INTO CONSIDERATION THE PAST HISTORY OF STREAM.

A railroad company, in constructing a bridge across a stream, must exercise ordinary care to avoid injury to neighboring lands, and must guard against such floods or freshets as men of ordinary prudence can foresee, and should employ engineers of at least ordinary ability and must take into account the laws of hydraulics, the natural formation of the country, the character of the stream, its habits and history, to the extent of learning its probable behavior under conditions which experience has shown are likely to recur, so as to guard against injury which may reasonably be anticipated, not only from the usual state of the stream, but also from such extraordinary floods and freshets as may reasonably be anticipated, in view of the stream's past history and known behavior, but is not bound to provide against such extraordinary floods as have never been known to occur and which competent and skilled engineers could not reasonably anticipate.

3. WATERS AND WATER COURSES ⊂⊃179(3)—EVIDENCE OF DAMAGES TO OTHER LANDS NOT ADMISSIBLE TO SUPPORT DEFENSE THAT FLOOD WAS EXTRAORDINARY.

In an action against a railroad company for damages from an overflow of plaintiff's land, resulting from the railroad's negligence in the construction of a bridge, evidence that other lands upon the stream were inundated by the same flood is inadmissible to support the defense that the flood was extraordinary and unprecedented, unless it be shown that there is a similarity of location, surroundings, and conditions as between the respective lands.

4. WATERS AND WATER COURSES ⊂⊃179(4)—LANDOWNER MUST SHOW BY PREPONDERANCE OF EVIDENCE NEGLIGENT CONSTRUCTION OF RAILROAD BRIDGE AND THAT NEGLIGENCE WAS PROXIMATE CAUSE OF FLOODING.

In an action by a landowner against a railroad for damages from flooding, alleged to have been caused by defective construction of a bridge, the burden was upon the plaintiff to show by a preponderance of the evidence, not only that defendant was negligent, as alleged, but that such negligence was the proximate or concurring proximate cause of the injury.

5. WATERS AND WATER COURSES ⊂⊃171(2)—RAILROAD CONSTRUCTING BRIDGE NOT NEGLIGENT IN FAILING TO PLACE BENTS AT PARTICULAR ANGLE WHERE AXIS OF FLOODS VARIED.

If the direction of the flow of flood water during excessive rainfalls constantly changed, so that no engineer, however familiar with the known habits of the stream, could foresee at what angle the water of any flood might strike the bents and sway-braces of a bridge, it could not be claimed that the owner of the bridge was negligent because it did not place the bents and sway-braces at some particular angle with the longitudinal direction of the bridge, or with the ever-changing axis of the flood waters.

6. WATERS AND WATER COURSES ⊂⊃179(3)—EVIDENCE OF DAMAGE BY FLOOD TO OTHER LANDS ADMISSIBLE TO SHOW THAT AXIS OF FLOOD WATERS CHANGED IN SUCCESSIVE FLOODS.

In an action by a landowner for damages by flooding, alleged to have been caused by the placing of bents or sway-braces of a bridge at an improper angle, testimony of other landowners along a stream as to the damage done by successive floods to their land was admissible to show that the axis of the flood waters changed from time to time without any apparent reason, striking first one bank of the stream and then the other.

7. WATERS AND WATER COURSES ⊂⊃179(5)—INSTRUCTION CONCERNING ALLEGED NEGLIGENT RECONSTRUCTION OF BRIDGE NOT ERRONEOUS.

In an action for damages from flooding, alleged to have been caused by negligent re-enforcing and sway-bracing a bridge, court did not err in charging the jury that they must assume conclusively that the bridge was not, as originally built, of improper length, type, or location, and that in determining whether defendant was negligent in reconstructing, rebracing, and re-enforcing, they should be guided in the light of the circumstances and surroundings at the time of such reconstruction.

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Hugh L. Asher against the Pacific Electric Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Davis & Rush and John S. Cooper, all of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and A. W. Ashburn, all of Los Angeles (W. R. Millar, of Los Angeles, of counsel), for respondent.

FINLAYSON, P. J. This is an action to recover damages for the washing away of a part of plaintiff's land by the waters that flowed down the Lexington wash, near the town of El Monte, in Los Angeles county, during the flood of February 20, 1914. In August, 1913, the railway company had reinforced its bridge across the wash by placing

sway-braces on the bents. It is claimed by plaintiff that, in thus placing sway-braces on the bents of the bridge, defendant was guilty of culpable negligence, and that this negligence was the proximate cause, or concurring proximate cause, of the diversion of the flood waters onto and through his land. The case was tried before a jury, a verdict was rendered for defendant, and plaintiff appeals from the judgment.

The following summary of the principal features of the case is sufficient for an understanding of appellant's claims: Out of the steep mountains lying a few miles to the north of the area immediately surrounding plaintiff's land, the San Gabriel river debouches. As the waters of the river emerge from the mouth of the canyon at the foot of the mountains, they follow, generally, and for some distance, the course known as the San Gabriel river. A little below where the Santa Fé bridge crosses the stream, the waters of the river, during some of the floods occurring over a period of years commencing at a time prior to the reinforcement of defendant's bridge to the time of the flood of February 20, 1914, have divided, a part of the waters flowing in a southeasterly direction in the old course of the river, known as the Old San Gabriel or East river, and a part flowing southwesterly into and through the Lexington wash, which is now a broad, irregular sand and gravel wash, extending generally in a northerly and southerly direction. As is frequently the case with the streams of Southern California, there is, at the mouth of the canyon, a broad débris cone. Prior to 1891 Lexington wash was a small wash extending generally in a northerly and southerly direction, and situated west of the town of El Monte, receiving its water from four or five small canyons lying to the northwest. Prior to 1891 this wash, which was then quite small, received no water from the San Gabriel canyon, excepting once, in the year 1870. In 1891, by breaking through the débris cone at the mouth of the canyon, a considerable quantity of the waters of the San Gabriel river flowed westerly over into the Lexington wash, widening it to some extent. This condition did not change materially until 1910, when, on January 1st, during a severe rainstorm, a large part of the San Gabriel river cut through the débris cone below the canyon's mouth, swung westerly into the wash, widened it considerably, and, racing down the wash, followed its course down to and through the Rio Hondo into the Los Angeles river and thence to the sea. This condition was repeated in 1911, during which year two floods occurred. In the floods of that year Lexington wash received more water from the San Gabriel river than it had the previous year. As we have said, the damage to plaintiff's land occurred during the flood of February 20, 1914.

Defendant's bridge, as originally constructed, was built some years prior to 1913. It crosses Lexington wash about 800 feet north of and above plaintiff's land. The bridge runs approximately due east and west. North of defendant's bridge, and substantially parallel with it, are two other bridges —the county-road bridge, which is about 1,000 feet north of defendant's bridge, and the Southern Pacific bridge, which is about 2,400 feet north of defendant's bridge. As originally constructed, defendant's bridge was about 600 feet long. After the flood of 1910, it was lengthened to about 1,300 feet. Prior to August, 1913, there was no sway-bracing on the bridge, but in that month defendant strengthened and reinforced its bridge by placing sway-braces upon and across the bents. It is these sway-braces that plaintiff claims are responsible for the damage done to his land. In his complaint he alleges:

That on or about August 15, 1913, defendant "negligently, carelessly and wrongfully * * * added to, * * * reinforced, * * * braced, * * * and changed said bridge. * * * That such negligent, careless, and wrongful acts were calculated to and did interfere with, impede, delay, and modify the natural, usual, and ordinary course, direction, and flow of said river, and was calculated to and did cause said river to be diverted and changed from its old, original, and accustomed bed and channel. That on or about February 20, 1914, waters gathered in and flowed down the course and channel of said river, as they were accustomed to, until they reached and arrived at the bridge of said defendant, where, because of the negligent, careless, and wrongful acts of the defendant, * * * they were impeded * * * and modified from their usual and ordinary course * * * and changed in such a manner * * * that they formed a new and independent course and channel * * * almost due south * * * so that they came into and upon the lands of plaintiff, * * * and cut * * * in * * * the land of plaintiff a deep, wide, new, and independent bed or channel."

One of plaintiff's expert witnesses, Wilkie Woodard, a civil engineer, testified that, in his opinion, the bridge, prior to the addition of the sway-braces, was sufficient to carry all the waters of the river during ordinary high water, including the waters of the flood of February, 1914, without injury to plaintiff's land; but that "after the placing of those sway-braces upon those bents * * * in my opinion the bridge was not in such condition as that it would be sufficient to carry off the ordinary high water of the river, and especially the flood of February, 1914, without doing injury." By its answer defendant denied the allegations of negligence in its reinforcement of the bridge by the addition of the sway-braces, and further denied that the bridge was the cause of the damage. Defendant also, by way of affirmative defense, alleged that the flood of February 20, 1914, was the result of an un-

usual, unprecedented, and extraordinary storm, and that it was of such volume that it could not have been reasonably anticipated. The flood washed away two bents in defendant's bridge, and otherwise damaged it. The witnesses on both sides described in detail this storm of February, 1914, and its effect upon the water flowing down and through the Lexington wash.

[1, 2] A railroad company in constructing a bridge across a stream is bound to exercise ordinary care to avoid injury to neighboring lands. "Ordinary care" is such care as is exercised by ordinarily prudent persons under the same or similar circumstances. In the exercise of ordinary care, it is the duty of a railroad company to guard against such floods or freshets as men of ordinary prudence can foresee, but not against such extraordinary floods and accidental casualties as cannot reasonably be anticipated. It not only should employ engineers of at least ordinary ability, who will bring to bear such engineering skill as is ordinarily applied to works of that kind, but it is its duty to exercise a reasonable degree of care and prudence in the construction of the bridge, taking into account the laws of hydraulics, the natural formation of the country, and the character of the stream, its habits and history, to the extent of learning its probable behavior under conditions which experience has shown are likely to recur, so as to guard against injuries which may reasonably be anticipated, not only from the usual state of the stream, but also from such extraordinary floods and freshets as may reasonably be anticipated, in view of the stream's past history and known behavior, even though such floods or freshets have occurred but infrequently. For the bridge should be so constructed as not to be subject to the risks and perils arising from rainfalls known by experience to be incident to that section of the country, though rarely occurring, or which ordinarily competent and skilled engineers should reasonably anticipate. But there is no liability for floods which would surprise ordinary caution. The company is not bound to provide against such extraordinary floods as have never been known to occur, and which competent and skilled engineers could not reasonably anticipate. And if the company has employed engineers of at least ordinary ability and skill, and has used all ordinary precautions in the construction to have the work done properly, it will not be liable to others for injury to land caused by an extraordinary and unprecedented storm and flood, unknown to common experience, and which could not reasonably have been anticipated.

[3] Over the objection of appellant, the court permitted several witnesses for respondent, owners, some of them, of lands a mile or so upstream above appellant's land, and others, owners of lands some distance downstream from appellant's property, to testify respecting the actions and behavior of the waters in the wash opposite their respective land holdings during the flood of February 20, 1914—the flood that resulted in the injury to appellant's land. It is the admission of this testimony of which appellant principally complains. His contention is that it is prejudicial error to admit testimony as to injury done to other lands along the course of the river during a flood, unless a proper foundation be first laid by showing that the conditions at such other points on the stream were the same as at plaintiff's land. Undoubtedly it is the general rule that, in an action against a railroad company to recover damages occasioned by an overflow of plaintiff's land, resulting from the railroad's negligence in the construction of its bridge, evidence that other lands upon the stream were inundated by the same flood is inadmissible to support the defense that the flood was extraordinary and unprecedented, unless it be shown that there is a similarity of location, surroundings, and conditions as between the respective lands; for, unless such similarity be shown, it may be that these other lands were so situated with reference to the stream that they were subject to overflow, to the extent shown, even upon the occasion of ordinary floods, or of floods that reasonable prudence could have foreseen and anticipated. Bell v. Missouri, K. & T. Ry. Co., 36 Tex. Civ. App. 569, 82 S. W. 1073; Missouri, K. & T. Ry. Co. v. Bell (Tex. Civ. App.) 93 S. W. 198; Farnham on Water and Water Rights, § 595; 40 Cyc. 586. It may be conceded, therefore, that the general rule is as contended for by appellant, where such evidence is offered solely for the purpose of showing that the flood was of unprecedented dimensions; but the difficulty that confronts him is that in this case the evidence was admissible for an entirely different purpose.

[4, 5] The burden rested upon plaintiff to show, by a preponderance of the evidence, not only that defendant was guilty of negligence as alleged in the complaint, but that such negligence was the proximate, or a concurring proximate, cause of the injury. For if, notwithstanding any negligence in reinforcing and sway-bracing the bridge, the injury to plaintiff's land would have occurred nevertheless, even had there been no such structure, then its existence could not have caused the damages and defendant would not be liable. San Antonio & A. P. Ry. Co. v. Kiersey, 98 Tex. 590, 86 S. W. 744; Vyse v. Chicago, B. & Q. Ry. Co., 126 Iowa, 90, 101 N. W. 736. Also, if the direction of the flow of the flood waters, during these excessive rainfalls, constantly changes, so that no engineer, however familiar with the known habits of the stream, could foresee at what angle the waters of any flood might strike the bents and sway-braces, it could not be

claimed that defendant was negligent simply because it did not place the bents or sway-braces at some particular angle with the longitudinal direction of the bridge or with the ever-changing "axis" of the flood waters, if such waters can be said to have any particular axis of flow.

To sustain his contention that the bridge was a concurring proximate cause of the damage to his land, appellant, both by the allegations of his complaint and evidence introduced in his behalf, presented the theory that during the flood of February 20, 1914, the river had a definite "axis" at the place where the bridge crosses the wash. By evidence produced in his behalf, appellant presented the theory that immediately above respondent's bridge, i. e., between respondent's bridge and the county-road bridge about 1,000 feet to the north, the river had such definite "axis"; that in this section of its course, the axis of the stream was at an angle of about 45 degrees with the sway-braces that had been placed across the bents for the purpose of reinforcing the bridge; that thus the flood waters, impinging upon these sway-braces at an angle of 45 degrees, were deflected in a southerly direction towards and through appellant's land, instead of passing on under the bridge as, in the opinion of appellant's expert witness Woodard, they would have done had there been no sway-braces. Appellant's land, where it was cut through by the flood waters of February 20, 1914, lies to the south of the bridge. It is altogether probable that, between a point in respondent's bridge where one of the bents went out and the middle of the county-road bridge that crosses the wash about 1,000 feet to the north, the stream, as it flows in the wash after the subsidence of a flood, does flow at an angle of about 45 degrees with the sway-braces. But it is a question whether the stream has any such well-defined axis during those periods when the waters of great floods are tearing through the broad gravel wash, carrying before them and turning over and over large uprooted trees, boulders, and other débris. This was one of the principal questions in the case—a question as to which there was a sharp conflict in the evidence. If the river did not have any well-defined axis during flood periods, and if, therefore, regardless of the utmost care with which defendant may have sought so to construct the sway-bracing that the waters would not strike at an angle that would deflect them toward the plaintiff's land, the waters, nevertheless, by a sudden switch of the stream and change in direction of flow, might strike the structure at any angle whatever, or if, in the absence of any bridge, plaintiff's land, by reason of the switching of the river and rebounding of the stream, would have been cut into by the waters, then a state of facts would be presented that would afford an occasion for defendant to contend before the jury, either that no negligence could be predicated of defendant's acts or that plaintiff's land would have been damaged to the extent that it was even if there had been no bridge. In other words, if defendant could show that the waters in the wash, during these great floods, have no constant and definite axis of flow, it could well contend that its alleged negligence was not the cause, or contributing cause, of the injury.

Appellant's engineering expert Woodard, in the course of his testimony, stated appellant's theory as to the diversion of the river toward appellant's land as follows:

"Because the axis of the river from the highway bridge down to the Pacific Electric bridge and beyond was at an angle of 45 degrees with the bridge, and at the time that the piles were all in there, the débris had collected and it was hanging on each and every pile and on the sway-braces and was forming considerable of a dam, and there was about 30 feet from the extreme north end to the extreme south end of each bent, and staying in that direction and being dammed up and having the sway-braces on there, they would form a baffle-board and the water striking them would be deflected and the current changed, and I think the change would unquestionably persist for a distance of two thousand feet, unless it got started the other way."

In order to establish his theory of a definite direction of the flow or current, or definite "axis," as his witness Woodard called it, appellant introduced evidence respecting the flow and habits of the river in that part of its course which extends from the Southern Pacific bridge to and through the county-highway bridge, on southward through the bridge of defendant, and then southward beyond the northerly line of appellant's land—a stretch of more than 3,200 feet along the course of the stream. To counteract this theory of a definite "axis," respondent introduced the evidence of which appellant now complains. For example, one of respondent's witnesses, James Cleminson, testified as follows:

"I think there was more water in the Lexington wash than I ever saw before, more than in 1884. It was a waving, rolling flood. * * * I saw the part of my land that was washed away in the daytime, after it went out. The flood was not coming in a straight line; it switched from side to side. It would switch from bank to bank. As fast as it cuts off the lower part of the bank, it drives to the other part of the bank and keeps working from side to side."

Another witness for defendant, John B. Snoddy, testified:

"I know the Lexington wash. I have lived on it during my entire life. * * * From 1884 it continued to grow every flood year in some point. There was some points it has never touched any of the old soil since 1884, but it would switch across the channel and take out 10 or 15 acres and the sand. The current would

carry the sand, and the sand created a levee, and in high water it would throw over and in low water it would melt away. * * * The river in the February flood was rolling pretty high. * * * The river struck the bank. It had struck the bank south and pretty near reached us through some of Mr. Pierson's property, and flowed directly west. Mr. Pierson's property is right down below the Santa Anita wash, right across the river from the wash. The water struck the bank of Mr. Pierson's property and then came across and struck our bank. Then after it struck our property it took out the Cleminsons' property. He lost about 10 or 12 acres. From the Cleminson side the river switched over to the Michener side, and took out part of the Baldwin lease. * * * In each flood the Lexington wash makes a separate channel. * * * In running of the same flood, if it lasted more than a day, the river would not keep to a true course. The floods do not come down in well-defined channels; they wind about a good deal. The course of the channel in that part of it largely depends on the hummocks or rises in the river bed. I do not know what makes the course of the river switch; it is beyond my knowledge. It will switch where there is comparatively nothing to be seen. The river does not act like it does in a confined channel. I don't know as there are any rocks in the channel to amount to anything. There is no certainty where the current of the water will flow in high water in any portion of the river above us. To-day it may be in that portion of the river up there, where it is half or three-quarters of a mile wide, and to-morrow it may move westerly and be against the westerly bank, and in the afternoon against the east bank; then it may switch back to the west bank at the same point. I have always been told that that was caused by the quicksand, of which there is a great deal at that point. That has been the condition of the stream for years. Because of the switching from day to day and from hour to hour almost, it has cut out in that portion an immense territory of land."

J. F. Killian, a witness for defendant, testified:

"I don't think that the axis of the stream between the Southern Pacific bridge and the P. E. bridge has been constant during the times I have observed it. * * * While the banks of that stream may be definite this year, you don't know where they will be next year, and this particular bank you speak of between those two bridges has washed out on both sides more or less within that space of time, from 1884 down to the present time."

The witness Bradway testified:

"I saw the flood of February, 1914. It was very much larger than any of the other floods I have ever seen here. * * * In these floods the river did not have any fixed or definite axis of flow. It changed from side to side, and made some changes during the same flood; that is, it would change in a few hours or over night at times, striking first on one side and then the other."

It is true these witnesses, owners of lands above and below appellant's property, were addressing themselves, in the main, to conditions immediately opposite to or in the vicinity of their respective holdings; but their testimony, in the aggregate, tends to show the habits of the flood waters in the wash during severe storms and heavy rainfalls, and to establish respondent's claim that, during these great floods, the turbulent waters, that churn and leap, writhe and tumble, rush down the wash without any definite axis of flow, and, commencing in the upper reaches of the river, the current lashes and switches from side to side, striking first one bank of the wash, eating out and devouring there its tribute of soil, and then, rebounding to the other side, works there the same ravaging destruction, only to switch back again to the other side, and so on throughout its whole devastating course.

[6] That the testimony of respondent's witnesses respecting this switching and rebounding tendency of the river at places above and below appellant's land was admissible as indirect evidence of a similar tendency in that particular stretch of the wash where the seething waters flow between the county bridge and respondent's structure—the stretch concerning which appellant's witness Woodard testified—is shown by the testimony of defendant's witness J. A. Bell, a civil engineer, who testified as follows:

"As to what are the causes of the axis changing, there are a number of causes. * * * A stream has a tendency, these torrential streams, once it has deflected at one point to reverse its action. If it strikes a bank and is deflected, it naturally flows toward the other bank, and this action is aggravated when each succeeding flood tends to increase instead of diminish. That is what is called switching."

With these excerpts from the testimony of the witnesses, we leave this branch of the case with the declaration that, in our opinion, the evidence of which appellant complains was admissible as tending, in the most practicable, if not the only available, manner, to rebut appellant's theory of a definite axis of the flood waters in the vicinity of respondent's bridge.

[7] In one of its instructions the court charged the jury as follows:

"There is no charge in this case that defendant was negligent in respect to the condition of the channel of the wash during the years succeeding the building of this bridge, nor that the bridge as built originally was not of proper length, type, construction, or location. You must therefore assume conclusively, in considering this case, that the bridge was not as originally built of improper length, type, construction, or location. The charge is made that the said bridge several years after its original construction was negligently reconstructed, retied, rebraced, and reinforced. In determining whether the defendant was negligent in this matter, you should be guided * * * in the

light of the circumstances and surroundings * * * at the time of such reconstruction."

Appellant complains of this instruction and assigns the giving of it as error. He contends that, as originally built, the bridge was negligently constructed, for the reason that the bents in the bridge, as originally constructed and as maintained up to the time of the injury to his land, were placed at right angles to the length of the bridge, and hence at an angle of 45 degrees to the "axis" of the stream; whereas these bents should, he says, have been constructed along the axis of the stream, instead of at so great an angle therewith. Upon these premises counsel argue that—

"When defendant came to reconstruct, reinforce, retie, and rebrace said bridge, it was incumbent upon it to take into consideration the fact that the bridge was not properly constructed in the first instance."

Of course, when defendant came to reinforce the bridge by placing sway-braces on the bent, it was "incumbent upon it to take into consideration" all details of the then existing bridge—its character and also the relative position of the bents and of the whole structure with the axis of the stream at times of flood, if the stream had any well-defined axis at such times, and also the known history and habits of the waters in the wash during flood conditions. But there is nothing in the instruction that told the jury that defendant, when reinforcing the bridge, was not required to take all these conditions into consideration. Appellant's complaint did not charge defendant with negligence in the original construction of the bridge, but only with negligence in reinforcing and rebracing it. The instruction was proper, and we fail to see how appellant could have been prejudiced by it.

Judgment affirmed.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 726

SOUTHERN CALIFORNIA FISH CO. v. WHITE STAR CANNING CO.

(Civ. 3038.)

(District Court of Appeal, Second District, Division 2, California. Jan. 10, 1920.)

1. TRADE-MARKS AND TRADE-NAMES ⊂93(3)—EVIDENCE NOT SHOWING UNFAIR COMPETITION IN CANNING TUNA FISH.

On appeal from judgment enjoining defendant's sale of canned tuna designated by labels similar to those used by plaintiff, as being imitative and calculated to deceive the public, *held*, there was no such similarity as to sustain judgment against defendant.

2. TRADE-MARKS AND TRADE-NAMES ⊂70(4)—USE OF STYLE OF CONTAINERS USED BY OTHERS IN THE TRADE AS WELL AS PLAINTIFF NOT UNFAIR COMPETITION WITH PLAINTIFF.

Where the cans used by both parties to a suit for unfair competition in sale of canned tuna were of the style used by tuna packing companies generally, the fact that any one was deceived by the style of cans did not help plaintiff's case, since he must show deception from similarity of some feature of defendant's goods to a distinctive or peculiar feature of plaintiff's, and not merely a similarity in respect of a feature common to plaintiff's goods and those of others.

3. TRADE-MARKS AND TRADE-NAMES ⊂17—COLOR CANNOT BE MONOPOLIZED AS DISTINGUISHING MARK.

While sometimes a color on a label, taken in connection with other characteristics, may serve to distinguish one's goods, and be protected by the courts, as a rule a color cannot be monopolized to distinguish a product.

4. TRADE-MARKS AND TRADE-NAMES ⊂70(4)—IDENTITY OF COLOR OF LABEL NOT ESTABLISHING IMITATION.

Where the difference between plaintiff's and defendant's labels are so marked in other respects that, in the absence of identity of color, there can be no possibility of confusion, a charge of unfair competition falls to the ground.

5. TRADE-MARKS AND TRADE-NAMES ⊂4, 70(4)—THERE CAN BE NO EXCLUSIVE APPROPRIATION OF SYMBOL DESCRIPTIVE OF ARTICLE SOLD.

That label of rival tuna packing concern also contained design of a fish did not show unfair competition; for there can be no exclusive appropriation of a sign or symbol representing or descriptive of the article to which attached, but, to give the right of exclusive appropriation, the sign or figure must be an arbitrary one, not suggestive of the nature of the article sold.

6. TRADE-MARKS AND TRADE-NAMES ⊂68—DECEPTION BY ARTICLE ITSELF, AND NOT DECEPTION OF DEALERS, THE TEST OF UNFAIR COMPETITION.

The law of unfair competition does not protect purchasers against falsehoods which tradesmen may tell; the falsehood must be told by the article itself in order to make the rule of unfair competition applicable.

7. TRADE-MARKS AND TRADE-NAMES ⊂75—DECEPTION OF ORDINARILY PRUDENT AND CAREFUL PURCHASER TEST OF UNFAIR COMPETITION.

One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it has fairly discharged his duty to the public and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by the Southern California Fish Company against the White Star Canning Company. From judgment for plaintiff, defendant appeals. Reversed.

C. F. Holland, of Los Angeles, for appellant.

Joseph F. Westall, of Los Angeles, for respondent.

FINLAYSON, P. J. [1] This is an appeal by defendant from a judgment enjoining it from offering for sale tuna packed in cans similar to those used by plaintiff and encircled with a label such as that which is being used by defendant. The theory of plaintiff is that defendant is guilty of unfair competition in trade, in that its label is an imitation of plaintiff's label, calculated to deceive the purchasing public. A comparison of specimens of the cans and labels used by the parties, and submitted to our inspection, convinces us that there is no such similarity as will sustain a judgment against defendant.

Each party packs in cans and sells to the trade a product designated on the cans as "Tuna Fish." Each puts up its product in cylindrical tin cans, approximately 3⅜ inches in diameter and 2 inches in depth, each can being encircled by a paper wrapper, or label, embellished with various decorative designs, of different colors, imprinted upon a dark blue background. Plaintiff's product is known to the trade as "Blue Sea Tuna," and those words, in white bordered with gold, are printed in large type upon its label. Defendant's product is known as "White Star Tuna Fish," and those words, in large white letters bordered with gold, are printed on its label. The cans used by both parties, though of the same size and shape are such as are commonly used in the trade. Plaintiff's secretary testified that the cans were of the style that the can manufacturers were making, and that he did not know of any tuna company that packed in anything except a round can similar to that used by both plaintiff and defendant.

Except that both labels have substantially the same blue-colored background, the figure of a fish, designated to represent the "tuna," and truthful printed descriptions of the contents of the packages, the labels of the two competitors differ in almost every respect.

Though aware that written descriptions of labels and wrappings are almost always unsatisfactory, we shall essay a comparison and description of the two labels, hoping that we shall succeed in showing whatever points of similarity there may be, as well as the dissimilarities. In a general way, the respective labels may be described as follows: At the left end of plaintiff's label—that is, the left end when it is laid out flat, for, of course, it has neither left nor right nor middle when it encircles the can—are the words "Blue Sea" in gilt letters, and printed in such a manner that the letters, which run into each other, represent a rope with several coils. Under this, in large gilt letters, is the word "Tuna." Between the words "Blue Sea" and "Tuna" is a representation of the sea, with a small steamer sailing thereon. To the right of the steamer, in white letters, is the word "Brand." At the corresponding end of defendant's label are the words "White Star," in large bold type, and under them, in similar type, the words "Tuna Fish." Between the words "White Star" and the words "Tuna Fish" is a five-pointed star, in white bordered with gold, and printed therein the words "Chicken of the Sea." To the left of the star is the word "California," and to the right the word "Brand." In the middle of plaintiff's label, when laid out flat, is a figure which, we are informed by appellant's counsel, is intended to represent a sea serpent holding a trident. Under this figure of the sea serpent on plaintiff's label, printed in dark blue letters and in a space bordered with gilt, are the words: "Prepared ready to eat for a delicious salad. Add to this tin of tuna fish one-quarter cup celery chopped fine, mix with equal parts salad dressing and cream or condensed milk." On the corresponding part of defendant's label is the word "Tuna," printed in large white letters, edged with gold, and on either side a white five-pointed star, edged with gold, in a gilt circle. Under the word "Tuna," and printed in white, are the words: "When used for salad prepare as you would for chicken meat, fish, crab or other salads, using dressing to suit the taste." Under these words is another five-pointed star. Toward the right end of plaintiff's label—right end when the label is laid out flat—are the words "Blue Sea Tuna," in large bold type. Each letter of these words is white with a pronounced gilt edge. Under these words there is a representation of the sea, with the figure of a fish, the tuna, in the act of leaping from the water. To the right of this figure are three sea gulls, winging their flight over the face of the sea. Under the figure of the fish plaintiff's corporate name is printed. The corresponding part of defendant's label is as follows: At the top, printed in large white letters edged with gold, are the words "White Star"; under these words the figure of a fish, the tuna. To the left of the fish, in gilt letters, are the words, "Net contents 3½ oz." Under the figure of the fish, in gilt, is the word "California," and under this, in bold letters, white edged with gold, the words "Tuna Fish." At the extreme right end of plaintiff's label—extreme right end when laid out flat—are the words, "Prepared from a species of tuna caught in the Pacific Ocean," printed in white. On the corresponding part of defendant's wrapper, printed in white, are the words: "Tuna caught in the

Pacific Ocean, selected white meat, packed in high-grade cotton seed oil and olive oil. Empty contents of can as soon as opened. Packed and guaranteed by White Star Canning Co., Los Angeles, Cal."

On both labels all the words, figures, and letters are printed on a dark blue background. A representation of the sea runs across plaintiff's label, or around the can when the label is pasted upon the container in which the tuna is packed. There is no representation of a sea on defendant's label. Nor is there on defendant's label any figure of a sea serpent holding a trident, nor anything at all like any such figure. On both labels there is the design or figure of a fish—the tuna. The fish figure on plaintiff's label is not horizontal, but is in the act of rising from the sea or ocean. The corresponding figure on defendant's label is in a horizontal position, and is not shown rising or leaping from the water. Indeed, no water is represented on defendant's label.

That plaintiff's and defendant's cans, with their respective labels or wrappers, bear considerable resemblance to each other, may be admitted. But all of the resemblances arise from features that are common to the trade, or from the use of a design—the figure of a fish—to which no one has an exclusive right.

[2] That any one is deceived by the size, shape, and general make-up of the cans, or by the prevailing color scheme of the wrappers or labels, does not help plaintiff's case. All these feature are old, separately and in combination. As we already have seen, the cans used by both parties are of the style put out by the can manufacturers, and are used by all the tuna packing companies. Plaintiff's secretary testified:

> That he did "not know of any tuna packing company packing in anything except a round can similar to this in the exhibit. I do not know of any American packers of fish using any other except the round can with concentric rings on the ends of the can. There are about 12 or 14 packers of tuna in Southern California using this style of can."

Plaintiff must show deception arising from some feature of its own, not common to the public. Castle v. Siegfried, 103 Cal. 71, 37 Pac. 210; Canal Co. v. Clark, 13 Wall. 311, 20 L. Ed. 581, cited and quoted from in Dunston v. L. A. Van, etc., Co., 165 Cal. 95, 131 Pac. 115; Continental Tobacco Co. v. Larus, etc., Co., 133 Fed. 727, 66 C. C. A. 557. As was said in Coats v. Merrick Thread Co., 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847:

> The purchaser of thread "is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name of the manufacturer."

"He [plaintiff] must make out, not that the defendant's are like his by reason of those features which are common to them and other people, but he must make out that the defendant's are like his by reason of something peculiar to him, and by reason of the defendant having adopted some mark, or device, or label, or something of that kind, which distinguishes the plaintiff's from other goods which have, like his, the features common to the trade. Unless the plaintiff can bring his case up to that, he fails." Payton v. Snelling, 17 R. P. C. 48, 52.

"The evidence is very strong that one tin may be mistaken for the other, very likely; but why? Because of the features common to them and common to all." Payton v. Snelling, 17 R. P. C. 628.

[3, 4] Nor is plaintiff's case helped by the fact that dark blue, the color of the background, is the predominant color in both labels, though it is apparent that the gravamen of plaintiff's charge lies in an alleged imitative color scheme. It is the one specific feature emphasized by the plaintiff throughout its case. It is true that sometimes a color, taken in connection with other characteristics, may serve to distinguish one's goods, and thus be protected by the courts. Fairbanks Co. v. Bell Mfg. Co., 77 Fed. 869, 23 C. C. A. 554, a case where, however, there was proof of specific instances of deception. But as a rule a color cannot be monopolized to distinguish a product. There are not more than seven primary colors, and if one of these may be appropriated as a distinguishing characteristic of a label, it would not take long to appropriate the rest. Thus, by appropriating the colors, the packing of tuna could be monopolized by a few vigilant concerns. To allow colors to be appropriated as distinguishing characteristics would foster monopoly by foreclosing the use by others of any tasty dress; and where the difference between plaintiff's and defendant's labels are so marked in other respects that, in the absence of identity of color, there can be no possibility of confusion, a charge of unfair competition falls to the ground. Pacific Coast, etc., Milk Co. v. Frye & Co., 85 Wash. 133, 147 Pac. 865; Diamond Match Co. v. Saginaw Match Co., 142 Fed. 727, 74 C. C. A. 59; Schlitz Brewing Co. v. Houston Ice & B. Co., 241 Fed. 817, 154 C. C. A. 519; Heinz v. Lutz, 146 Pa. 592, 23 Atl. 314; Morgans Sons Co. v. Troxell, 89 N. Y. 293, 42 Am. Rep. 294. See, also, U. S. Tobacco Co. v. McGreenery (C. C.) 144 Fed. 531. Moreover, in this case the use of blue labels was common to the trade. Plaintiff's secretary, called by it as a witness in its behalf, testifying on cross-examination, said that in Southern California there are "about six or eight, maybe ten [tuna packing companies] using the blue label." In Continental Tobacco Co. v. Larus, etc., Co., supra, it was held that, where tin tags of all colors, including yellow, and of various sizes, had been used for many years by manufacturers of plug tobacco, and a yellow tag similar in

appearance to that used by complainant had been in use by others for ten years, the size and color of such tag was not of itself a distinction sufficient to establish against defendant a case of unfair competition in trade, though defendant was using on its plug tobacco a tin tag of the size and color used by the complainant.

[5] Passing from the features that are common to the trade—size and shape of cans, color scheme of labels, etc.—we find that, with but one exception, presently to be noted, the label used by defendant is substantially unlike that used by plaintiff. The exception to which we refer is the figure or design of the fish. But the figure of the fish is a symbol that is indicative of the article sold. And the rule is that there can be no exclusive appropriation of a sign or symbol that represents or is descriptive of the article to which it is attached; that there can be no exclusive appropriation of anything which is merely descriptive of the article, or which indicates the ingredients of the package, or the mode of composition. To give the right of exclusive appropriation, the sign or figure must be some arbitrary form or figure, not suggestive of the nature of the article to which it is affixed. Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040; Heide v. Wallace & Co., 135 Fed. 346, 68 C. C. A. 16; Marvel v. Pearl, 133 Fed. 160, 66 C. C. A. 226. In Heinz v. Lutz, supra, which was an action based upon alleged unfair competition in trade, and not for violation of a technical trade-mark, and which was brought to enjoin a fruit dealer from using on his packages a label whereon certain fruits were pictured, the Supreme Court of Pennsylvania used this language:

"Both labels are colored, but in every feature except the fruit the colors are widely different. The fruit is of course highly colored to make it look as luscious as possible; but no one trader in this article has or can have a monopoly of pears, peaches, cherries, plums, strawberries, etc. Any dealer in fruits has the right to put a picture of these fruits upon his labels, and to make them as attractive as possible, and the fruit in one label is very likely to resemble that in another."

In the instant case a comparison of the labels used by plaintiff and defendant shows that the only features that possibly can give rise to any similarity are those that are common to the trade, size and shape of the cans and general similarity of color scheme, and the fish symbol, a design that serves to indicate the nature of the article packed in the cans or containers. In Payton v. Ward, 17 R. P. C. 58, the court said:

"The only question you have then to consider is whether the defendants' get-up is so like the plaintiffs' as to be calculated to be mistaken for it. But when, as in this case and in the last, what is called the plaintiff's get-up consists of two totally different things combined, namely, a get-up common to the trade, and a distinctive feature affixed or added to the common features, then what you have to consider is not whether the defendants' get-up is like the plaintiffs' as regards the common features, but whether that which specifically distinguishes the plaintiffs' has been taken by the defendants."

In the case before us, aside from the features that are common to the trade, size and shape of can and general color scheme, that which specifically distinguishes the plaintiff's label and which it may be claimed was taken by defendant, the figure of the fish, is not a subject of exclusive appropriation by either party. Moreover, in the respective figures of the fish, while there no doubt is a general resemblance, there is a marked difference in the position of the fish. And even if there were not this difference in the two fish figures, still it would remain a fact that those parts of plaintiff's label which it is entitled to use exclusively bear no resemblance to anything in defendant's label. The two labels differ in style and device. Plaintiff's product is designated in its label as the "Blue Sea" brand. Defendant's is designated as the "White Star" brand. The name of each proprietor is stamped upon its respective label in large and distinct letters; and while purchasers desiring to buy canned tuna, without caring by whom it had been canned, doubtless would accept indifferently either plaintiff's "Blue Sea" brand or defendant's "White Star" brand, yet it is not at all likely that any ordinarily intelligent purchaser, exercising reasonable care, and who desired to buy "Blue Sea," and not "White Star," would be led by any similarity of the respective packages to accept the latter supposing it to be the former.

[6, 7] Plaintiff claims that a side-by-side comparison of the two labels when laid out flat is not a fair test. It is asserted that, when the label is pasted on its can, encircling it, the prospective purchaser sees but a small portion of the periphery of each package, and that this tends to and does confuse and deceive the average purchaser. Even so, we doubt if, under the recognized rules already stated by us, plaintiff would be entitled to an injunction. In Continental Tobacco Co. v. Larus, etc., Co., supra, the court said:

"It is urged that the illiterate persons, such as those who mostly use this kind of smoking tobacco, look only at the color and size of the tag; but this is not good ground for relief, for we find from the proofs that the color and size of the yellow circular tags is not of itself a distinction which either manufacturer can appropriate."

Moreover, according to the testimony of plaintiff's own witnesses—witnesses who had bought from retail grocers cans of tuna with the label or wrapper encircling the can—

there is no such similarity as will deceive an intending purchaser of ordinary intelligence using reasonable care. In an effort to prove specific instances of actual deception, plaintiff introduced the testimony of two women, housewives, the husband of one being employed by plaintiff and engaged in selling plaintiff's product. Each of these housewives testified that she ordered "Blue Sea" tuna from her grocer; that he sent her the "White Star" brand instead; that she did not discover the mistake until she had opened the can, but that if she had used ordinary precaution she could have seen the difference in the two cans. One of these witnesses, in response to a question if she would have any difficulty in noticing the difference in the cans if, instead of ordering the fish of her grocer—presumably by telephone—she personally had bought it at the store, said:

"Why, I think I could notice the difference; yes; I could tell the difference by the looks of the can immediately."

The fact that the grocer did not deliver the brand of tuna ordered is not a determinative factor. There is no evidence to show that the grocer himself was deceived by any similarity in the labels. It is quite possible that he intentionally sought to palm off on his customers an article different from that ordered, trusting to their carelessness to obviate any detection of the intended deception; for, unfortunately, the habit that some dishonest dealers have of handing out anything they think they can sell to their customers, when they cannot supply the particular article called for, is all too common.

"The law of unfair competition does not protect purchasers against falsehoods which the tradesman may tell; the falsehood must be told by the article itself in order to make the law of unfair competition applicable." Hill Bread Co. v. Goodrich Baking Co. (N. J. Ch.) 89 Atl. 863.

Each of the housewives whose testimony plaintiff relies on to show specific instances of actual deception admitted that, by using her eyes, she could readily detect the difference in the two packages.

"A resemblance which would deceive an expert or very cautious purchaser may still give a right of action, but a resemblance which would deceive only an indifferent or careless purchaser gives no right of action. The true rule lies between these extremes, condemning what would be reasonably calculated to deceive the common or usual purchaser of the given article *when exercising ordinary care.*" Pacific Coast, etc., Milk Co. v. Frye & Co., supra. (Italics ours.)

As said in Wrisley Co. v. Iowa Soap Co., 122 Fed. 796, 59 C. C. A. 54:

"One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it has fairly discharged his duty to the public and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition."

As regards plaintiff's goods, if they have acquired a title or denomination in the market, the only title or denomination which they can have acquired is that of "Blue Sea" brand of tuna; while as regards the defendant's goods, if they have acquired or should acquire a title in the market, it is or will be the title of "White Star" brand; and, aside from the color scheme, which is common to the trade, and the figure of the fish, which neither can appropriate exclusively, the differences in the two labels are so many and so prominent as to negative any probability that an ordinarily intelligent buyer, exercising ordinary care, will ever be so far deceived by any resemblance of defendant's to plaintiff's label as to buy one of these brands of tuna when ordering or intending to buy the other.

Judgment reversed.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 418

DEMARTINI v. MARINI. (Civ. 3104.)

(District Court of Appeal, First District, Division 1, California. Jan. 9, 1920.)

1. BASTARDS ⊂⊃16—MOTHER CANNOT SUE FATHER FOR SUPPORT AND MAINTENANCE.

Under Civ. Code, § 196a, making both the father and mother of an illegitimate child liable for its support and education, the mother who has provided such support has no right of action against the father for reimbursement.

2. COURTS ⊂⊃122—PRAYER IS NOT CONCLUSIVE AS TO AMOUNT DEMANDED.

The sum demanded of the prayer in the complaint is not the final test of the court's jurisdiction, and does not preclude an examination into the real amount in controversy.

3. PLEADING ⊂⊃225(2)—AMENDMENT AFTER DEMURRER SUSTAINED, IS PROPERLY DENIED WHERE CAUSE OF ACTION CANNOT BE STATED.

Leave to amend was properly denied after a demurrer was sustained to the first count where, on the facts therein contained, a cause of action could not be stated, and without that count the amount in controversy could not be brought within the court's jurisdiction.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Lilly Demartini against Frank Marini. Judgment for defendant, and plaintiff appeals. Affirmed.

Jos. L. Taaffe and Devoto, Richardson & Devoto, all of San Francisco, for appellant.

Robt. P. Troy and Daniel A. Ryan, both of San Francisco, for respondent.

WASTE, P. J. Plaintiff, an unmarried woman, brought this action against the defendant, alleging him to be the father of her illegitimate child, who died on September 9, 1918. Demurrer to the amended complaint was sustained without leave to amend. From the judgment thereupon entered in favor of the defendant, the plaintiff appeals.

The complaint is in four counts. The first is for the sum of $62.50, "for the care, maintenance, and support of said child during its life, the reasonable value of which" is alleged to be the sum of $25 per month, and for $5 paid by plaintiff for hospital expense for the child. The second count is for $142.50, the reasonable value of medical service alleged to have been "necessary in the care, maintenance, and support of the child." The third count is for $20 for the service of a trained nurse for the child during its last illness. The fourth count is for $118 funeral expenses incurred in the burial of the child.

In each of the counts, except the first, the ability of the defendant, and the lack of ability of the plaintiff, to pay for the services, is alleged. In each of the last three counts it is also alleged that "for a valuable consideration" the party rendering the service assigned the claim to plaintiff, "who is now the owner and holder thereof."

Appellant contends that defendant, as father of the child, is liable for the respective amounts set forth in the complaint, under section 196a of the Civil Code, which reads as follows:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, and in such action the court shall have power to order and enforce performance thereof, the same as under sections one hundred and thirty-eight, one hundred and thirty-nine and one hundred and forty of the Civil Code, in a suit for divorce by a wife."

[1] Under this section the father, and the mother also, are required to contribute to the child's support and maintenance, thus relieving others upon whom the burden might fall. McLain v. Meadows, 186 Pac. 411. When the mother has provided the child with such support, no right of action accrues to her by which she may, in turn, compel the father to reimburse her for the expenditure. The action authorized by the section is merely one which may be maintained in behalf of the minor illegitimate child to compel the father to do that which the law imposes, but which the father is neglecting to do. Consequently the plaintiff did not state a cause of action in the first count of her complaint, and under the facts alleged cannot. The demurrer thereto was properly sustained by the court.

[2] Assuming, but not deciding, that the other three counts are good, the aggregate amount of plaintiff's claim over which any controversy may exist does not bring her demand within the jurisdictional amount of the superior court. Appellant is mistaken in her contention that the sum demanded in the prayer of the complaint is the final test of jurisdiction. None of the cases cited by her, and none ever called to our attention, go to the length of holding that the prayer, irrespective of the allegations of the complaint, concludes an examination into the real amount in controversy. Lehnhardt v. Jennings, 119 Cal. 192, 199, 48 Pac. 56, 51 Pac. 195; Reeg v. McArthur, 17 Cal. App. 203, 119 Pac. 105. The demurrer interposed to the complaint assigned want of jurisdiction as one of the grounds. With the first cause of action eliminated from consideration, as it must be for the reason stated, the court below was correct in refusing to entertain jurisdiction of the action, and properly sustained the demurrer without leave to amend.

[3] There was no error in the order denying plaintiff leave to amend, for the reason plaintiff cannot state a sufficient cause of action against defendant on the facts contained in her first count. Without it she cannot bring her cause of action within the jurisdiction of the superior court.

The judgment is affirmed.

We concur: KNIGHT, Judge pro tem.; RICHARDS, J.

45 Cal. App. 436

Ex parte STATHAM. (Cr. 694.)

(District Court of Appeal, Second District, Division 1, California. Jan. 12, 1920.)

1. MUNICIPAL CORPORATIONS ⟸106(1)—FACTS RECITED IN ORDINANCE HELD SUFFICIENT TO JUSTIFY EMERGENCY CLAUSE.

Recitals in an ordinance that prior ordinances regulating the soliciting of transportation of passengers and baggage at railroad stations had been repealed, and that the absence of regulation had resulted, and would result, in disturbance of the peace and safety of the general public, are sufficient to justify a declaration that an emergency required the ordinance to become effective at once, and the recited facts cannot be questioned by the court.

2. MUNICIPAL CORPORATIONS ⟸108—ORDINANCE SUBSTANTIALLY DIFFERENT FROM ONE ON SAME SUBJECT REPEALED AFTER REFERENDUM PETITION WAS FILED IS NOT INVALID.

Where a former ordinance had been repealed after a petition for referendum thereon had been filed, a subsequent ordinance on the same

subject, but substantially different from the former in important items, is not invalid as an attempt to evade the referendum.

3. MUNICIPAL CORPORATIONS ⊂626—ORDINANCES PROHIBITING SOLICITING TRANSPORTATION OF PASSENGERS AND BAGGAGE AT STATIONS WITHOUT PERMISSION OF THE RAILROAD IS NOT DISCRIMINATORY.

An ordinance, prohibiting the solicitation of transportation of passengers and baggage at railroad stations or on trains or the maintenance of stands therefor without the written consent of the railroad company, is not void as an unlawful discrimination between those who can obtain such consent and those who cannot.

Petition by Geo. U. Statham for a writ of habeas corpus to be directed to the Chief of Police of the City of Los Angeles. Writ discharged, and petitioner remanded to custody.

Warren L. Williams, of Los Angeles, for petitioner.

Charles S. Burnell, City Atty., Wm. P. Mealey, Asst. City. Atty., Erwin W. Widney, City Prosecutor, and J. D. Taggart, Deputy City Prosecutor, all of Los Angeles, for respondent.

CONREY, P. J. In this proceeding it is duly shown that George U. Statham is held in custody, pursuant to arrest and upon a complaint filed in the police court of the city of Los Angeles, charging him with the commission of a misdemeanor by willfully and unlawfully soliciting custom and patronage for the transportation of persons and baggage for hire in the Southern Pacific Depot in said city and upon property used and occupied in conjunction with said depot, contrary to the provisions of an ordinance of the city.

The ordinance in question is No. 39551, new series, of the city of Los Angeles. This ordinance was passed by the city council on November 17, 1919, approved on the 21st day of November, 1919, and duly published on the 25th day of November, 1919. It was adopted as an emergency ordinance, and as such, by its terms, became effective on the date of its publication, notwithstanding the referendum provisions of the city charter. The previous ordinances of the city upon the same subject had been expressly repealed by an ordinance approved on the 23d day of September, 1919, and from that time until the adoption of ordinance No. 39551 there was no ordinance of the city in force regulating the solicitation of custom and patronage in or about railroad depots and premises, etc., in said city. Ordinance No. 39551 recites these facts, and declares that the absence of adequate prohibitory and regulatory legislation upon that subject has resulted, and will continue to result, in disturbance of the peace of the general public and the safety of the general public, and especially of the traveling public, etc., for which reasons "this ordinance is urgently required for the immediate preservation of the public peace, health, and safety, and the city clerk shall certify to the passage of this ordinance by a three-fourths vote of the city council and cause it to be published once in the Los Angeles Daily Journal, and thereupon it shall take effect and shall thereafter be in force." The alleged offense of Statham is charged to have been committed on the first day of December, 1919, which was within the 30 days' time allowed for the institution of proceedings for referendum upon ordinances to which the right of referendum applies.

On behalf of petitioner it is contended that at the time of the adoption of Ordinance No. 39551 there did not exist any urgency for the passage of the ordinance as an emergency ordinance; that it was not necessary for the immediate preservation of the public peace, health, and safety; that it was not, in fact, an emergency ordinance; and that, therefore, its operation was, by law, suspended for a period of 30 days from the date of publication thereof; also that Ordinance No. 39551 is void for the reason that a similar ordinance (No. 39385), adopted by the council, had been approved on the 23d day of September, 1919, and had been suspended by a referendum placed thereon by the voters of the city, and had been thereafter repealed by the council, and that the subsequent Ordinance No. 39551 was enacted by the city council as an emergency ordinance in bad faith, and with the intent to evade the effect of the referendum petition.

It is further claimed that said Ordinance No. 39551 is unconstitutional and discriminatory, in that it provides that it shall be unlawful for any person engaged in the described business to cause any vehicle owned or operated by him to remain upon any railroad depot grounds or premises in said city while awaiting employment, except such person have the written consent of the owners, etc., of such depot grounds, etc., and further provides that it shall be unlawful for any person to solicit custom or patronage of transferring persons or property or baggage in or upon any railroad train, etc., excepting persons having written consent of the owners, etc., of such railroad trains, etc., and is further discriminatory in that it confers the right upon owners, etc., of railroad trains, etc., to confer upon certain favored taxicab companies or individuals the exclusive privilege of entering upon such railroad trains, etc., and discriminates against independent taxicab men, etc., and in favor of those persons having such written consent of the owners.

[1] The legislative body, presumably upon a sufficient investigation and knowledge of the situation existing, has determined that facts existed constituting an emergency, such that the peace and safety of the community,

and particularly the traveling public, required that appropriate legislation be immediately enacted. The facts recited in the ordinance are facts which reasonably might be held to constitute such emergency. This being so, the courts will not, in a proceeding like that now before this court, undertake to investigate the truth of the statement of facts as set forth in the ordinance and substitute their decision for that of the city council. We are here concerned only with the jurisdiction of the police court, whose authority is challenged on the ground that the facts charged in the complaint against petitioner did not, at the time of their occurrence, constitute a public offense. While it has been held that the mere declaration of the council that the ordinance is passed for the immediate preservation of the public health, peace, and safety is neither conclusive nor yet sufficient, it was further pointed out that "the nature of the ordinance itself will, in most instances, be determinative, and where a sudden emergency has arisen, a statement of the nature of the urgency finds proper place to support the declaration." In re Hoffman, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75.

[2] It may be conceded that, ordinarily, when an ordinance which has been suspended by a referendum has been repealed by the council, the council cannot enact another ordinance in all essential features like the repealed ordinance; although, even then, if there is an emergency involving the immediate safety of the public welfare, and the council has inadvertently failed to declare such emergency in passing the ordinance, it may be that this oversight can be remedied forthwith by repeal and re-enactment in proper form, notwithstanding the filing of a referendum petition. The council may, however, deal further with the subject-matter of the suspended ordinance by enacting an ordinance essentially different from the ordinance protested against, avoiding, perhaps, the objections made to the first ordinance. If this be done, not in bad faith, and not with intent to evade the effect of the referendum petition, the second ordinance should not be held invalid for this cause. L. R. A. 1917B, 26, citing Re Megnella, 133 Minn. 98, 157 N. W. 991. We have compared the two ordinances, Nos. 39551 and 39385, which are set out as exhibits annexed to the petition herein. Without making the comparative quotations, which would unduly extend this opinion, we are content to say that the two ordinances differ from each other, not merely in phraseology, but in substance relating to items of importance. Therefore the assertion of petitioner that the last ordinance was, in all essential features and provisions, similar to the former, and that the last ordinance was enacted in bad faith and with intent to evade the effect of the referendum petition, is not sustained by the record.

[3] We think that the terms of the ordinance do not create any unlawful discrimination between persons who have, and others who have not, written consent of the owners of depots and depot grounds, to maintain booths, or keep vehicles standing upon such depot property. In the case of In re Barmore, 174 Cal. 286, 163 Pac. 50, the Supreme Court upheld the validity of an ordinance of the city of Los Angeles which wholly prohibited soliciting of patronage for transportation of passengers or goods in certain public places, including railroad stations. Having the power to prohibit, the city has equally power to regulate and restrict the conduct of such business when permitted. In so regulating traffic on such premises it is only necessary that the prescribed rules and restrictions be reasonably adapted to promote the welfare of the traveling public. Now it is common experience, and nothing is suggested to the contrary, that the convenience of passengers arriving at transportation stations is promoted, and their business facilitated, by having a single agency at hand to which they can apply for service; whereas, competitive solicitation of such business has been found to be a cause of much disorder and inconvenience. In passing the ordinance, the provisions of which are attacked by petitioner in this proceeding, the city council made a regulation which seems to be reasonable and well adapted to the end in view. A person engaged in the business of carrying passengers and baggage from public transportation depots has not, in that capacity and in the absence of any contract right, a vested right to solicit business on such depot premises. This being so, the prohibition of such solicitation without written consent of the owner of the premises, while there is no prohibition to those who have such consent, is not an arbitrary and unlawful discrimination. The advantage given to the favored person (if any such there be) is only incidental to the regulation, which is enacted for the convenience and safety of travelers, and not for the purpose of discriminating between persons equally entitled to transact such business on premises devoted to public transportation business.

The writ is discharged, and the said George U. Statham is remanded to custody.

We concur: SHAW, J; JAMES, J.

45 Cal. App. 421

BANK & TRUST CO. OF CENTRAL CALIFORNIA v. GEARHART. (Civ. 2866.)

(District Court of Appeal, First District, Division 1, California. Jan. 10, 1920. On Petition for Rehearing, Feb. 9, 1920; Hearing Denied by Supreme Court March 8, 1920.)

1. PARTNERSHIP ⟸52 — EVIDENCE INSUFFICIENT TO SHOW THAT PERSON AUTHORIZED TO SIGN CHECKS AND DRAW MONEY WAS PARTNER.

In an action to recover the balance of the purchase price of an automobile, wherein defendant set up that plaintiff's assignor, a partnership, had failed to comply with Civ. Code, §§ 2466 and 2468, requiring a partnership doing business under a fictitious name to file and publish the names of the partners, evidence that the business bore the name of the husband of one of the partners, that he had authority to sign contracts and checks in the name of the firm and to draw money for his own use, *held* insufficient to bring such husband within Civ. Code, § 2395, defining a partnership.

2. PARTNERSHIP ⟸64 — CERTIFICATE OF NAMES OF PARTNERS MAY BE PUBLISHED BEFORE FILING.

Under Civ. Code, § 2466, requiring persons doing business under a fictitious name to file and publish the names of the partners, it is immaterial that the certificate be published first and then filed, the disability to maintain an action on a contract, or transaction under a fictitious name until the certificate has been filed and published, under section 2468, remaining until publication has been completed.

On Petition for Rehearing.

3. PARTNERSHIP ⟸64 — CERTIFICATE OF NAMES OF MEMBERS NEED NOT STATE THAT ALL MEMBERS ARE NAMED WHEN THEY ARE SO IN FACT.

A certificate of the names of persons composing a partnership doing business under fictitious name, filed and published under Civ. Code, § 2466, giving in fact the names of all the partners, is not insufficient because it does not state that such partners constitute the entire number of members of the firm.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the Bank & Trust Company of Central California against James W. Gearhart. Judgment for plaintiff, and defendant appeals. Affirmed.

Short & Sutherland and Carl E. Lindsay, all of Fresno, for appellant.

Milton M. Dearing, of Fresno, for respondent.

WASTE, P. J. This action was brought by plaintiff, as assignee, to recover the sum of $1,000 and interest, alleged to be due from defendant upon a contract with the Oscar Parlier Company, for the purchase of an automobile, and on which the initial payment of $800 had been made. Plaintiff recovered judgment, and defendant appeals. The principal contention of the appellant, as stated by his counsel, is that—

"The Oscar Parlier Company was a copartnership, doing business under a fictitious name, which copartnership had failed to comply with the provisions of sections 2466 and 2468 of the Civil Code of the State of California, and therefore its assignee cannot recover in this action."

[1] In support of his position appellant argues, first, that the evidence shows conclusively that the Oscar Parlier Company, the copartnership, found by the trial court to consist of Mrs. Bertha V. Parlier and Kathryn Hall Wilson, the only parties executing the certificate of fictitious copartnership required by the section of the Code, in reality consisted of those two and Oscar Parlier, husband of the first-mentioned partner. In this appellant is mistaken. Mrs. Parlier and Kathryn Hall Wilson are sisters. The uncontradicted testimony of the former is that the entire capital contributed to the partnership fund was their own money, derived from the estate of their mother, and money borrowed, and that no other person was interested in the company. The only additional testimony, on which appellant relies, merely established the fact that the business bore the name of Mrs. Parlier's husband, and that he had authority to sign contracts and checks, in the name of the firm, and to draw money for his own use, charging himself with it. This evidence was insufficient to bring Mr. Parlier within the operation of section 2395 of the Civil Code, defining a partnership. The court's finding upon the matter was therefore correct.

[2] Appellant's second point is that the certificate of copartnership had not been filed and published in the manner prescribed by section 2466 of the Civil Code, in that it was published first, and filed afterwards in the office of the county clerk. The section provides that—

Persons transacting business in this state under a fictitious name, or designation not showing the names of the persons interested as partners in such business, "must file with the clerk of the county * * * a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence. Such certificate must be published once a week for four successive weeks, in a newspaper published in the county. * * *"

Appellant's contention is that the certificate should have been filed before publication. As yet we have found no case squarely deciding one way or the other, but there are authorities which seem to hold that a substantial compliance with the section is all that is

required. The purpose of laws of this type appears to be to protect persons giving credit to a fictitious firm on the faith of a fictitious designation. 20 R. C. L. 923. The object of the section, supra, is that public notice shall be given, and a public record made of the individual members of such partnerships, with such definiteness and particularity that those dealing with them may at all times know who are the identical individuals with whom they are dealing, or to whom they are giving credit or becoming bound. Meads, Seaman & Co. v. Lasar, 92 Cal. 221, 226, 28 Pac. 935; Pendleton v. Cline, 85 Cal. 142, 144, 24 Pac. 659. The members of such partnership may be as fully identified and designated for this purpose, by a certificate published first, and then filed, as was done in the instant case, as by one filed and then published. The disability to maintain an action upon a contract made or transaction had under the fictitious name, until the certificate has been filed and the publication made (section 2468, Civ. Code), remains, in either event, until the publication has been completed. As we understand the decisions, the certificate imparts no notice until it has been filed and the publication had for the statutory time. Byers v. Bourret, 64 Cal. 73, 28 Pac. 61; Nicholson v. Auburn Gold Mining & Milling Co., 6 Cal. App. 547, 92 Pac. 651. Consequently, we are unable to perceive what difference it can make, in arriving at the manifest results intended by the section, whether the filing preceded or followed the publication. There is nothing in the section lending support to appellant's contention other than the order of the two sentences, providing for the filing and for the publication. The provision relating to filing precedes the other. There is no provision that the certificate shall be filed first, or that the publication shall refer to the filing, or bear any indorsements showing such fact. The section contains nothing of such compelling force as to lead us to hold that its provisions were not substantially complied with in the instant case. None of the authorities cited by appellant go further than to hold both things must be done.

The other issues raised by appellant's answer in the court below were correctly disposed of by the findings.

The judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

On Petition for Rehearing.

PER CURIAM. [3] On petition for a rehearing, appellant lays stress upon a third objection to the form of the published certificate of copartnership, as ground for a reversal of the judgment. Although the point was raised in the opening brief, the only one filed by appellant, it was there stated in such a manner that the court concluded, as counsel concedes it might well do, that such objection was based solely upon the ground that, in appellant's opinion, the evidence disclosed that the partnership consisted of more persons than those named in the certificate. The suggestion was presented with but little more than a passing reference. Now, for the first time, appellant amplifies his argument of the point.

There were but two partners, Bertha V. Parlier and Kathryn H. Wilson. The notice reads as follows:

"Notice is hereby given that the undersigned have engaged in business at the city of Fresno, California, under the fictitious name of 'The Oscar Parlier Co.'; that the full names of the persons and their place of residence thereof is as follows:

"Bertha V. Parlier, Fresno, California; Kathryn H. Wilson, Fresno, California."

Appellant's point is that it does not purport to say that Bertha V. Parlier and Kathryn H. Wilson are all the members of the partnership, and, notwithstanding the statement made, there may have been other persons engaged in the same business and in the same partnership, and, from all that appears on this certificate, any number of persons other than the persons signing it might have been associated with them in business.

Section 2466 of the Civil Code, so far as pertinent to this discussion, reads:

"* * * Every person transacting business in this state under a fictitious name and every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence."

In the instant case the certificate contained all that was necessary, and complied literally with the requirement of the section. It was signed by the partners and acknowledged in the manner provided by section 2468 of the Civil Code, and was sufficient.

The petition for a rehearing is denied.

45 Cal. App. 480

Ex parte MACDONALD. (Cr. 499.)

(District Court of Appeal, Third District, California. Jan. 15, 1920.)

1. PRISONS ⟸15—BOARD OF PRISON DIRECTORS MAY FORFEIT GOOD BEHAVIOR ALLOWANCE IN SUMMARY PROCEEDING.

Pen. Code, § 1588, authorizing the board of prison directors to forfeit a convict's good behavior allowance for misbehavior after proof of the offense and notice to the convict, was intended to compel obedience to the prison rules, and the proceeding thereunder may be summary in character.

2. PRISONS ⟸15—CONVICT SUFFICIENTLY ADVISED OF CHARGE AGAINST HIM.

Pen. Code, § 1588, authorizing forfeiture of a convict's good behavior allowance for disregarding prison rules after proof of the offense and notice to the convict, *held* sufficiently complied with, where the record of proceedings shows that the charge was read and explained to the convict, and it is immaterial whether the charge was entered in the records of the board of prison directors or on a disconnected sheet of paper.

3. CONSTITUTIONAL LAW ⟸272—PRISONS ⟸15—CONVICT MUST BE GIVEN NOTICE OF PROCEEDING TO FORFEIT GOOD BEHAVIOR ALLOWANCE.

Under Pen. Code, § 1588, authorizing forfeiture of a convict's good behavior allowance for disregarding prison rules after proof of the offense and notice to the convict, the requirement as to notice is mandatory, especially as the Constitution prohibits a person's liberty being taken except by due process of law.

4. PRISONS ⟸15—WRITTEN NOTICE TO CONVICT OF PROCEEDINGS TO FORFEIT GOOD BEHAVIOR ALLOWANCE NOT NECESSARY.

Under Pen. Code, § 1588, authorizing forfeiture of a convict's good behavior allowance for misbehavior after notice, there is no requirement that the notice be written, nor does Code Civ. Proc. § 1010, requiring notices to be in writing, apply to such proceedings.

5. PRISONS ⟸15—NOTICE GIVEN CONVICT UPON FORFEITING HIS GOOD BEHAVIOR ALLOWANCE SUFFICIENT.

In a proceeding under Pen. Code, § 1588, authorizing forfeiture of a convict's good behavior allowance for disregarding prison rules after notice to him, *held*, that sufficient notice was given a convict who was brought before the board and there notified of the offense with which he was charged, especially where he did not request time to prepare a defense, but pleaded guilty.

6. PRISONS ⟸15—PLEA OF GUILTY TO CHARGE OF DISREGARDING PRISON RULES WAIVES NOTICE OF FORFEITURE PROCEEDINGS.

In a proceeding under Pen. Code, § 1588, authorizing forfeiture of a convict's good behavior allowance for disregarding prison rules after notice, a convict who pleaded guilty to a charge of misbehavior waived any further or different notice than that which was given him.

7. APPEARANCE ⟸20 — VOLUNTARY APPEARANCE WAIVES SERVICE OF PROCESS.

If a defendant in a civil action appears therein without having been duly summoned, he submits himself to the court's jurisdiction as effectually as if he had been served with summons.

8. CRIMINAL LAW ⟸98—PERSONAL JURISDICTION ACQUIRED UPON FILING COMPLAINT OR INDICTMENT.

In a criminal case, the court upon the filing of a complaint, indictment, or information acquires jurisdiction over accused's person to the extent that it may by appropriate process compel him to appear and plead to the charge.

9. PRISONS ⟸13 — JURISDICTION OF PRISON DIRECTORS OVER CONVICTS.

Under the law giving the board of state prison directors its powers, the board has jurisdiction over the person of a prisoner confined in the state prison.

10. PRISONS ⟸15—BOARD OF PRISON DIRECTORS HAS JURISDICTION OVER PERSON OF CONVICT.

Under Pen. Code, § 1588, authorizing the board of prison directors to forfeit a convict's good behavior allowance for disregarding prison rules after notice, etc., the filing of a charge against the prisoner gives the board jurisdiction over his person so that it may compel the convict to appear and answer the charges.

11. PRISONS ⟸15—CONVICT SUBMITTED TO JURISDICTION OF PRISON DIRECTORS BY PLEA OF GUILTY.

In a proceeding under Pen. Code, § 1588, to forfeit a convict's good behavior allowance for disregarding prison rules, a prisoner submitted his person to the jurisdiction of the board of prison directors when he entered a plea of guilty to the offense of which he was charged.

Application by Henry E. MacDonald for writ of habeas corpus to be directed to the Warden of the State Prison at Represa. Writ denied, and petitioner remanded.

Jay L. Henry and Wachhorst & Wachhorst, all of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

HART, J. The petitioner, a prisoner confined in the state prison at Represa, this state, claiming that thus he is being illegally restrained of his liberty by the warden of said prison, asks, by this petition for a writ of habeas corpus that he be discharged from such restraint and restored to his liberty.

The petition shows that the petitioner, having previously been duly convicted in the superior court of Los Angeles county of a felony and sentenced by said court to a term of five years in said state prison was in pursuance of said judgment of conviction and sentence, duly delivered into the custody of the warden of said prison on the 13th day of

February, 1915; that, in the month of August, 1916, the petitioner, then a prisoner in said prison under the judgment above mentioned, was assigned by the prison authorities, upon the requisition of the department of engineering of the state of California, to employment at Susanville, Lassen county, in the work of constructing and improving the highway system of the state of California, said order of assignment to such employment having been made under and in pursuance of the provisions of an act of the Legislature of the state of California, approved April 27, 1916, authorizing the employment of convict labor in the construction, improvement, and maintenance of the state highways; that, while he was so employed, and on the 10th day of December, 1916, the petitioner, as the petition delicately states it, "voluntarily absented himself from said employment" (which, in plain language, means that he made his escape from the officers under whose immediate charge he was so employed and so became a fugitive from justice), and remained "absent therefrom," as such fugitive, until the 23d day of April, 1917, when he was apprehended and placed under arrest and returned to the custody of the warden of said prison, "where he is now and ever since has been confined and detained." The petition further alleges that thereafter, to wit, on the 19th day of May, 1917, "the board of prison directors of the state of California, without any formal accusation, complaint, or preliminary affidavit made against this petitioner, without due or any notice to this petitioner, and without giving him an opportunity to be heard, or the right of a trial, or the right to present evidence or witnesses in his behalf, ordered, adjudged, and declared that all credits and all deductions of time allowed from his term of imprisonment under and in pursuance of the provisions of section 1588 of the Penal Code of the state of California, at any time theretofore earned by him, or at any time thereafter earned by him, be and the same were thereupon forfeited"; that the credits and deductions so declared forfeited, and to which it is alleged the petitioner is entitled, amount to one year and five months; that the petitioner has actually served, under the sentence imposed upon him by the court, up to the time of the application for this writ, four years, five months, and twenty-one days; and that with the credits and deductions allowed from said sentence, under the provisions of section 1588 of the Penal Code, "to all of which credits and deductions the prisoner is rightfully entitled," the petitioner has long since been, and now is, entitled to his liberty and discharge from said state prison.

The minutes of the meeting of the board of prison directors, held on the 19th day of May, 1917, contain the following record of the proceedings had by the said board relative to the charge of escape preferred before that body against the prisoner:

"No. 9411. Henry MacDonald.

"The above prisoner was brought before the board on a charge of having escaped from the State Highway Camp at Susanville on December 10, 1916. The charge was read and explained to him and being asked for his plea, the prisoner pleaded guilty, whereupon a motion was duly made, seconded, and carried, and it was—

"Resolved that the board find the prisoner guilty of the charge, and it was—

"Further resolved that all credits earned and to be earned by him be and the same are hereby forfeited."

Warden J. J. Smith, at the mutual request of the attorneys for the petitioner and the Attorney General, was sworn as a witness before this court at the hearing of this petition, and testified that the prisoner, without previous notice of the hearing of the charge of escape filed against him by the board of directors, was, on the day named in the minutes of the board, brought before that body and then and there entered a plea of guilty to the charge after the nature of the same had been stated and explained to him by the board. The warden further stated that that course was the customary one in all such cases, the practice of giving prisoners so charged formal previous notice of the hearing of the charge by the board never having been followed, as a general rule.

The points made by the petitioner, in support of his claim that he is entitled to be discharged from custody, are that the board of prison directors did not acquire jurisdiction to hear and determine the charge against him for the reason that no formal accusation or complaint, "or preliminary affidavit containing the charge against this petitioner was filed or made against him," and that, the petitioner not having been given the notice required by law, or any notice, of the pendency before that body of the charge against him, the said board never acquired jurisdiction of the person of the petitioner. It is hence argued that the action of the board declaring forfeited the deductions from his sentence to which the prisoner was entitled under the section of the Penal Code above named is absolutely null and of no legal force.

Section 1588 of the Penal Code provides that any convict "who shall have no infraction of the rules and regulations of the prison, or laws of the state, recorded against him, and who performs in a faithful, orderly, and peaceable manner the duties assigned to him, shall be allowed from his term, in stead and lieu of the credits heretofore allowed by law," a certain specified deduction from each year of said term. The section further provides:

"Each convict shall be held entitled to these deductions, unless the board of [prison] direc-

tors shall find that for misconduct or other cause he should not receive them. But if any convict shall commit any assault upon his keeper, or any foreman, officer, convict, or person, or otherwise endanger life, or shall be guilty of any flagrant disregard of the rules of the prison, or commit any misdemeanor, or in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that, under this section, he may earn in the future, or shall forfeit such part of such deductions as to the board of directors may seem just; such forfeiture, however, shall be made only by the board of directors after due proof of the offense and notice to the offender."

[1, 2] The obvious purpose of vesting in the governing board of the state prisons of California the right and the power to punish prisoners confined in those prisons in the manner prescribed by section 1588 is to compel, on the part of such prisoners, obedience to the rules of discipline established for the government of the conduct of the inmates of those institutions, a power quite essential to the maintenance of proper discipline of such prisons and the orderly behavior of the prisoners. It is therefore plainly manifest that a proceeding instituted by the governing board of our state prisons for the purpose of ascertaining and determining whether a prisoner confined in any of said prisons has been guilty, while such prisoner, of an infraction of any of the prison rules or of any law of the state, was intended to be summary in character only or not to be inaugurated and conducted after the fashion of the strict procedural rules by which cases are commenced and tried in the courts of justice. This conclusion is fortified by the consideration that the Legislature has not, in terms, provided in section 1588 of the Penal Code, or in any other law or provision of law of which we have knowledge, that a charge preferred against a prisoner under said section shall be in writing, nor, indeed, has it prescribed any formal precedure by which such cases shall be commenced before and investigated by the board. Of course, a prisoner charged with an offense under section 1588 is entitled to be informed, before he is put upon his trial, of the nature of such offense and it is to be conceded that it would be the more orderly to put the charge in writing and in such language as would leave him in no doubt as to the nature of the charge. Undoubtedly, a charge against a prisoner, with a sufficient explanation of its nature, if not in some other form of writing, is always inserted in some book kept to preserve a record of the proceedings of the board of directors; and, we may observe, in this case, if we assume, as we are authorized to do, that the minutes of the proceedings before the board of directors involving the investigation of the charge against the petitioner state the truth, the charge against him was in some written form, it appearing from the minutes that "the charge was read and explained to him, and being asked for his plea, the prisonor pleaded guilty." Whether the charge was merely entered in some book in which evidence of the proceedings of the board is preserved or written on a sheet of paper disconnected with any such book, in either case it was sufficient under the law. Indeed, we can see no reason for holding that, in a strict sense, it would not have been sufficient for the presiding officer or some other member or the secretary of the board merely to state to the prisoner orally the nature of the offense to which he was required to plead.

[3, 4] As to the second point, to wit, that the board of prison directors did not acquire jurisdiction of the person of the petitioner because he was not given the notice of the pendency of the charge against him before the board prescribed by section 1588, it is first to be conceded that the provision of said section, as to notice in such cases, is obviously mandatory. In other words, such notice must be given in all such cases. The statute so provides, and, besides, the provision as to deductions from sentence becomes a part of the judgment of sentence (Ex parte Wadleigh, 82 Cal. 518, 520, 23 Pac. 190), and to deny to a prisoner in such case, even if it were through omission by the Legislature to make specific provision therefor, the right to be notified of a charge pending against him before the prison board, would amount to a denial to him of the protection of the constitutional guaranty that no person's property or liberty or life shall be taken from him except by due process of law. But it will be observed that section 1588 does not require, in specific terms, that the notice to be given to a prisoner of the filing of a charge against him before the prison board shall be in writing, nor is it specified how much notice, as to time, shall be given the prisoner. It was, however, contended at the hearing of this proceeding that, where a statute or section of any of the Codes requires a notice to be given of any proceeding or action to be taken before any tribunal against a party, such a notice must be in writing, and that therefore, while section 1588 does not, in terms, require the notice therein mentioned and to be given a prisoner of the pendency of a charge against him before the prison board to be in writing, such a notice in such case must, nevertheless, be given. No authorities are cited in support of this proposition, but we suppose that its foundation is in section 1010 of the Code of Civil Procedure and some cases explaining the scope of that section. See Forni v. Yoell, 99 Cal. 173, 33 Pac. 887, and cases therein cited; also, Peterson v. Superior Court, 30 Cal. App. 466, 158 Pac. 547. We are of the opinion that neither the Code section last above mentioned, nor the decisions cited construing the same, have any application to the notice referred to in section 1588 of the

Penal Code. Nor do we find any reason for holding that written notice is imperatively demanded by the last-named section. So long as the prisoner is given due or such timely notice as will put him in possession of knowledge of the nature of the charge to which he is required to plead and as will afford him sufficient opportunity for the preparation of any defense which he may have, whether such notice be given in writing or orally, it is sufficient; for the obvious purpose of the notice referred to in section 1588 is to give the prisoner an opportunity to prepare any defense he may desire to offer in impeachment of the charge preferred against him and to offer such defense at the hearing of the charge.

[5, 6] It follows, from the foregoing views and conclusion, that there are two answers to the proposition that the petitioner here was not given sufficient notice of the filing of the charge against him, viz.: (1) That he was brought before the board and there notified of the offense with which he was there charged. In this connection, we remark that we must assume, in this proceeding, that had petitioner desired to contest the charge, he would have so stated to the prison board when notified of the pendency of the charge against him, and that the board would thereupon have given him ample opportunity to prepare his defense and to procure the attendance of witnesses to testify in support of his defense. (2) That the accused, upon being brought before the board, and the charge read and explained to him, entered a plea of guilty to the charge as so read and explained. To our minds, this latter action of the prisoner amounted to and, in fact, involved a waiver by him of any further or different notice than that which had been given him. The just interpretation of his plea to the charge is that he understood what the charge was, knew the consequences of a conviction, or a plea of guilty thereto; that he had no defense which he could interpose to the charge; and that therefore he did not desire to introduce evidence or to have a trial of the charge against him. In reply to the question of waiver, however, counsel for petitioner contend that the latter's appearance before the board to answer to the charge was not voluntary, and that therefore his plea of guilty, under such circumstances, cannot legally be held to be a waiver. In connection with this contention, and as supporting it, it is suggested that jurisdiction cannot be conferred by consent or stipulation of the parties to a controversy upon a court or other tribunal. As to the first proposition, it is to be conceded that the appearance of the prisoner, in the proceeding instituted against him before the prison board, was not strictly a voluntary appearance. The warden testified that it was the uniform practice in such cases to take the prisoner from his particular place of confinement before the board and there notify him that an offense against the prison rules was pending against him and that the charge was to be investigated, and we assume that that was about what was done in this case. But the point is without merit.

While, as stated, it must be admitted to be true that the appearance of a prisoner before the prison board to make answer and defend against a charge of offending against the rules of the prison, where he does not himself or of his own volition offer to go before the board for that purpose, is, in a sense, involuntary, it must also be conceded that such appearance by a prisoner, circumstanced as is the petitioner or any other prisoner confined in one of our state prisons, is no less voluntary than is the appearance in court of a prisoner confined in a county jail on a felony charge to plead to the indictment or information accusing him of the offense. The latter may not make his appearance before the court to plead to the charge voluntarily, in the strict sense of that term. Indeed, it can safely be declared that he would undoubtedly prefer not to be arraigned and tried upon the charge at all, and would not appear for that purpose but for the fact that he is in custody and may be required to do so. A prisoner confined in a county jail upon a felony charge awaiting trial thereon cannot, obviously, if he pleads guilty upon his arraignment, complain that he was not given time within which to prepare himself for a trial which his plea shows that he did not want. And so in the case of a prisoner confined in the state prison, who has been charged before the prison board with an infraction of the established prison discipline. If, upon being taken before the board, he pleads guilty to the charge, such plea implies that, whatever the character of the notice given him of the pendency of the charge was, it was enough for him for the purposes of his plea, and it would be very strange, indeed, if he could thereafter successfully put forth the plea in the courts that he had not been given the notice essential to a preparation by him of a trial which his plea demonstrated that he did not desire. But it is too obvious to require even a suggestion of the proposition in this opinion that under such circumstances the prisoner would not have a legal leg to stand on before a court. His plea of guilty, as above declared, amounted to a waiver of the notice contemplated by section 1588, the purpose of which is, as we have shown, not to give the prison board jurisdiction of his person, but to enable him to make whatever preparation he may conceive to be necessary to resist the force of the charge against him.

To the second proposition—that is, that jurisdiction cannot be conferred upon a tribunal by consent—the answer is that the situation now being considered is not one where juris-

diction is conferred or attempted to be conferred by consent, but one where a party submits himself to the jurisdiction of the tribunal which (as we have shown) by the filing with it of a complaint against the accused charging him with an offense against the prison rules had acquired jurisdiction of the subject-matter of the complaint or controversy.

[7-11] What is generally meant by the expression that "jurisdiction cannot be conferred upon a court by the mere consent of the parties" is that jurisdiction of the subject-matter of an action or proceeding cannot be so conferred. The law itself fixes the jurisdiction of all tribunals—that is, it fixes or prescribes and limits the extent or scope of the power of all tribunals to hear and determine certain matters—and it is as clear as any proposition can be made that, where a court has under the law no jurisdiction to hear and determine a certain matter, then such court cannot be vested with jurisdiction of such matter by the consent or agreement of the parties to the controversy, or either of them. And this might in some instances be true if the court, having lawful jurisdiction of the subject-matter of the controversy, has failed, for some reason, perhaps some reason arising from a misconception of the remedy suitable to the relief sought, acquired the right to put its general jurisdiction in motion as to that particular controversy. But, as above stated, where the question is as to the jurisdiction of the tribunal of the person of a party to a controversy of the subject-matter of which such tribunal has jurisdiction under the law, the rule above discussed has no application. If a defendant in a civil action appears therein and answers or demurs to the complaint without having been regularly or duly summoned, he thereupon submits himself to the jurisdiction of the court in the action, and the court thus acquires jurisdiction of his person as effectually as though he had been served with summons in any of the modes prescribed by law. In a criminal case, the court, immediately upon the filing of a complaint, if the charge be an ordinary misdemeanor, or of an indictment or information, if the charge be an indictable offense, acquires jurisdiction of the person of the accused to the extent that it is authorized by appropriate process to compel him to appear and plead to the charge and to stand trial thereon, if he pleads not guilty. The situation as to a prisoner confined in a state prison is even different from that with regard to criminal cases arising in the courts; for, under the law giving to the board of state prison directors its powers as such, the said board has at all times for all the purposes of the state prisons and the government thereof jurisdiction of the persons of all prisoners confined therein. But if it be said that, since in a particular proceeding, like the one here, the prisoner's right to liberty is at stake, the law therefore contemplates that some preliminary special step be taken to give the board jurisdiction of the person of the prisoner in such particular proceeding, the answer is that, losing sight for the moment of the proposition that the board under the law giving it its powers as such has jurisdiction of and over the persons of all prisoners confined in our state prisons, the filing of a charge before the board against a prisoner ipso facto gives the board jurisdiction of his person as to that particular proceeding to the extent that it is authorized to compel him to appear before the board and answer to the charge whether he desires to or not. But a conclusive reply to the whole contention in this case is that the petitioner submitted his person to the jurisdiction of the board of directors when he entered a plea of guilty of the offense of which he was accused before that body.

There is nothing said in the case of In re Knowlton, 136 Cal. 107, 68 Pac. 480, or the other cases cited in the briefs of petitioner, in conflict with the views herein expressed. In the Knowlton Case it is merely held, as we here hold, that a prisoner proceeded against before the prison directors under section 1588 of the Penal Code is, by virtue of the requirement of said section, entitled to such notice of the proceedings or the charge against him as will afford him reasonable or sufficient opportunity to prepare for and present his defense and that the alleged offender shall not be convicted except upon a regular hearing of the charge preferred against him.

In concluding, we do not regard it amiss to suggest here that the better plan to adopt in such cases is to file written charges against the prisoner with the prison board and thereupon serve upon the alleged offender written notice stating generally the nature of the charge preferred against him and that the same will be taken up for hearing at some future date, naming the date, and giving the prisoner all reasonable necessary time within which to prepare himself to meet the charge.

For the reasons herein given, the writ herein prayed for is denied, and the petitioner remanded to the custody of the warden of the state prison at Represa.

We concur: ELLISON, Presiding Judge pro tem.; BURNETT, J.

45 Cal. App. 332

EVERETT v. STANDARD ACC. INS. CO.

(Civ. 3149.)

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1919. Hearing Denied by Supreme Court Feb. 26, 1920.)

1. FRAUD ⟸50—PRESUMPTION AGAINST FRAUD.

The presumption is always against fraud, and this presumption approximates in strength that of innocence of crime.

2. FRAUD ⟸58(1)—NECESSITY FOR ALLEGATION AND PROOF BY SATISFACTORY EVIDENCE.

One who seeks relief from fraud must allege it, and prove it by clear and satisfactory evidence, and a mere suspicion of fraud is insufficient.

3. INSURANCE ⟸289—NAMES ⟸20—CHANGE OF NAME LAWFUL WITHOUT LEGAL PROCEEDINGS; REPRESENTATION THAT APPLICANT'S NAME IS ONE IN FACT ASSUMED IS NOT MISREPRESENTATION.

Where insured had been known as E. for 22 years before the policy was written, a representation that his name was E. was not a misrepresentation, although his name had before that been C., since a man may lawfully change his name without resort to legal proceedings, and by general usage or habit acquire another.

4. INSURANCE ⟸665(3)—EVIDENCE SHOWING TRUTH OF STATEMENT AS TO MARRIAGE.

In view of Code Civ. Proc. §§ 1958, 1959, 1961, 1963, evidence *held* to support a finding of truth of decedent's representation that a certain woman was his wife.

5. EVIDENCE ⟸590—TESTIMONY OF INTERESTED WITNESS MAY BE DISREGARDED.

The court or jury may disregard the testimony of an interested witness, as against a presumption, if the latter satisfies them.

6. INSURANCE ⟸646(3)—BURDEN ON INSURER TO PROVE DEFENSE THAT PLAINTIFF WAS NOT LAWFUL WIFE OF INSURED.

The law presumes that deceased insured did not commit either bigamy or perjury when he secured the license to marry plaintiff, and that he did not commit fraud when he procured the insurance policy, and the burden was on the insurer to overcome these presumptions, and establish its defenses that decedent contracted a bigamous marriage, so that plaintiff was not his lawful wife, as he represented.

7. INSURANCE ⟸296—EVIDENCE OF MISREPRESENTATION AND BREACH OF WARRANTY OF OCCUPATION; "ZANJERO;" "OCCUPATION."

In a widow's action against insurer for the death of her husband, defended on the ground of misrepresentation of "occupation," which word means the principal business in which one engages, where he represented that he was superintendent of a water company, and the insurer's agent added, "supervising duties only," to the application, evidence that he was a "zanjero," a Spanish word meaning a water boss of an irrigating concern, and that he occasionally used a shovel to make quick repairs while acting as boss, did not show such a misrepresentation as would avoid the policy, since under the evidence he might have changed occupations, as allowed to do by the policy; and his further representation that he was also an orange grower, supervising two small orange groves, would not render the policy void, because he occasionally hoed weeds, milked the cow, and attended to honey bees.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupation.]

8. INSURANCE ⟸646(3)—AVOIDANCE OF LIFE POLICY FOR MISREPRESENTATION OF INSURED'S INCOME.

In a widow's action upon insurance policy for the death of her husband, the presumption of innocence of crime and fraud cast upon insurer the burden of proving its allegation that insured's representation as to income was untrue.

9. INSURANCE ⟸665(3)—EVIDENCE HELD NOT TO SUSTAIN ALLEGATION OF INSURED'S MISREPRESENTATION AS TO TEMPERATE HABITS.

In a widow's action for the death of her husband against his insurer, evidence *held* not to sustain defendant's contention that insured had misrepresented in stating that his habits were correct and temperate.

10. INSURANCE ⟸668(4)—POLICY NOT MAKING WARRANTIES MATERIAL TO RISK AS MATTER OF LAW.

The materiality of warranties in a policy alleged to have been breached was not made material to the risk as a matter of law by a clause in the policy, "Full compliance of the insured and beneficiary with all provisions of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the company all right to any indemnity;" such clause not being a declaration that "a violation of specified provisions thereof shall avoid it," under Civ. Code, §§ 2610, 2611, as to violation of a material warranty as ground for rescinding a policy, and providing that "a policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy," for "compliance" by the insured and beneficiary with the provisions of the policy relates to things required to be done by them after the policy is written.

11. INSURANCE ⟸146(3)—CONSTRUCTION OF CONTRACT AGAINST INSURER.

Any uncertainty or ambiguity of a contract of insurance is to be interpreted most strongly against insurer.

12. INSURANCE ⟸668(4)—ON DEFENSE OF INSURED'S BREACH OF WARRANTIES, MATERIALITY FOR THE JURY.

In view of Civ. Code, § 2583, and section 2612 as limited by section 2610, where the insurer fails to exercise the right to rescind and sets up breach of warranty as a defense to payment, if the evidence of insured's fraud is not clear and uncontradicted, so that the materiality of the warranties is a matter of law, the question of such materiality is properly left to the jury.

13. EVIDENCE ⟸471(2)—AGENT'S OPINION AS TO WHETHER HE WOULD HAVE WRITTEN POLICY, HAD HE KNOWN FACTS ALLEGED TO CONSTITUTE FALSITY OF WARRANTIES, PROPERLY REJECTED.

In a widow's action against an insurer for the death of her husband, the trial court properly rejected the testimony of the agent as to whether he would have written the insurance, if he had known some of the facts alleged to constitute the falsity of the insured's warranties, since such testimony was merely the individual opinion of defendant's employé.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by Elizabeth A. Everett against the Standard Accident Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Stephens & Stephens and Chandler P. Ward, all of Los Angeles, for appellant.

Daley & Byrne and Fred A. Wilson, all of San Bernardino, for respondent.

NOURSE, J. This is an appeal from a judgment in favor of plaintiff for the full principal sum of an accident insurance policy providing for the payment of $7,500 to plaintiff as the wife of Francis J. Everett, who was killed while riding a motorcycle in the city of Redlands as the result of a collision with an automobile. The policy of insurance was executed in due form, and the premium paid, and proof of the death from accidental causes was properly made.

The company defended upon the ground that decedent had been guilty of fraudulent misrepresentations and concealment, which resulted in breaches of warranties which were contained in the application for the policy. The misrepresentations asserted by the company were: (1) That the insured's name was James F. Cowie, instead of Francis J. Everett; (2) that Elizabeth A. Everett was his wife, whereas the wife of the insured was Jennie B. Cowie; (3) that the insured was the superintendent of a water company, with supervising duties only, and an orange grower, with supervising duties only, whereas he was a working zanjero for a water company, and a working farmer, and was accustomed to perform manual labor in each occupation; (4) that his income exceeded $25 a week, whereas it was less than that amount; (5) that his habits were correct and temperate, whereas he was living at the time in an adulterous relation with a woman not his wife. The concealment asserted related to the failure of the insured to disclose to the company the fact that he had deserted his wife, Jennie B. Cowie, and five children, in an Eastern state, and had come to California, taken an assumed name, and contracted a bigamous marriage with plaintiff.

On each one of the defenses urged by the defendant there was a substantial conflict in the evidence, which the jury resolved in favor of the plaintiff and against the defendant. On this appeal the company urges that the evidence fully supports its theory of the case and does not support the verdict in favor of the plaintiff. It is also urged, apparently with some seriousness, that any verdict against an insurance company should on appeal be treated as prima facie erroneous, and that this court should take the entire matter from the jury, and direct a judgment in favor of the company, upon the record herein presented. Criticisms of certain instructions given to the jury and rulings upon the admission of evidence are also made, and these will be considered in their proper order.

The defenses above noted as 1, 2, and 5, together with the matter of concealment, are based upon the following testimony offered by the defendant: That one James F. Cowie was married in an Eastern state in 1877 to one Jennie Burt, and that these two lived together as husband and wife until June, 1890, when Cowie deserted his wife and five children. Mrs. Cowie never heard from her husband directly thereafter until about six months after the desertion, when she received through the mail in a roundabout way a letter in his own handwriting, regretting his action and offering to return, if she was willing to have him do so. Nothing further was heard from him until 1893, when, according to one of defendant's witnesses, he appeared in San Bernardino county under the name of Francis J. Everett. Witnesses were produced on behalf of the defendant who testified that in their opinion Cowie and Everett were the same person, and one witness was produced on behalf of the plaintiff who testified that he knew Cowie well in the East, that he was also acquainted with the man named Everett in San Bernardino county, and that he did not recognize them as being the same. In April, 1895, Everett and the plaintiff in this action were licensed to marry and a marriage ceremony was regularly performed. Thereafter and continuously until the death of decedent they lived together in San Bernardino county as husband and wife. Proof was offered on the part of the defendant that the deceased never obtained any divorce from Jennie B. Cowie in San Bernardino county, and that Jennie B. Cowie never obtained a divorce from her husband, or received any summons or other papers in relation to an action for divorce on the part of the husband. Plaintiff relied upon the presumption of the legality of her marriage with the decedent in 1895 and their continuous cohabitation for a period of 20 years thereafter as husband and wife, failure of proof that a divorce may have been obtained during the period unaccounted for by defendant, and the failure of proof as to the identity of the parties.

The facts relied upon by defendant in sup-

port of its defense noted as No. 3 relating to asserted misrepresentations as to the occupations of the decedent, are that though the decedent represented himself to be the superintendent of the West Redlands Company, a mutual irrigation company, he was, in fact, the zanjero for such company, and was known as such throughout the district in which he was employed. It is also claimed that the decedent misrepresented his occupation as an orange grower, with supervising duties only, because he performed some manual labor in and about his home and assisted with the care of the orange grove. The evidence upon both of these points was conflicting. The records of the company show that decedent was employed as its superintendent. The company was a small concern, supplying an average of 110 inches of water per day for distribution among its stockholders during the irrigating season. The deceased had no duties to perform regarding the acquisition of the supply of water, other than to direct the engineer when to begin pumping. His chief duties were to look after the lines of distribution and measure the water out to the stockholders. He had full power to employ all necessary labor. He would go at 9 o'clock a. m. each day to measure the water to be delivered to the company on that day. He would then make his rounds of the distributing system, being employed in this capacity until about 12 o'clock noon. Frequently this completed his work for the day with the company, but on many occasions he went over the system again, commencing about 2 o'clock p. m., and finishing at about 4 o'clock p. m. On many occasions he was seen to use a shovel and a hoe in making minor repairs to the pipe line, and even carried in his Ford machine with which he made the rounds a small supply of cement with which he repaired leaks in the pipes. On one occasion he was seen to use a wheelbarrow in removing dirt from a driveway, and on other occasions he was seen to use a wire in cleaning roots from some of the pipes. Generally the evidence in this connection was that the decedent was known both as superintendent and as zanjero, but that his chief duties were to look after the distribution and measuring of the water, to make out the water schedule, and to apportion the water to the different growers. The repairs which he made were all voluntary, he having the power to employ such labor for that purpose as he desired, and the repairs which he did make were occasional or "10-minute jobs."

The facts relating to the occupation of decedent as an orange grower are that he and the plaintiff owned two orange groves, one not quite 4 and the other 2½ acres. He hired the heavy manual labor and supervised the manner in which it was performed. He did some manual labor in and about the groves and around his home place, consisting of cutting out some brush or deadwood, hoeing weeds about the house and the lawn, and small jobs in the orange groves. For instance, it was shown that on one occasion he helped operate the machine that carried around the fertilizer, and did some "light pruning," and showed his employé how to use the plow on one occasion. In addition to this, when time and inclination permitted, he assisted his wife in feeding the chickens, milking the cow, and caring for the honey bees. All of the evidence of the defendant in connection with these acts done by decedent is extremely indefinite as to time, and falls far short of proving a deliberate misrepresentation or concealment on the part of decedent on March 2, 1915, the date when the application for the policy was executed. On the other hand, the testimony on behalf of plaintiff clearly indicates that this manual labor of which defendant complains was performed by the decedent prior to the date of his employment with the water company in January, 1915, and that the work performed by him in and about the home and the orange grove during the period of his employment with the water company was of a supervising character, as represented by him at the time of his application.

The evidence in support of the defense noted above as No. 4, relating to the income of decedent, is that as superintendent of the water company he received a salary of $65 a month, and that consequently he misrepresented the facts as to his income to the agent, when he accepted the application containing the statement:

> "My income per week exceeds the gross amount of weekly indemnity under all policies carried by me."

In response to this defense, plaintiff offered testimony that decedent's income, together with his salary from the water company, exceeded the sum of $25 a week, the weekly indemnity provided in the policy in suit.

[1, 2] The special defenses raised by appellant were all based upon the alleged fraud of decedent. The presumption is always against fraud. This presumption approximates in strength that of innocence of crime. Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26. One who seeks relief from fraud must allege it, and prove it by clear and satisfactory evidence. A mere suspicion of fraud is not sufficient. Here the evidence was conflicting in every particular. Consideration will be given each of these special defenses in the order presented by appellant.

[3] 1. That decedent represented and warranted that his name was Francis J. Everett, whereas in truth his name was James F. Cowie. The uncontradicted evidence was that for a period of 22 years before the policy was written decedent had been known as Francis J. Everett, during which time he

lived continuously in the county of San Bernardino. Evidence was offered tending to identify him with one James F. Cowie, who deserted his wife and children in Minnesota some 25 years previously. The jury might well have believed this evidence, but still could not have found that there was either a misrepresentation or breach of warranty in this particular. A man may lawfully change his name without resort to legal proceedings, and by general usage or habit acquire another name.

"The name is not the person, but only a means of designating the person intended; and where one assumes and comes to be known by another name than that which he properly bears, that name may be effectually employed for the purpose of designating him." Emery v. Kipp, 154 Cal. 83, 87, 97 Pac. 17, 19 (19 L. R. A. [N. S.] 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792).

[4] 2. That Elizabeth A. Everett was his wife. Even if this be treated as a warranty, there is sufficient evidence to support a finding that it was true. Appellant relies upon the showing that one James F. Cowie was married to Jennie Burt in Wisconsin; that they lived together in Minnesota until 1890, when Cowie deserted his wife and children; that his wife had not heard from him since his desertion, except by way of a letter written in July of that year; that the wife had not secured a divorce, and had no knowledge whether a divorce had been obtained by her husband; that the person who it was claimed was in fact Cowie had lived in San Bernardino county since 1893, and had not procured a divorce in that county. Respondent relies upon the presumption that Everett did not commit a crime when he contracted the marriage with respondent in 1895, the presumption that such marriage was valid, and the failure of identification of the decedent with Cowie. Unless these presumptions were controverted by other evidence, the jury was bound to find according to the presumption. Section 1961, Code Civ. Proc. If controverted by other evidence, the presumption itself is to be treated as evidence conflicting with the other evidence offered. Otherwise there would be no need of using the word "other" in the Code section cited. Thus the presumption of innocence of crime will support a verdict of acquittal in a criminal case, though no evidence is offered to controvert the case of the prosecution. The rule differs as to an inference which can be drawn only from facts proved. Where evidence is offered controverting the inference which might ordinarily be drawn under the circumstances, the jury is bound to find according to the controverting evidence. The distinction is found in the Code. Section 1958, Code of Civil Procedure, defines an inference as "a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect." Section 1959 defines a presumption as "a deduction which the law expressly directs to be made from particular facts."

Appellant cites Maupin v. Solomon, 183 Pac. 198, to the effect that controverting evidence does not create a conflict with a presumption so that a finding of the jury in accordance with the presumption may be sustained. But the Supreme Court, in denying a rehearing in that case, expressly rejected that rule, and said that they understood the opinion to relate to an inference, and not to a presumption. Other cases cited by appellant fail to distinguish between presumptions and inferences. In any event, the extent of the rule announced in these cases is that, where clear and convincing proof is offered controverting all the facts upon which the presumption is based, the presumption is thereby overcome and dispelled and no conflict in the evidence arises. Here there is a lapse of nearly 3 years during which Cowie may have obtained a divorce, and the fact that Mrs. Cowie moved to another state immediately after the desertion, and moved frequently from place to place thereafter, might account for the fact that she obtained no summons in such an action.

[5] Furthermore, the jurors were not bound to believe the testimony of the witness purporting to be Mrs. Cowie, whose deposition was taken in Mendocino county; she not having been otherwise identified as such. The court or jury may disregard the testimony of an interested witness, as against a presumption, if the latter satisfies them. Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712. This witness was shown to have consulted counsel with a view to recovering on the policy, if she could show that she was the legal wife of the decedent. Then, again, the jurors were not bound to believe the testimony of other witnesses attempting to identify Cowie with decedent. The photograph of Cowie, taken before the desertion in Minnesota, was identified by the witness Mrs. Cowie; but no attempt was made to show any likeness between the photograph and the decedent.

[6] This branch of the case is controlled by the decision of the Supreme Court in Hunter v. Hunter, 111 Cal. 261, 267, 43 Pac. 756, 757 (31 L. R. A. 411, 52 Am. St. Rep. 180), where the court say:

"It is presumed that a person is innocent of crime or wrong. Code Civ. Proc. § 1963. There is also a presumption, and a very strong one, in favor of the legality of a marriage regularly solemnized. Rather than hold a second marriage invalid, and that the parties have committed a crime or been guilty of immorality, the courts have often indulged in the presumption of death in less than seven years, or, where the absent party was shown to be alive, have allowed a presumption that the absent party has procured a divorce. A more correct statement,

perhaps, would be that the burden is cast upon the party asserting guilt or immorality to prove the negative—that the first marriage had not ended before the second marriage."

To the same effect are Estate of Baldwin, 162 Cal. 471, 488, 123 Pac. 267; Wilcox v. Wilcox, 171 Cal. 770, 774, 155 Pac. 95; In re Pusey, 173 Cal. 141, 159 Pac. 433; Estate of Hughson, 173 Cal. 448, 453, 160 Pac. 548.

The evidence offered by appellant on this branch of the case would not sustain a conviction of bigamy, if decedent had been tried for that offense. The law presumes that he did not commit bigamy, that he did not commit perjury when he secured the license to marry respondent, and that he did not commit fraud when he procured the policy of insurance. The burden was on appellant to overcome these presumptions, and this it failed to do.

[7] 3. The third defense upon which argument is presented on this appeal relates to the occupation of decedent. In this, as in all the other special defenses, appellant put squarely in issue the materiality of the representations, alleging "that the fact that the duties of the said decedent were not supervising duties only was material to and affected the hazard under the risk assumed by the terms of said policy." To establish this defense it was necessary to prove the materiality of the respresentations, as well as their falsity, unless they could be deemed material as a matter of law.

The facts presented to the jury were that upon the books of the water company he was designated superintendent. Appellant asserts that among the farmers he was known as zanjero. The difference between the use of the two titles depends mainly upon the community in which the party is employed. Zanjero is a Spanish word, commonly used to designate a water boss of an irrigating concern. The Standard Dictionary gives this definition:

"A person employed to distribute the water of an irrigating canal in due proportion among those entitled to use it."

If during the course of his employment he should take a shovel or a hoe, or make minor repairs in and about the system, he would suffer no injury to his reputation, whether he be known as a superintendent or a zanjero. He was asked to state what his duties were. He answered, "Superintendent, water company." The agent of the company added, "Supervising duties only." The testimony of the president and directors of the company shows the truth of this statement. There is no conflict in the evidence upon this point. Appellant offered a mass of testimony to show that at certain times after the policy was written appellant was seen making some "10-minute repairs," or using a shovel or a hoe to find a leak in the pipes. The most that this testimony could prove would be that there had been a change of occupations after the policy was written, a matter not in issue, because the policy did not prohibit a change of occupations, but expressly permitted it. There was no evidence tending to show that prior to or at the time the policy was written the decedent had engaged in any of these minor repairs.

The word "occupation" means the principal business in which a man engages. His duty is that which he is bound to do. The evidence here was that the duties of the insured were to superintend the work and to employ necessary labor to keep up the system. It was also shown that any minor repairs made by him were made voluntarily, because they were not of sufficient importance to justify the employment of a laborer. Here again appellant, by its answer, put in issue the materiality of this representation and warranty, and on the trial showed that the only other classification under which the insured could have been enrolled was that of "pipe line laborer." What a misrepresentation it would have been if the insured had given his occupation as that of a pipe line laborer.

The evidence relating to the insured's occupation as an orange grower was of like character. It was to the effect that he supervised the care of two small orange groves, employed all of the heavy labor, but occasionally hoed weeds around his front yard, milked one cow, and brought in the honey from the honey bees. The evidence as to these acts, however, was not definite as to time; the greater part of it relating to acts which were done by the decedent prior to his employment as superintendent of the water company, in January, 1915, 3 months prior to the date of the policy. From this the jury could properly infer that upon his employment as superintendent of the water company his labor about the orange groves ceased. The evidence offered by appellant on the matter of occupations by decedent is insufficient to show either misrepresentation or a breach of warranty in connection with either occupation.

[8] 4. If it be conceded that the acceptance by decedent without objection of the printed matter in the application above quoted constitutes a warranty on his part that his weekly income was in excess of $25, there was a substantial conflict in the evidence as to the actual income of the decedent from his two occupations, given as water superintendent and orange grower, which the jury resolved in favor of plaintiff and against the defendant. But it may well be said that the printed matter referred to in the application was not a warranty on the part of the applicant that his income exceeded $25 a week. He did warrant that his income exceeded the

gross amount of weekly indemnity under all policies carried by him. The policy upon which this suit rests had not then been issued. If the company intended this statement to be a warranty that the weekly income exceeded that provided for in the policy which might thereafter be issued by it, it was guilty of a concealment equal only to that charged against the applicant in the particulars hereinbefore noted.

The agent of the company who wrote the insurance, called by appellant, testified that he questioned the insured fully as to his occupations and income before the policy was written. Two occupations were given—superintendent of water company and orange grower. The income of an orange grower depends upon many conditions beyond his control. The policy was written for the year commencing March 2, 1915. The inquiry as to income related to the probable return of that period. The statements of the applicant relating thereto were more matters of opinion than statements of facts. If they should be treated as warranties that the income exceeded $25 a week, they could be based only on an estimate that such would be the income for the ensuing year under ordinary conditions. The fact that a frost had injured the orange crop in 1913 does not justify a conclusion that such would be the result in 1915.

The presumption of innocence of crime and of fraud cast upon appellant the burden of proof. It voluntarily put in evidence the statements of decedent as to his income and attempted to controvert this merely by the showing that his salary with the water company was $65 a month. Upon this point it presented the issue in its answer merely by the allegation that the income of decedent did not "exceed $65 a month." This it failed to prove. It alleged that the warranty was material to the risk covered, yet from its own manual, which it put in evidence, it appears that the company fixed the indemnity arbitrarily according to occupation, and without regard to weekly income.

[9] 5. That his habits were correct and temperate, whereas he was living in an adulterous relation with a woman not his wife. The only positive evidence on this branch of the case was that decedent had lived "a respectable, honorable life here, and was respected by all his neighbors." Against this evidence was the suspicion that decedent was in fact Cowie, who had deserted his wife, and that decedent was illegally cohabiting with respondent. In view of the evidence heretofore discussed, and the presumption covering the legality of the marriage with respondent, the evidence falls short of proving the alleged falsity of this warranty. The concealment relied upon by appellant related to the failure of decedent to disclose the facts of the desertion and the contraction of a bigamous marriage, failure of proof of which has already been noted.

[10, 11] The objections relating to the instructions given to the jury may be generally stated as involving the single point whether a question of the materiality of the warranties should have been submitted to the jury. Section 2611 of the Civil Code provides:

"A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy."

Section 2610 of the same Code provides:

"The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind."

In Victoria Steamship Co. v. Western Assurance Co., 167 Cal. 348, 357, 139 Pac. 807, 811, it was said:

"Under these provisions, no right to avoid or rescind a subsisting policy occurs from the violation of any provision thereof, whether technically a warranty or not, unless such provision is material, except in cases where the policy itself declares that such breach shall avoid it. This policy makes no such declaration. We cannot agree with the defendant's counsel in their contention that the principles stated in sections 2608 and 2610 are applicable only to implied warranties and that the principle of the common law that a violation of an express warranty avoids the policy, although the warranty be immaterial, applies to and controls this case."

The language of the policy relied on by appellant as meeting the terms of section 2611 is:

"Full compliance of the insured and beneficiary with all provisions of this policy is a condition precedent to recovery hereunder, and any failure in this respect shall forfeit to the company all right to any indemnity."

"Compliance" by the insured and the beneficiary with the provisions of the policy relates to those things which are required to be done by either the insured or the beneficiary after the policy is written. Any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer. Victoria Steamship Co. v. Western Assurance Co., supra, 167 Cal. 353, 139 Pac. 810. The language of this policy falls short of a declaration "that a violation of specified provisions thereof shall avoid it." If such had been the intention, the policy should have so declared in clear and unmistakable terms. None of the warranties of this policy alleged to have been breached was such that the court could say as a matter of law it was material to the risk, and appellant, having put in issue the materiality of each of the warranties by the allegations in its affirmative defenses, cannot complain that that issue was adjudicated. In this re-

spect the case differs from McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 Pac. 242; Westphall v. Metropolitan Life Ins. Co., 27 Cal. App. 734, 151 Pac. 159, and Porter v. General Accident, etc. Assurance Corporation, 30 Cal. App. 198, 157 Pac. 825, wherein it was held that the materiality of the warranties was determined by the parties themselves when they appeared in written answers to written questions in the application. None of these cases considered the effect of sections 2610 and 2611 of the Civil Code. Two are cited in the opinion of Justice Melvin in Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 169 Pac. 997, to the effect that where the proof of fraud is clear and uncontradicted the question of materiality is one of law and not of fact.

[12] In Solomon v. Federal Ins. Co., 176 Cal. 133, 167 Pac. 859, it was said that section 2612, Civil Code, was limited by section 2610, Civil Code, which permits a party to rescind upon breach of a material warranty. But rescission must be made before action on the policy. Section 2583, Civ. Code. It is where the insurer fails to exercise the right to rescind, and sets up breach of warranties as a defense to payment, if the evidence of fraud on the part of the insured is not clear and uncontradicted so that the materiality of the warranties is a matter of law, that the question of such materiality is properly left to the jury.

[13] Objection is made to the refusal of the trial court to permit the agent of the appellant company to testify whether he would have written the insurance, if he had known some of the facts alleged to constitute the falsity of the warranties. The trial court properly rejected this testimony. It was nothing more than the individual opinion of an employé of the company as to what he would have done under certain circumstances.

Other objections raised do not require consideration.

The judgment is affirmed.

We concur: LANGDON, P. J.; BRITTAIN, J.

182 Cal. 252

MILLER & LUX, Inc., v. SACRAMENTO AND SAN JOAQUIN DRAINAGE DIST. (Sac. 2901.)

(Supreme Court of California. Feb. 17, 1920. Rehearing Denied March 18, 1920.)

1. DRAINS ⟸78—LEVY OF GENERAL ASSESSMENT VALID THOUGH GENERAL SCHEME WAS NOT SEGREGATED INTO PROJECTS.

A levy of a general assessment by the Sacramento and San Joaquin district created by St. 1913, p. 252, *held* valid, though the general scheme of improvement had not been segregated into projects.

2. WATERS AND WATER COURSES ⟸118—FLOOD WATERS DEEMED COMMON ENEMY AT COMMON LAW.

At common law flood waters were deemed a natural enemy of all, and each man had the right to protect his property as he might against such water, and damage to his neighbor by reason of the diversion of flood water was damnum absque injuria.

3. DRAINS ⟸70—ASSESSMENT NOT OPEN TO ATTACK BECAUSE IT INCLUDED RECLAIMED AS WELL AS UNRECLAIMED LANDS.

Where all of the land within the Sacramento and San Joaquin drainage district, created by St. 1913, p. 252, were subject to danger from floods, a landowner whose property had been reclaimed cannot complain that the assessment included his lands.

4. DRAINS ⟸71—ASSESSMENT NOT OPEN TO ATTACK AS NOT LEVIED IN ACCORDANCE WITH BENEFITS BECAUSE PLAINTIFF'S LANDS HAD BEEN RECLAIMED.

A uniform assessment by the Sacramento and San Joaquin drainage district upon land in the San Joaquin valley, all of which was subject to danger from flood, *held* not open to objection by landowner whose property had been reclaimed on the theory that it was not levied in accordance with the benefits.

5. EVIDENCE ⟸10(1), 18—JUDICIAL NOTICE OF LOCAL CONDITIONS JUSTIFYING DRAIN ASSESSMENTS.

It is common knowledge of which the courts will take judicial notice that there are more reclamation projects and a greater area of reclaimed land requiring supervision and adjustment in the Sacramento valley than in the San Joaquin valley, and for that reason it was proper for the Sacramento and San Joaquin drainage district to levy a greater assessment on the lands in the Sacramento valley.

6. DRAINS ⟸79—ASSESSMENT NOT OPEN TO OBJECTION BECAUSE HAVING NO DIRECT RELATION TO VALUE OF LANDS ASSESSED.

Where an assessment by the Sacramento and San Joaquin drainage district was for the general benefit of the whole area, the project being designed to prevent flooding of lands in the two valleys, a landowner cannot complain that the assessment was levied regardless of the value of the lands.

7. DRAINS ⟸70—DETERMINATION OF LEGISLATURE AS TO BOUNDARIES OF DRAINAGE DISTRICT IS ORDINARILY CONCLUSIVE.

The general rule is that, where the Legislature has itself fixed the boundary of a district to be assessed for the benefits of improvement, the legislative determination is conclusive upon the courts and prevents inquiry into the question as to whether the property in the district was benefited.

8. DRAINS ⟸70—ACTION OF LEGISLATURE IN INCLUDING PLAINTIFF'S LANDS IN DRAINAGE DISTRICT CONCLUSIVE.

In attack on a general assessment levied by the Sacramento and San Joaquin drainage district, created by St. 1913, p. 252, plaintiff, whose lands were reclaimed, but were included within the district, asserted the unconstitutionality of the statute on the ground that the work would not benefit its property, *held*, it cannot be said that there was nothing palpably arbitrary or grossly unequal in the inclusion of plaintiff's lands within the district, and hence the courts cannot interfere on the ground that plaintiff's constitutional rights have been infringed, and the action of the Legislature in including his lands is conclusive.

9. DRAINS ⟸71—WHERE LEGISLATURE INCLUDED PLAINTIFF'S LANDS WITHIN DISTRICT, EVIDENCE THAT SAME WERE NOT BENEFITED INADMISSIBLE.

Where the Legislature included plaintiff's lands within limits of the Sacramento and San Joaquin drainage district, created by St. 1913, p. 252, evidence that plaintiff's lands would not be benefited is inadmissible, being an attempt to contradict a fact which it must be presumed the Legislature conclusively determined.

10. DRAINS ⟸73—EVIDENCE ⟸10(5)—JUDICIAL NOTICE TAKEN OF RIVER CONDITIONS; ASSESSMENT NOT OPEN TO ATTACK ON GROUND THAT THERE WAS NO MINING DÉBRIS OBSTRUCTING RIVER IN PART OF AREA ON WHICH ASSESSMENT WAS LAID.

It is a matter of common knowledge that when the Sacramento river is higher than the San Joaquin, the effect is to obstruct the flow of the latter, and, that débris from mining regions in the tributaries of the Sacramento, if carried into its waters, tends constantly to raise the level of the bottom of that river and to decrease its capacity for carrying water, in consequence of which the height of the Sacramento river would be raised and the flow of the San Joaquin impounded; hence a general assessment by the Sacramento and San Joaquin drainage district, created by St. 1913, p. 252, on lands in both valleys is not open to objection on the ground that there is no prospect of there being any mining débris in the San Joaquin river, for a reduction of the flood stage of the Sacramento would benefit lands in the flood area of the San Joaquin, for while section 13 of the act allows the courts to determine whether an assessment should be modified or annulled because unjust or unequal, yet under the section and in view of Pol. Code, § 3462, and section 3493½ as enacted in 1893, such assessment is conclusive save as to benefits.

11. DRAINS ⟸71 — LANDOWNER CANNOT DEFEAT PRESUMPTION OF BENEFITS BECAUSE LANDS INCLUDED WITHIN EXTERIOR BOUNDARIES WERE EXCLUDED.

As the possibility of future floods is unknown, a landowner whose property was included within boundaries of the Sacramento and San Joaquin drainage district, created by St. 1913, p. 252, cannot assert that it is conclusively presumed that all lands within the boundaries of the district are benefited because the Legislature excluded 300,000 acres included in the district; for it is obvious the Legislature included such higher lying ground to give the district power to levy assessments, etc., in case of unprecedented floods.

12. DRAINS ⟸73—VALIDITY OF ASSESSMENT WHERE LANDS WERE EXCLUDED.

A landowner on whose property was levied a general assessment by the Sacramento and San Joaquin drainage district created by St. 1913, p. 252, cannot complain that lands lying within the exterior boundaries of the district were excluded; it appearing that the assessment was for general projects, etc., which would not benefit the excluded lands.

13. STATUTES ⟸109 — TITLE OF AMENDING ACT MAY BE SUFFICIENT INDEPENDENT OF TITLE OF ORIGINAL ACT.

If the title of the amending act itself expresses the subject dealt with, it is sufficient independently of the original title.

14. STATUTES ⟸123(5)—SUFFICIENCY OF TITLE TO EXPRESS OBJECT.

St. 1913, p. 252, creating the Sacramento and San Joaquin drainage district, which amended the act of 1911, and was entitled "An act to amend an act entitled 'An act approving the report of the California débris commission,'" etc., "'directing the approval of plans of reclamation along the Sacramento river,'" etc., is not, as it specifically mentioned the San Joaquin river, open to attack on the ground that it included matter not specified in the title in violation of Const. art. 4, § 24, even though the title of the act of 1911 (St. Ex. Sess. 1911, p. 117) may not have included the San Joaquin river.

In Bank.

Appeal from Superior Court, Merced County; Wm. A. Beasly, Judge.

Proceeding by Miller & Lux, Incorporated, against the Sacramento and San Joaquin Drainage District to contest the validity of general assessment made by defendant. From a judgment affirming the assessment, plaintiff appeals. Affirmed.

Edward F. Treadwell and Berkeley B. Blake, both of San Francisco, for appellant.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

WILBUR, J. This proceeding was instituted to contest the validity of general assessment No. 1 made by the defendant. The judgment affirmed the assessment. The defendant was created by the Legislature in 1913 (Stats. 1913, p. 252). The district contains 1,735,533 acres of land, of which 367,000 are situated in the valley of the San Joaquin river, and the balance in the valley of the Sacramento river. By the assessment attacked herein 5 cents per acre was levied upon the land in the San Joaquin valley and 15 cents per acre upon the land in the Sacramento valley. The general plan of improvement contemplated by the Legislature and the necessity therefor are clearly set forth in the statement in People v. Sacramento Drainage District, 155 Cal. 373, 103 Pac. 207, and in Gray v. Reclamation District, 174 Cal. 622, 163 Pac. 1024, and in the report of the California débris commission (public documents, No. 81, House of Representatives, 62d Congress), a federal commission created by Congress in 1893 (27 Stats. at Large, p. 507 [U. S. Comp. St. §§ 10,004, 10,005, 10,007–10,029]), which report was adopted by the Legislature of California (Stats. Extra Session 1911, p. 117), and made the basis of the act creating the defendant (Stats. 1913, p. 252), and by the supplemental report, No. 616, on flood control, submitted by Mr. Curry of the committee of flood control and ordered printed April 29, 1916 (pages 32, 61, 62, items 49, 51, 189, 197). See, also, report of chief of engineers of the United States army, transmitted to Congress by Henry L. Stimson, the Secretary of War, items 1, a, b, c, 2, 4, 5; Senate Joint Resolution No. 16, Session 1911, Stats. Extra Session 1911, p. 426; public report of the California débris commission, dated February 8, 1913; document No. 5, 62d Congress, §§ 11 and 12. It would unduly extend this opinion to quote extensively from these reports and documents. It is sufficient at this time to state the general purposes of the formation of the district in the language of sections 1 and 7 of the statute as amended in 1913 (Stats. 1913, p. 253):

"Sec. 1. The report of the California débris commission, * * * *with such modifications and amendments as may hereafter be adopted by the reclamation board*, is hereby approved as a plan for controlling the flood waters of the Sacramento river and the San Joaquin river and their tributaries for the improvement and preservation of navigation and the reclamation and protection of the lands that are susceptible to overflow from said rivers and their tributaries."

"Sec. 7. * * * The purposes and objects of this act are to carry into effect the plans of the California débris commission for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries, and to vest in said reclamation board control and jurisdiction over said plans *and such other plans as may be adopted by said board*, excepting such portions of said plans as relate to channel excavation, enlargement, rectification and control in the Sacramento river and the construction of weirs; it being the intent of this act that all work and control in the said stream and the

construction of weirs shall remain with the United States and the state of California, concurrently, but this exception does not apply to the San Joaquin river and its tributaries."
(Italics ours.)

The United States government, through its California débris commission, and the state of California, acting through its Legislature and through the reclamation board of the defendant and through the various reclamation districts and other public and quasi public corporations organized for the purpose, are endeavoring to so control flood conditions in the two rivers as not only to reclaim swamp and overflowed lands, but to protect these comparatively level valleys from the effect of floods and to protect and increase the navigability of the Sacramento river, and and the San Joaquin river as far as Stockton.

[1] Appellant raises three objections to the validity of the assessment: First, that the assessment was unauthorized by the statute, for the reason that as a prerequisite thereto the board was required by the statute to have prepared proper plans for the reclamation of the land, and that no such plans were made; second, that the assessment was not made in accordance with the benefits; third, that the assessment was for purposes which in no way benefited the land of the plaintiff. The first two points deal with the validity of the assessment under the terms of the statute organizing the defendant. The last point involves the validity of that statute in so far as it authorizes, if it shall be found to so authorize, the levy of an assessment upon lands within the district regardless as to whether or not the lands were actually benefited; this question, in turn, involving rulings of the trial court in relation to the admissibility of evidence sought to be adduced by the appellant for the purpose of establishing that its lands were not benefited. In considering these questions it will be necessary to state further facts with regard to the assessment and its purposes. The assessment was for $250,000. In its resolution levying the assessment it is declared that $50,000 is for the reimbursement of one-half of the appropriation of $100,000 made by the Legislature for the use of the reclamation board by the act establishing it. Two hundred thousand dollars was for the purpose of paying—

"general administrative and engineering expenses of the reclamation board, not specifically pertaining to any particular portion or project into which may be divided the plans to be carried out by said board, and including per diem and expenses of its assistants, employés and advisors, office expenses, equipment, supplies, expenses of litigation, and expenses of the state engineer incurred by him under the direction of this board, and general and miscellaneous engineering expenses and any other expenses necessary to enable the reclamation board to carry out the objects and purposes of said act, and which do not specifically pertain to any particular portion or project into which may be divided the plans to be carried out by said board, as aforesaid; also the expenses of levying, assessing, apportioning, reapportioning, defending, and collecting the assessment which is hereby levied."

The assessment was levied upon all the lands within the district below the flood planes of the Sacramento and San Joaquin rivers, and included all the land within the district, with the exception of 300,000 acres.

The assessment was levied upon the theory that it was proper to charge this expense, which would relate to all subsequent plans and improvements, and the purpose of which was to consummate a general plan of reclamation, upon all the lands lying within the district which had been affected by floods, and the respondent predicates its statutory authority to levy such assessment upon the first provision in section 13 of the statute, which reads as follows:

"Whenever, in the opinion of said board it shall be necessary to levy an assessment upon any lands within said drainage district for any of the purposes herein specified, said board shall cause an assessment to be levied upon the lands within said drainage district for such purposes. * * * Said assessors must assess upon the lands within said drainage district the said sums so estimated by the board, and shall apportion the same according to the benefits that will accrue to each tract of land in said district, respectively, by reason of the expenditure of said sums of money. After said assessors have examined the plan or plans of the works contemplated and the said estimates of the cost, they shall make a preliminary report to the reclamation board indicating the exterior boundaries of the lands that in their opinion will be benefited by the expenditures. * * * They shall exclude any land that will not be benefited by the expenditure of said sums and shall assess all lands that will be benefited thereby."

After providing for hearings before the board with reference to the assessment, the statute provides:

"Any person aggrieved by the decision of the board approving said assessment may commence an action against the district in the superior court of the county in which said land or the greater part thereof is situated, to have said assessment modified or annulled. Such action must be commenced within thirty days after the reclamation board has approved such assessment and shall have preference over all civil actions in fixing the time of trial. No objection to said assessment shall be considered by the court unless such objection shall have been made in writing to the reclamation board as hereinbefore prescribed, and, excepting in the action above mentioned, no action or defense shall ever be maintained attacking the said assessment in any respect."

The appellant in its objections before the reclamation board and in this proceeding, in pursuance of the provisions of section 13, above quoted, claims that other portions of section 13 so far modify the general authority above quoted to levy assessments that the reclamation board must first provide the gen-

eral scheme of reclamation in accordance with the provisions of the statute before being authorized to make any assessment whatsoever for benefits, and, while recognizing the necessity of preliminary surveys and other work to enable the reclamation board to intelligently subdivide the various reclamation projects, contends that the Legislature contemplated that such expense should be made by general taxation, and that no authority is conferred upon the reclamation board to make such assessment. In section 13, after the first sentence above quoted, occur the provisions upon which the appellant relies:

"The plans to be carried out shall be divided by said board into separate portions or projects in such manner as will in its judgment best facilitate the levying of assessments for each particular portion or project in a just and equitable manner according to benefits upon the lands in said district. Said board shall enter in the minutes of the board, a resolution to the effect that the execution of each such separate portion or project which they may determine upon is a public necessity. Each such particular portion or project shall be designated by the board in such resolution by name and number. All assessments, plans and funds intended for or connected with the execution of each particular portion or project shall be designated by such name and number and shall be kept separate and shall be used only for the purpose of carrying out such particular portion or project."

Then follow provisions for the appointment of three assessors, the assessment by such assessors upon lands within the district, apportioning the same "according to the benefits that will accrue to each tract of land in said district, respectively, by reason of the expenditure of said sums of money." "After said assessors have examined the plan or plans of the works contemplated and the said estimates of the cost, they shall make a preliminary report to the reclamation board indicating the exterior boundaries of the lands that in their opinion will be benefited by the expenditures." It was evidently the purpose of the Legislature to provide for the segregation of this vast project into separate projects and to levy the expense of each project upon the particular district benefited thereby, to be determined by the assessors and the reclamation board, and the plan of assessment outlined in section 13 was evidently adopted with that in view. As appellant points out, it contemplates the adoption of plans for the particular work or project in hand, the inspection of those plans by the assessors with a view to determine the district to be benefited thereby, the establishment of the district in accordance with that finding and the assessment of the cost of the particular plan upon the assessment district so established. Considered without reference to other provisions of the act, and in view of the fact that the mode of assessment is also the measure of the power of assessment, we might be constrained to hold that, notwithstanding the broad general purposes of the law, the legislation was defective by reason of the failure to provide a method of raising funds for the large general expenditures necessary for the comprehensive plan of improvement which was contemplated by and indeed the very purpose of the Legislature in the act in question. We are now endeavoring to ascertain the scope of the power conferred by the Legislature upon the reclamation board, and in doing so we must consider, not only the details of the method of assessment, but other provisions in the law bearing upon the power and authority of the reclamation board. The act contemplates the adoption of a comprehensive plan of improvement, the carrying out of surveys and investigations for the purpose of perfecting those plans, and appropriates $100,000 for the expenditures thus made necessary. The portion of the statute making this appropriation and providing for an assessment to reimburse the state is particularly significant in view of the contention now under consideration. By section 19 it is provided:

"The sum of $100,000 in addition to the sums heretofore appropriated, is hereby appropriated for the use of the reclamation board, at least $20,000 of which shall be used by the board to pay the expenses of the state engineer in carrying out the directions of this act. *In the first assessment levied in said district the sum of $50,000 shall be levied,* collected and paid to the state treasurer *as reimbursement of one-half of the above appropriation.*

"The state of California shall not be liable, directly or indirectly, for any obligation, claim or liability of any kind or character arising under or by reason of this act or any of the provisions thereof, in excess of $100,000 in and by this act appropriated."

(Italics ours.)

It is apparent from this provision that the Legislature contemplated that the expenditures involved in the preliminary work should be borne by the state to the extent of $50,000, and that $50,000 thereof should be levied upon the property in the district, and that the state contemplated no other responsibility, claim, or liability growing out of the activities of the reclamation board. Unless we assume that the Legislature underestimated the expenditures necessary for the preliminary work of the reclamation board, it is clear that, in view of their purpose to pass an effective act which would enable the reclamation board to deal comprehensively with the whole problem before it, it was contemplated that any additional expenditures necessary in the preparation of the plans should be borne by the property within the district. If the reclamation board, instead of providing for additional surveys and information before segregating the general scheme into separate projects, had made a more or less arbitrary segregation of the district into various subsidiary or assessment districts

relating to the several projects, it would, no doubt, be conceded that the expense incidental to each piece of work would properly be assessable upon that district, and in this way the whole expense of survey and plan with the proper proportion of overhead expenses could be apportioned to the several projects. Appellant's contention is, in effect, that this is the sole and only way in which such expenditures could properly be charged against the property. The almost conclusive answer to this contention is the provision of the act in question which requires "in the first assessment levied in said district the sum of $50,000 shall be levied * * * as reimbursement of one-half of the above appropriation." It is evident that the Legislature contemplated an assessment spread over the entire district, or at least an assessment covering a large proportion of the district. Every contention that is raised by the appellant concerning lack of benefits and unfair distribution of the assessment would apply with greater emphasis if the board had adopted the plan contended for by the appellant and had charged to some comparatively unimportant improvement in a small district one-half of the initial outlay which had obviously been to the advantage of the entire district. If the entire $100,000 had been expended in connection with the preliminary work for the Sacramento valley, appellant could have contended with much greater force that the assessment was unjust and unconstitutional. If, instead of being spread over the entire district, covering both the Sacramento and the San Joaquin valleys, it had been levied upon some project manifestly benefiting the lands only on some tributary of the San Joaquin river, even if the language of the statute justified the construction sought to be placed upon it by appellant, constitutional considerations requiring that the assessment should be in proportion to the benefits would constrain us to adopt the construction so obviously indicated by the provision requiring that $50,000 utilized for the general purposes of the board should be levied in the first assessment made in the district. This provision, as well as the general scope and purpose of the act, points to the conclusion which is definitely stated in the opening sentence of section 13, above quoted, that the reclamation board was authorized by the Legislature to make an assessment upon the lands within the district to cover the outlay necessary in the preparation of the plans for the segregation of the general scheme of improvement into separate projects. The necessity of such expenditure and for such preliminary work is clearly pointed out by the court in its statement of facts in People v. Sacramento Drainage District, supra, wherein it stated (155 Cal. 380, 103 Pac. 211):

"In time two impending difficulties came to be perceived: (1) That, because of the great number of such small districts, each operated independently and under no general plan for the good of all, much money and labor were wasted. Since there was no common and harmonious plan of reclamation, one district frequently worked in antagonism to another; the operations or neglect of one district might tend to imperil the existence of another; while the extravagant use of money, made necessary because of the lack of concerted action, and because each district was obliged to fight not alone the common enemy—the water—but perhaps equally an adjoining district, put burdens upon many of the districts which soon became intolerable, with the result that the districts themselves were sometimes abandoned, and their works fell into disrepair and disuse. * * * Such being the situation, it was deemed expedient by the state to form one large district, to the end that the commissioners of such district might by exercising supervisorial control over the smaller districts, and by adopting one general plan of reclamation, economize in expenditures, save the extravagant waste of moneys which had been a part of their past history, and by general assessment over a large area materially lessen, perhaps, the burden which the landowners might otherwise be called upon to bear. These were the obvious reasons actuating the Legislature in formulating the scheme in the act under consideration."

We conclude, then, that the statute authorized the levy of the assessment in question without first having segregated the general scheme into projects.

[2-4] Next taking up the contention of the appellant that the assessment is not made in accordance with the benefits to be derived from the proposed expenditure: This contention is based in part upon the proposition that appellant's lands have already been reclaimed, are valuable agricultural lands requiring irrigation, and that much of the other land within the district is permanently flooded and overflowed, and that other land is subject to periodical overflow. The latter are of comparatively nominal value—$10 per acre—and obviously would be benefited to a vastly greater extent than the lands owned by the appellant when a plan of complete reclamation is finally executed. It is pointed out also that most of the work already undertaken by the reclamation board has been in the Sacramento valley, and that there is no way in which it can be said what benefit will accrue to the land within the district, for the reason that the nature of the plans contemplated cannot be known until after they have been perfected. It is, of course, conceded that the apportionment of the benefit is largely, if not exclusively, a question for the legislative branch of the government. But it is claimed that it is unfair to assess the cost of a reclamation project upon lands already reclaimed, or, at any rate, to make the burden equal upon such lands and upon lands not yet reclaimed. The

testimony on this subject makes it clear that the assessment was based upon two fundamental considerations: First, that the board was dealing with the problem of flood control, and that all lands subject to overflow were necessarily benefited by the formation of plans designed to diminish the danger of flood or to lower the flood plane; second, that it cannot be said that unreclaimed lands were exclusively benefited thereby for the reason that the danger from flood is one common to all lands below the flood level, whether reclaimed or unreclaimed. The justice of this view is manifest by the fact that at common law flood waters were deemed a natural enemy of all, and that each man had a right to protect his property as best he might against such waters, and that damage to his neighbor by reason of the diversion of flood water is damnum absque injuria. Gray v. Reclamation District No. 1500, supra. Without further discussion of the more or less difficult question of the control of flood waters, it is sufficient for the purposes of this case to say that the mere fact that appellant's land has been reclaimed does not justify the exclusion of this land from a general scheme of improvement looking to the diminishing of the danger of flood waters, since the plaintiff's lands are below the flood level and subject to such danger. Much of the flood control work to which a large portion of the time and attention of the reclamation board has been and will be directed concerns the larger and more difficult plans for flood control in the Sacramento valley. It was this consideration which, no doubt, moved the reclamation board to place the larger tax upon the land in the Sacramento valley. It must be manifest from these considerations that neither the fact that a uniform levy of five cents per acre was made upon land in the San Joaquin valley, nor the fact that the land of the appellant has been reclaimed, necessarily results in the conclusion that the assessment was not levied in accordance with benefits.

[5] The assessment of the larger amount on the lands in the Sacramento valley may be explained from the fact that floods come more frequently and often in greater volume there than in the San Joaquin valley. It is common knowledge, of which we take judicial notice, that in the part of the Sacramento valley included in the assessment district there are more reclamation projects and a greater area of reclaimed land requiring supervision and adjustment than there are in the San Joaquin valley. All this was proper matter for the board to consider in determining the amount of the assessment of each region, and it cannot be said as a matter of law that their decision is contrary to the facts.

[6] With respect to the assessment of all lands, improved or unimproved, at the same rate, it is sufficient to say that a general assessment of this character has no direct relation to the value of the lands assessed. The assessment is made because of the general benefit to the whole area. The general scheme involves not only the reclamation of lands, but protection from floods as well. It designed also the lowering of the flood plane by the creation of better outlets for the escape of water so that lands under the flood plane would be overflowed less frequently when the entire scheme is complete than has been the case before. Doubtless the greater part of these expenses would have been necessary if no reclamation work had been done and the entire area below the flood level had been unimproved. These and other considerations may have entered into the reasons which induced the board to levy the assessment upon lands regardless of value. The court cannot say that it was unfair or unjust and that the assessment was not in proportion to the benefits derived from the general work of the board. Indeed, it is doubtful if a more fair and just method of assessment could have been devised. Appellant suggests no better plan.

[7-9] The third contention of appellant, "that the assessment was for purposes which in no way benefited the land of appellant," involves two distinct propositions: First, the constitutionality of the statute in so far as it includes the land of appellant within the improvement district; and, second, the validity of the particular assessment under consideration. In support of its contention that the statute is unconstitutional appellant offered evidence to prove that its property would not be benefited by any work authorized to be done by the statute or its amendments, and made numerous special offers directed to this general point. The general rule is that, where the Legislature has itself fixed the boundaries of a district to be assessed for the benefits of an improvement, the legislative determination is conclusive upon the courts and precludes inquiry into the question as to whether or not the property within the district has been benefited. Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 Pac. 1028, and cases therein cited. Appellant, however, relies upon Myles Salt Co. v. Board of Commissioners of the Iberia, etc., Drainage District, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190, Spring Street Co. v. City of Los Angeles, 170 Cal. 24, 148 Pac. 217, L. R. A. 1918E, 197, and Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, to overcome the general rule in this particular case. These cases were so exceptional in their facts that thereunder the effect of the tax was to confiscate property without due process of law. Notwithstanding the contention of the appellant that this case is a parallel one with them, it is sumcient to say that there is no

allegation made nor proof offered to bring the case within the exceptional decisions mentioned. On the contrary, it comes clearly within the general rule which has been recently restated by the Supreme Court of the United States in St. Mary's Cemetery Association v. Mullins (decided January 27, 1919) 248 U. S. 501, 39 Sup. Ct. 173, 63 L. Ed. 383, where it was said:

"This court has more than once declared that it does not interfere with the taxation and assessment laws of the states as violative of the Fourteenth Amendment *unless the state's action has been palpably arbitrary or grossly unequal in its application to the persons concerned.*" (Italics ours.)

In view of the nature and character of the work contemplated by the Legislature, of which we take judicial notice, it cannot be said that there is anything so "palpably arbitrary or grossly unequal" in the inclusion of appellant's lands within the respondent district as would justify the interference of a court on the ground that a constitutional right of the appellant has been violated. The inclusion by the Legislature of the appellant's lands within the respondent drainage district is therefore conclusive upon the courts and precludes inquiry as to whether or not the lands in question are benefited by the general legislative scheme. There was, therefore, no error in excluding the evidence which was offered for the purpose of proving that the lands in Fresno, Madera, Merced, and Stanislaus counties would not be benefited by the general scheme of improvement proposed by the statute under which the respondent was organized, for the reason that the inclusion of appellant's lands within the exterior boundaries of the district by the act of the Legislature is conclusive on that subject. Los Angeles County Flood Control District v. Hamilton, supra. It is obvious that the offer to prove that the lands of the plaintiff within the district would not be benefited by the carrying out of the work and plans contemplated by the act and described therein by reference to the report aforesaid is nothing less than an offer to disprove a fact which it must be presumed the Legislature determined conclusively before passing the act. No objection going to the general benefits of the entire scheme to all the land included within the area of the drainage district as defined by the act can be considered by the courts, and evidence going to sustain the same cannot be admitted.

[10] The plaintiff offered proof that there has not been and that there was no prospect of there ever being any mining débris in the San Joaquin river to be taken care of by the reclamation board. Such proof would not, even if admitted, be sufficient to show that the lands of the plaintiff will not be benefited by the overhead expenses of the part of the general scheme under way for which this assessment was levied. Facts of which the court will take judicial notice demonstrate that evidence to that effect would not have established the fact to which it was to be addressed, namely, that the lands will not be benefited. The extreme flood waters of the two rivers, when both are in flood, meet in opposite directions in the delta region lying to the west of Stockton. When the Sacramento river flood is higher than that in the San Joaquin, the effect is to obstruct the flow of the latter and force it back to the south up the river so as to increase the height of the flood plane in the San Joaquin valley. It is a matter of common knowledge that the débris from the mining regions in the tributaries of the Sacramento, if carried in its waters, tends constantly to raise the level of the bottom of that river and so to decrease its capacity for carrying water. The consequence would be that it would increase the height of the flood level in the Sacramento river and correspondingly elevate the flood level in the lower part of the San Joaquin river, under the conditions above described. Consequently the fact that there may be no mining débris coming down into the San Joaquin river would not show that the prevention of mining débris in the Sacramento river, or the disposal of it without diminishing its flood capacity, would not be beneficial to lands situated in the part of the flood area usually covered by the waters of the San Joaquin river. This objection to the evidence was properly overruled. Section 13 of the act of 1913 (Stats. 1913, p. 252) authorizes the court to determine the question as to whether or not the assessment should be "modified or annulled," because unequal or unjust or not in proportion to benefits, and provides, in effect, that while the assessment therein levied shall be conclusive in every other action, in this action it is not conclusive as to the assessment of benefits. See, also, section 3493½, Pol. Code, added in 1893; section 3462, added in 1911; Reclamation District No. 673 v. Diepenbrock, 168 Cal. 577, 143 Pac. 763; Spurrier & Krohn v. Reclamation District No. 17, 172 Cal. 157, 155 Pac. 840; Meyer v. Reclamation District No. 17, 172 Cal. 104, 155 Pac. 635. The appellant presented such evidence and was not precluded from presenting any evidence that bore on the question of benefits, if any, to be derived from the work contemplated by the particular levy under consideration. Upon the evidence the trial court found against the contentions of the appellant as to the assessment and affirmed the same. The decision is supported both by evidence and by facts of which this court takes judicial notice, as hereinbefore stated.

[11, 12] Appellant claims that it is inconsistent to hold that it is conclusively presumed that all the lands within the exterior boundaries of the whole district are benefited by

the plan of improvement contemplated by the Legislature, and to sustain an assessment upon a district which excludes 300,000 acres of such lands. The Legislature, however, clearly contemplated that, in order to accomplish the purposes designed, it would be necessary to organize a number of reclamation districts and to construct a number of reclamation improvements for which separate local assessments would be necessary, each separate and distinct from others of like character, all to be included within the exterior boundaries of the entire district, and that the administration of the whole project, including the determination of the separate reclamations and the boundaries of the separate assessment districts that would be rendered necessary by reason thereof, was to be placed under the control of the reclamation board. It is obvious that a considerable sum of money would be necessary for overhead expenses in making the surveys and investigations necessary to determine the location of the several projects and the character of the reclamations to be made in each one, and that these general expenses could not be said to be for the benefit of any particular local reclamation district or project, but would redound generally to the benefit of all the property within the exterior bounds of the whole district found by the reclamation board to be benefited in general by the several distinct reclamations and projects under consideration at the time of the levy of the assessment for such general expenses. In view of the fact that it is apparent from the act of the reclamation board that they considered that the various plans of reclamation under consideration would be beneficial only to lands below the flood plane of the two rivers, it was clearly within their power to limit the assessment district for such general and overhead expenses to the lands whose improvements were contemplated by the proposed plan. It is evident that at some future time other improvements contemplated by the board may include the improvement of the land now above the known flood plane of the two rivers.

There are other facts which also must be considered in construing and applying the act and in determining what areas must be included in any particular assessment for general expenses. The rainfall in the Sacramento watershed is usually more than that in the San Joaquin, and the floods occur there more frequently. The rainfall in the several tributaries of the two rivers often varies greatly during the same flood. The greater part of the flood water comes sometimes from one tributary, sometimes from another, and sometimes from several of them which are simultaneously at an equal flood stage. It is the latter condition that causes the highest floods. The level of the highest floods that have occurred since the acquisition of California by the United States is approximately known. The area covered by the assessment in question includes all the lands in the district below that level. The 300,000 acres excluded lie above it. But the future possibilities of floods are unknown. It is possible that at some time in the future more of the tributaries of the two rivers will simultaneously be at the highest flood level, or that all of them will be so, thus causing a higher flood than has been heretofore known—one which might cover the excluded area. The Legislature, it must be presumed, recognized this possibility and provided against it by including within the district the lands above the known flood level, so that, if the necessity should arise, the reclamation board would have the authority and power to devise and provide means for the protection of those lands, thus, in effect, declaring that in such a case those higher lands would receive benefit from the establishment of the district and be subject to assessment made for their protection.

There is nothing in the act which required the reclamation board to extend over the entire district a general assessment to meet the present needs. The possibility of floods materially higher than the present known level is at best remote, and while it may have been prudent for the Legislature to provide for it to some extent, it was not incumbent upon the reclamation board to make plans covering such higher lands or provide for any works, flood channels, levees, or reclamations for the benefit thereof. It is obvious that the board did not do so. The present overhead expenses are necessary only for the purpose of paying the general expenses appertaining to the several reclamations, alterations in the channels and means of control existing, determined upon, or approved, designed for the benefit and protection of the lands below the known flood plane. They are not exclusively for the benefit of existing reclamations for which local assessment districts have been formed. They are also for the benefit of all local or general improvements and works affecting all or any of the lands below the flood level, some of which lands may not be included in existing local assessment districts. Hence the board may have concluded that such expenses could not justly be apportioned to existing local districts. And even if all had been included, inasmuch as the act does not forbid it, the general power to "levy an assessment upon any lands within the drainage district" includes power to make one assessment for such expenses against all the lands benefited, instead of apportioning the amount for separate assessment by the local district. As this general expense would be of no benefit whatever to the 300,000 acres excluded, we think this is a sufficient answer to the contention that the levy should have extended over the

entire district. The reclamation board having fixed the boundaries of the assessment district so as to exclude 300,000 acres of land within the exterior boundaries of the whole district, and the trial court having received evidence as to whether or not the lands of the appellant were benefited by the contemplated expenditure, and having decided that it was so benefited, we cannot review the action of the reclamation board in excluding the 300,000 acres, if, as we hold, they had jurisdiction to fix the limits of the district benefited.

[13, 14] It will be necessary to determine a point raised by the appellant in its brief filed after oral argument. Up to the time of the oral argument the appellant had conceded that the general scheme contemplated by the Legislature included the reclamation of land along the San Joaquin river. But in its closing brief, after oral argument, appellant expresses a doubt as to whether or not the law authorizes such an improvement, and if it does authorize such an improvement it is claimed that the provisions authorizing the improvement are unconstitutional. The violation of the Constitution thus complained of is that in the enactment of the amendments to the law of 1911 the provisions for the reclamation of lands in the San Joaquin valley were incorporated in the original act whose title contemplated no such improvement; in other words, that the title of the amendatory act was not sufficiently broad to include the subject treated of in the amendment so far as it related to lands in the San Joaquin valley. Const. art. 4, § 24. The argument advanced is as follows:

"Any one reading the title of the act of 1913, and knowing that it was but an amendment to the act of 1911, would conclude that it had to do with the reclamation of the territory along the Sacramento and San Joaquin rivers covered by the report of the California débris commission. It may be true that, if this act was not in the form of an amendment to an earlier act, the title would be broad enough to include reclamation in the upper San Joaquin valley, but the rule is well settled that, although all of these matters might be included in one act, still, if the title of the act is but to amend an act much more limited in its character, the amendatory act cannot be by such a title extended to an entirely new proposition."

The title of the act of 1913 is as follows:

"An act to amend an act entitled 'An act approving the report of the California débris commission transmitted to the Speaker of the House of Representatives by the Secretary of War on June 27, 1911, directing the approval of plans of reclamation along the Sacramento river or its tributaries or upon swamp lands adjacent to said river, directing the state engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California débris commission and to make report thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a reclamation board and defining its powers,' approved December 24th, 1911; by amending sections one, three and four of said act, and adding sixteen new sections to said act to be designated as sections five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, sixteen and one-half, seventeen, eighteen and nineteen; creating a drainage district to be known as Sacramento and San Joaquin drainage district, appointing of a reclamation board, providing for the management and control of said district and defining the powers and duties of the reclamation board and the state engineer, the acquisition of rights of way and property by said drainage district, the reclamation and protection of the lands therein which are subject to overflow from the Sacramento and San Joaquin rivers and their tributaries and control of the floods thereof; the making of assessments; also defining the rights and powers of certain municipal corporations, levee, drainage and protection districts therein, and making an appropriation to pay the expenses of the state engineer and the reclamation board; also providing for the approval and creation of plans of reclamation, and the examination of the security afforded to bonds of reclamation and drainage districts and others; to prevent the diversion of the waters of any stream into the Sacramento and San Joaquin rivers; to prevent the construction of and to require the removal or regulation of obstructions in streams, bypasses and overflow channels; to repay money contributed for the purchase of rights of way for enlargement of the outlet of the Sacramento river and making an appropriation for carrying out the purposes of this act." Stats. 1913, p. 252.

Appellant concedes that the title to this act is broad enough to include the subject of reclamation of land in the San Joaquin valley were it not for the fact that the act in its title is styled "An act to amend an act entitled 'An act,'" etc., "'approved December 24th, 1911.'" There is, we think, no merit in the suggestion that the Legislature could have been misled by the title of the act of 1913 into believing that no subject was dealt with other than that covered by the original act. The scope of the legislation is clearly indicated by the title, and the fact that it was framed in the form of an amendment to a statute of more limited scope is of no consequence in determining whether the title to the act of 1913 complied with the constitutional requirement that the subject of legislation "shall be expressed in its title" (Const. art. 4, § 24), particularly where a most casual inspection of the title shows the clear intention to broaden the scope of the original title.

"If the title of the amending act itself expresses the subject dealt with, it is sufficient independently of the original title." 26 Am. & Eng. Ency. of Law, 594; Schmalz v. Wooley,

57 N. J. Eq. 303, 41 Atl. 939, 43 L. R. A. 86, 73 Am. St. Rep. 637.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; SHAW, J.; LENNON, J.; LAWLOR, J.

182 Cal. 407

McBRIDE v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9364.)

(Supreme Court of California. Feb. 13, 1920. On petition for Rehearing, March 12, 1920.)

On Petition for Rehearing.

MASTER AND SERVANT ⊂=416—COMMISSION AUTHORIZED TO RESERVE AWARD TO WORKMEN'S COMPENSATION CLAIMANT FOR MEDICAL TREATMENT PENDING PROCURING OF INFORMATION FOR SUPPLEMENTAL AWARD.

The Industrial Accident Commission may expressly reserve an award for medical, surgical, and hospital treatment, to which it finds the claimant entitled, pending the procuring of necessary information and vouchers for a supplemental award, although such practice is not commended, and although supplemental awards will not be allowed, for the purpose of correcting errors in the original award.

In Bank.

Petition by Glenn McBride for a writ of review to review acts of the Industrial Accident Commission. Writ denied.

Theodore L. Breslauer, of San Francisco, for petitioner.

PER CURIAM. The within application (for writ of review) is denied.

All concur.

On Petition for Rehearing.

The petition for a writ of review was denied in this matter upon the theory that the commission had the power to reserve, as it expressly did, the award for medical, surgical, and hospital treatment, to which it found the claimant entitled, pending the procuring of the necessary information and vouchers for a supplemental award. The practice is perhaps not one to be commended, as a single final judgment covering all matters involved is the orderly method. It certainly could not be extended to allow supplemental awards for the purpose of correcting errors in the original award, as was attempted in Georgia Casualty Co. v. Ind. Acc. Commission, 177 Cal. 289, 170 Pac. 625, the case principally relied on by petitioner. The case just cited is not in point upon the question here presented.

The petition for a rehearing is denied.

182 Cal. 301

MORGAN v. CITY OF LOS ANGELES (RIDEOUT, Intervener). (L. A. 6249.)

(Supreme Court of California. Feb. 20, 1920.)

1. MUNICIPAL CORPORATIONS ⊂=906—LOS ANGELES EMPOWERED TO ISSUE BONDS UNDER MUNICIPAL BOND ACT 1901.

The amendment of January 15, 1919, to Los Angeles Charter, art. 1, § 2, subd. 51, made so as to authorize the city to make and enforce all laws and regulations in respect to municipal affairs, subject to only the restrictions and limitations provided in the charter, and to exercise any and all rights, powers, and privileges prescribed by the general laws of the state, empowered the city of Los Angeles to issue bonds under the provisions of the Municipal Bond Act of 1901, in view of Const. art. 11, § 6.

2. MUNICIPAL CORPORATIONS ⊂=918(1)—ONLY TWO-THIRDS VOTE OF THOSE ACTUALLY VOTING ON BOND ISSUE AT CONSOLIDATED ELECTION NECESSARY TO AUTHORIZE ISSUE.

Under Const. art. 11, § 18, and Municipal Bond Act 1901, § 2, and in view of section 12¾ of the latter statute as amended in 1915 (Deering, Gen. Laws 1915, Act 2371), a vote of only two-thirds of those actually voting on such matter is sufficient to authorize the issuance of bonds by a city, although the election on such question is consolidated with a primary election and only one ballot is issued on which appear the names of candidates for office as well as the issue as to whether bonds should be issued.

In Bank.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Action by Mary H. Morgan against the City of Los Angeles and others, in which Mary Rideout intervened. Judgment for defendants, and the plaintiff and intervener appeal. Affirmed.

Overton, Lyman & Plumb and Wm. B. Himrod, all of Los Angeles (Edgar G. Pratt and Henry M. Willis, both of Los Angeles, of counsel), for appellants.

Charles S. Burnell and Clyde M. Leach, both of Los Angeles, for respondents.

LAWLOR, J. This is an appeal from a judgment entered in favor of the defendants upon an order of the trial court sustaining, without leave to amend, a general demurrer to the plaintiff's complaint, and to the complaint in intervention filed by permission of the court, in an action brought by the plaintiff, as a taxpayer, to obtain a judgment that a certain bond issue of the city of Los Angeles amounting to $4,500,000 was unauthorized, invalid, and void, and to restrain the city and its officers from issuing such bonds or expending any part of the proceeds thereof for any purpose. Both the plaintiff and the intervener have appealed, and by stipulation the record on

both appeals is brought before the court in a single transcript.

The material facts as alleged in the plaintiff's complaint are as follows:

Proceedings were instituted by the city of Los Angeles to incur a bonded indebtedness of $4,500,000 for certain municipal improvements, to wit: The acquisition, construction, and completion of docks, wharves, and other harbor improvements in the city of Los Angeles. A resolution declaring the necessity for such improvement was adopted by the city council on April 8, 1919. On April 24, 1919, the counsel adopted an ordinance, designated as Ordinance No. 38878 (New Series) of the city of Los Angeles, calling a special election for the purpose of voting on the proposed bond issue. Section 5 of the ordinance contained the following provision in regard to holding the election:

"That the election hereby called shall be and the same hereby is consolidated with the primary nominating election heretofore called and ordered by the council of the city of Los Angeles to be held on said Tuesday, the 6th day of May, 1919, by Ordinance No. 38867 (New Series)."

It is further alleged that the primary nominating election was held on May 6, 1919, and that the special bond election was consolidated with such primary nominating election; that at such consolidated election there was but one polling place, one set of election officials, one ballot box, one roster of voters, one poll list, one list of assisted voters, one list of challenged voters, and but one tally list, entitled "Tally List of Primary Nominating Election," used in each precinct; that there was but one ballot furnished to each elector; and that such ballot contained the names of the various nominees for the city offices, and also contained the proposition for the incurring of said bonded indebtedness for the use and purpose set forth in the ordinance calling the special election. It is also alleged that the total number of votes cast at the primary nominating election was 63,511; that the total number cast on the proposition to incur the bonded indebtedness in question was 51,974; that the number of votes cast in favor of this proposition was 37,013, and the number against it was 14,961. It is then alleged that the city council wrongfully and erroneously declared that the proposition of incurring said indebtedness had received the approval of the requisite number of electors of said city, and that the said proposition had carried, and that the bonds designated in the ordinance calling the election had been authorized. It is further alleged that since the election the city council has adopted an ordinance providing for the issuance of said bonds and directing the mayor and the treasurer of the city to sign the bonds and the clerk to countersign them and affix the corporate seal of the city; that the officials of the city threaten to, and will, unless restrained, print, issue, and sell and deliver such bonds and create a bonded indebtedness and levy a tax for the payment of the bonds. "Wherefore plaintiff prays that defendants and each of them be enjoined and restrained from proceeding further, or at all, with the printing and issuance, or signing or sale or delivery of said bonds, and from expending any part of the proceeds of said bonds for any purpose, and that the bonds purported to be authorized at said election be held to be unauthorized, invalid, and void, and for such other and further relief as to the court may seem meet and equitable."

The complaint in intervention is in most respects the same as that of the plaintiff, except that the intervener alleges in addition that the city officers in the matter of this bond issue purport to have acted under what is known as the Municipal Bond Act, approved February 25, 1901, and the amendments thereof (Deering, General Laws 1915, p. 1151), and that the said officials in taking such action exceeded the power vested in them by the city charter and the Constitution and the laws of the state of California, for the reason that the city of Los Angeles has not at any time by any affirmative action or otherwise adopted the said Municipal Bond Act of the state of California as a law of said city of Los Angeles.

In her prayer the intervener asks for the same relief as the plaintiff, and, in addition, that the court decree that the "pretended special municipal election purported to have been held May 6, 1919, was, and is, in all respects void."

The only question before the court is whether either the plaintiff's complaint or the complaint in intervention states a cause of action. The points raised on appeal by the appellant are:

"First. That the purported bond issue is void and of no force or effect for the reason that in order for such bonds to be authorized an affirmative vote of two-thirds of all the electors voting at the consolidated election was required and not merely a two-thirds vote of those voting on the proposition.

"Second. That the city of Los Angeles has no power or authority under its charter to take advantage of the Municipal Bond Act until after some affirmative action has been taken by the city adopting such Municipal Bond Act as a part of the law governing such city."

In addition to these two points, the intervener urges a third ground why the bonds should be declared invalid, which is as follows:

"In order to incur the proposed indebtedness it is necessary that the bonds receive the approval of two-thirds of the qualified electors of the city."

1. We will consider first the contention of appellants that the city of Los Angeles had no power or authority under its charter to take advantage of the Municipal Bond Act until after some affirmative action had been taken by the city adopting such act as a part of the law governing the city. Appellants claim, and respondents concede, that the issuance of these bonds is a municipal affair and that the charter of the city contains no provisions governing the procedure to be followed in their issuance. Section 6 of article 11 of the Constitution of the state, as amended in 1914, reads as follows:

"Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

In compliance with the provisions of this section, the city of Los Angeles, in 1917, amended article 1 of its charter to read:

"Sec. 2. The city of Los Angeles, in addition to any other power held by it, or that may hereafter be granted to it under the Constitution or laws of the state, shall have the right and power: * * *

"(51) To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter."

In the case of Civic Center Association v. Railroad Commission, 175 Cal. 441, 166 Pac. 351, these provisions of the Constitution and the charter were presented for construction. This court there said:

"By subdivision 51, as will be observed, the city has brought itself within the conditions of the amendments of 1914 to sections 6 and 8 of article 11 of the Constitution. Thereupon, according to the terms of those sections of the Constitution, its powers over municipal affairs became all-embracing, restricted and limited by the charter 'only,' and free from any interference by the state through general laws, including laws giving the Railroad Commission powers over public utilities. The result is that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles. If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law can confer it. Whether such powers heretofore conferred upon it by general law, if any there be, are now abrogated or suspended, is a question we need not decide."

Following the decision in the Civic Center Case, the city of Los Angeles on January 15, 1919, amended subdivision 51 of section 2 of article 1 of the charter so as to provide:

"(51) To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter; *provided, however, that nothing herein shall be construed to prevent or restrict the city from exercising or consenting to, and the city is hereby authorized to exercise, any and all rights, powers and privileges heretofore or hereafter granted or prescribed by general laws of the state.*" (Italics ours.)

[1] This charter provision was in effect at the time the city initiated the bond proceedings in question, and respondents contend:

"That the plain intent of the provision is to the effect that, if the city is independent of general laws upon municipal affairs, save only as it may be restricted or limited by its own charter, it has the power to *exercise* any right, power, or privilege heretofore or hereafter granted or *prescribed* by general law, and nothing in the charter shall be construed to *prevent* or *restrict* the city from *exercising* or *consenting* to such right, power, or privilege."

This contention is, in our opinion, sound, and it must be held that under subdivision 51 of section 2 of article 1 of its charter, as amended in 1919, the city of Los Angeles was empowered to issue bonds under the provisions of the Municipal Bond Act of 1901.

[2] 2. In urging that an affirmative vote of two-thirds of all the electors voting at the consolidated election was required to authorize such bonds, the position of the appellants is thus stated in the opening brief:

"We will assume in this part of our argument that the city had the power under its charter to utilize the Municipal Bond Act. 63,511 electors voted at the consolidated election on May 6, 1919. 51,974 electors voted on the bond proposition, 37,013 of whom voted in favor of the bonds and 14,961 of whom voted against the bonds. It is at once apparent that the affirmative vote in favor of the bonds was more than two-thirds of all the votes cast on the proposition, but was less than two-thirds of all the votes cast at the consolidated election. It is the contention of the plaintiff that, in order for the bonds to be authorized, two-thirds of all the voters voting at the consolidated election must have voted in favor of the proposition. Under the facts in this case, there can be no question but that one election, and only one, was held in Los Angeles on May 6, 1919. This being the fact, our position in regard to the number of affirmative votes required is abundantly sustained by the authorities."

With this contention we cannot agree.

Section 18 of article 11 of the Constitution provides:

"No * * * city * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof * * * *at an election* * * * *held for that purpose.* * * *" (Italics ours.)

Section 2 of the Bond Act of 1901 (Deering, General Laws 1915, p. 1151) provides that the city council may, after adopting a resolution of necessity, "order the submission of the proposition of incurring a bonded debt for the purpose set forth in said resolution, to the qualified voters of said city, * * * *at an election held for that purpose.*" Section 3 of the same act provides:

"It shall require the votes of two-thirds of all the voters *voting at such election* to authorize the issuance of the bonds. * * *" (Italics ours.)

It is clear from the foregoing provisions that a bond proposition can only be submitted to the qualified electors at an election "*held for that purpose*," that is to say, such questions can only be submitted at a special election. As has already been indicated, a special election was called in this instance. And we have also pointed out that the special election was consolidated with the primary election which was held on May 6, 1919. Such consolidation is authorized by section 12¾ of the Bond Act, as amended in 1915 (Deering, General Laws 1915, p. 1155). This section merely provides a means of saving the expense of holding a separate election by permitting a bond election to be held at the same time and place as any other election authorized by law at which the same qualified electors are entitled to vote. It specifically requires that all the provisions of the act relating to the procedure for the calling and holding of the bond election must be complied with, except that the ordinance calling the bond election may provide that the election precincts, polling places, and officers of election shall be the same as those set forth in the ordinance calling the other election by reference to such ordinance without setting them forth in the ordinance calling the bond election. This, we think, clearly shows an intention on the part of the Legislature to preserve the status of the bond election as a special election held for that purpose, and is not such a consolidation as to result in a complete joining together or uniting of the two elections to such an extent that a voter voting at the other election and not at the bond election can be said to have expressed an opinion on the bond proposition and by his silence have voted against it. Only by viewing the question in this light can section 12¾ be reconciled with the requirements of the preceding sections and the Constitution that bond propositions must be submitted at an election "*held for that purpose*" and that it shall require the votes of two-thirds of the voters voting "*at such election*" to authorize the issuance of the bonds. A qualified elector does not become a voter until he has cast a vote, and if he does not vote on the bond issue he is not a voter voting at the election held for that purpose. Every qualified elector who presented himself at the polls on May 6, 1919, was given a ballot with the bond proposition printed thereon, the same as he would have received if the bond election had been held on any other day. The mere fact that on the same ballot appeared the names of the candidates for office in no way could influence or affect the will or wish of the elector in expressing his opinion on the bond issue. He could vote "yes" or he could vote "no," or he could remain silent and express no choice one way or the other, as in fact 11,537 electors did on this occasion. We know of no principle of law which holds that those who express no choice can be said to have voted "no." Yet it would be necessary to adopt this principle if we are to give effect to the contention of the appellants in this behalf and hold that the two-thirds majority required to carry the bond issue in the present case means two-thirds of all the electors who voted at the primary election which was consolidated with the bond election.

A situation very similar to the one presented in the instant case was before this court in the case of Howland v. Board of Supervisors, 109 Cal. 152, 41 Pac. 864. In that case the proposition of authorizing the issuance of bonds for a county hospital, poorhouse, and farm was printed on the ballot used at the general state election held on November 8, 1892. The proposition was submitted under the provisions of section 37 of the act of 1891 (Stats. 1891, p. 310), which provides that the question of the issuance of bonds shall be submitted to the qualified electors of the county "at the next general election, or at a special election to be called by the board for that purpose. * * * If two-thirds of the electors of the county voting at such election shall vote in favor of issuing the bonds, and not otherwise, the board may proceed to issue the amount of bonds specified." The court there said:

"1. It is insisted that two-thirds of the qualified electors of the county of San Joaquin voting at the general election November 8, 1892, did not vote in favor of the issuance of these bonds, and for that reason the proposition to issue was defeated. The returns of the general election show that 6,500 votes were cast thereat; that 3,880 electors voted in favor of the issuance of bonds, and 1,006 voted against their issuance; and it thus clearly appears that, if two-thirds of all the votes cast were necessary to legally justify the board of supervisors in the issuance of the bonds, then the proposition was defeated. But does the law so declare? The foundation of the entire proceeding may be found in article 11, § 18, of the Constitution of this state, which provides:

"'No county * * * shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose.'

"If there had been no general election held

at the same time this bond election was held, there would be no question but that two-thirds of the qualified electors of the county voting assented thereto, and the fact that the county, by its board of supervisors, embraced the privilege extended to it by the Legislature, by the act of 1891, and held the election upon the day and at the same place as the general election, we think wholly immaterial. The Constitution provides that the voting upon the proposition must be done at an election held *for that purpose*, and, if there was not an election held upon this day for the purpose of allowing the qualified electors of San Joaquin county an opportunity to express their opinions upon this proposition, then it would be impossible to submit the question to the electors at a general election. This cannot be true, and it is quite evident that there was an election held for the purpose of submitting the proposition to the qualified electors of San Joaquin county. At that election 3,880 votes were cast in favor of the issuance of the bonds, and 1,006 votes against such issuance. It follows that two-thirds of the qualified electors of the county voting at an election held for the purpose assented to the incurring of the indebtedness and the issuance of the bonds, and that the constitutional provision in this regard is satisfied.

"If additional argument were necessary to sustain a construction already quite plain, it may be suggested that the election held upon this day, as far as the bond question is concerned, was a special election. The election was called by proclamation of the board of supervisors of San Joaquin county, for a single, definite purpose, and ex necessitate, was a special election, and the votes cast for and against the issuance of bonds were all the votes cast at that election. As already suggested, the fact that the Legislature granted the county the right to use the machinery of the state in conducting the election, if it so desired, and that it embraced the right granted, in no way changes the legal aspect of the case. There is no authority cited, and we know of none, opposed to this conclusion."

This, we think, is a correct statement of the law on the point here presented. So far as we are able to determine, the exact question has not been presented in this jurisdiction since the decision in the Howland Case. The Supreme Court of Oregon, however, in Wilson v. Wasco County, 83 Or. 147, 163 Pac. 317, entered into an exhaustive discussion of the subject in construing a statute which required a "majority of the voters voting at such election" to authorize the issuance of bonds, in a case where a bond proposition was submitted at a general election. The court quoted with approval from the Howland Case and followed with a quotation from Fox v. City of Seattle, 43 Wash. 74, 86 Pac. 379, 117 Am. St. Rep. 1037, wherein the court, discussing the same question, said:

"It will be observed that the Constitution requires propositions of this kind to be submitted to a vote at an election to be held for that purpose. This is, in effect, providing a special election for the submission of questions of this kind, and if all the requirements of a special election are met * * * by giving proper notice, etc., the fact that for the sake of economy the election was held on the same day that a general city election was held, and that the same ballots were used, does not make it a general election, or take it out of the provision of the Constitution above quoted, viz., that such proposition must be submitted at an election to be held for that purpose, but that the election on the special proposition being so held is merely an incident not affecting in any manner its distinct purpose or character."

See, also, Strain v. Young, 25 Wash. 578, 66 Pac. 64; State v. Blaisdell, 18 N. D. 31, 119 N. W. 360; Montgomery County, etc., v. Trimble, 104 Ky. 629, 47 S. W. 773, 42 L. R. A. 738; State v. State Board of Canvassers (N. D.) 172 N. W. 80.

The principal cases cited and relied on by the appellants are: City of Santa Rosa v. Bower, 142 Cal. 299, 75 Pac. 829; Law v. City and County of San Francisco, 144 Cal. 384, 77 Pac. 1014; and City of Long Beach v. Boynton, 17 Cal. App. 290, 119 Pac. 677. These cases are easily distinguishable from the cases above cited and have no application to the case at bar.

In Santa Rosa v. Bower, supra, the question arose out of the fact that at a general municipal election held in the city of Santa Rosa there was submitted a new city charter for adoption under the provisions of section 8, art. 11, of the Constitution, which read:

"It [the charter] shall be submitted to the qualified electors of said city *at a general or a special election*, and if a majority of such qualified electors *voting thereat* shall ratify the same, it shall thereafter be submitted to the Legislature for its approval or rejection as a whole, without power of alteration or amendment." (Italics ours.)

The court held that the proposition having been submitted at a general election, a majority of all the votes cast at the election for all purposes was necessary to ratify the charter. It is interesting to note that in 1902 the above provision of the Constitution was amended by substituting the word "thereon" for "thereat." In the course of the decision in that case it was said:

"The case is clearly distinguishable from that of Howland v. Supervisors, 109 Cal. 152 [41 Pac. 864], where the constitutional provision relative to the incurring by a county of an indebtedness in excess of the income and revenue of the year, provided that such indebtedness could not be incurred 'without the consent of two thirds of the qualified electors thereof voting at an election *to be held for that purpose*.' The mere fact that such question was in that case submitted at a general election did not make the election as to such question any less a special election, 'held for that purpose,' than if the proposition had been submitted by itself at another time, and the assent of two-thirds of the qualified electors voting *on the proposition of the indebtedness was held sufficient*. * * *

"In the case at bar the language of the con-

stitutional provision does not call for an election 'for the purpose' of determining the question, but expressly allows the question to be submitted 'at a general or special election,' and in terms requires that, whether submitted at a general or special election, it must receive the assent of a majority of the qualified electors voting at the election."

The case of Long Beach v. Boynton, supra, involved proceedings taken under the Bond Act of 1901, before the adoption of section 12¾ and at a time when bond propositions could be submitted at a special election only at which bond questions alone could be submitted, and provided that propositions for incurring indebtedness for more than one object or purpose might be submitted at the same election. It was there held that it made no difference how many separate propositions were submitted at such election, but it would be necessary for each to get two-thirds of all the votes cast at the election in order to carry.

In the case of Law v. San Francisco, supra, a situation very similar to that in the Boynton Case was presented. There a special election was called for the purpose of voting on ten separate bond propositions under the provisions of the San Francisco charter (section 4, art. 12), which provided that the board of supervisors shall submit the questions at a special election called for the purpose, and "at least two-thirds of the electors voting at such special election shall be necessary to secure the acquisition of such public utility or utilities, and to warrant the issuance of municipal bonds therefor." It was held there, as in the Boynton Case, that the law required that two-thirds of all the votes cast at the election shall be in favor of any single proposition before it can be said to have carried.

The proceedings in the present case were had under a different law, one which, as we have seen, requires a special election to be held for the purpose of voting bonds, which requires an affirmative vote of two-thirds of all the voters voting at such election to authorize the issuance of the bonds, and which authorizes such special election to be held at the same time and place with any other election where the same qualified electors are entitled to vote. Both upon principle and upon the authority of the Howland Case and the decisions which follow the rule there laid down, it must be held that there was a special election held on May 6, 1919, for the purpose of voting on the proposition of a bonded indebtedness in the city of Los Angeles, and that the bonds in question did receive the necessary two-thirds vote.

In view of the conclusion we have reached, it will not be necessary to consider the contention of the intervener that—

"In order to incur the proposed indebtedness it is necessary that the bonds receive the approval of two-thirds of the qualified electors of the city."

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; SHAW, J; WILBUR, J.; LENNON, J.; KERRIGAN, Judge pro tem.

OLNEY, J. I concur. I would say, however, that I do not agree with the assumption of the main opinion based on isolated language from the opinion in Civic Center Ass'n v. Railroad Commission, 175 Cal. 441, 166 Pac. 351, that a general law in regard to municipal affairs is not operative in Los Angeles or any other similarly chartered city unless picked up by the city charter and affirmatively made a part of the municipal law of the city. Such is not, in my judgment, the effect of section 6 of article 11 of our Constitution, as amended in 1914.

The section as it originally read provided that all municipal charters should be subject to and controlled by general laws. Under this reading it was held that, in case of any conflict between the provisions of a city charter and a general law, the latter should prevail. To obviate this, the section was amended in 1896 so as to provide that city charters should be subject to and controlled by general laws except in municipal affairs. The result was that thereafter, in case of conflict between charter provisions and a general law, the former prevailed.

The amendment, however, affected only cases of conflict between charters and general laws. It did not affect or change the rule in cases of conflict between general laws and municipal ordinances or other attempted exercise of municipal power upon matters as to which the city charter was silent. In case of such a conflict the general law still prevailed, since there was no conflict between it and the charter. Fragley v. Phelan, 126 Cal. 395, 58 Pac. 923; Clouse v. San Diego, 159 Cal. 434, 114 Pac. 573.

To obviate this condition, the constitutional section was again amended in 1914 to read as at present. It provides that cities by their charters may be authorized "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters." The intent and effect of this amendment is very clearly to make municipal ordinances and exercises of power as to municipal affairs prevail over general laws in case of conflict between them. But there is nothing in its language and nothing in its history which requires or justifies the assumption that it destroys the operation of general laws within chartered cities where there is no conflict between them and the municipal laws or regulations of the city, even though the subject dealt with be a "municipal affair." By the constitutional provi-

sion as it now reads chartered cities may be wholly independent as to what laws or regulations they may wish to adopt in municipal affairs; but, unless they adopt laws or regulations which are in conflict with general laws on the same subject, the latter should still operate both within and without the cities by virtue of the fact that they are general laws of the state of which the cities are still a part.

182 Cal. 315

LINDSAY-STRATHMORE IRR. DIST. v. SUPERIOR COURT OF TULARE COUNTY et al. (Sac. 2983.)

(Supreme Court of California. Feb. 20, 1920. Rehearing Denied March 18, 1920.)

1. JUDGES ⟸51(4) — IN DETERMINING DISQUALIFICATION ALLEGATIONS OF COMPLAINT HELD NOT SURPLUSAGE.

In determining whether a judge is disqualified by his ownership of a city lot within the delta of a river to hear a suit to restrain an irrigation district from pumping water from the underground flow of such river, allegations of the complaint that the water of the river penetrates the soil of the entire delta, including lands not belonging to plaintiffs, and moistens and makes productive the soil of such lands of other parties, and that such lands require the continuance of such underflow, cannot be disregarded as surplusage, where the suit is brought on behalf of all parties similarly situated, as such allegations were proper to show the interest of the persons for whose benefit the suit was brought.

2. JUDGES ⟸51(3) — DISQUALIFICATION BY REASON OF INTEREST MAY BE SHOWN BY DEFENDANT THOUGH IT DOES NOT APPEAR ON THE FACE OF THE COMPLAINT.

In a suit to enjoin an irrigation district from pumping water from the underground flow of a river, defendant, for the purpose of showing the judge's disqualification, could allege the facts as to the manner in which the pumping would affect a lot owned by the judge, though they were not shown on the face of the complaint.

3. JUDGES ⟸42—THAT JUDGE DOES NOT USE WATER UNDERFLOWING HIS LOT DOES NOT AFFECT DISQUALIFICATION IN SUIT TO ENJOIN PUMPING.

That a judge owning a city lot within the delta of a river did not use, or intend to use, the underground flow of the river did not prevent his disqualification in a suit to enjoin an irrigation district from pumping water from such underflow, where the theory on which the suit was brought on behalf of all owners within the delta was that they had a right to use the underflow at any time, though they had not previously done so, and whether such theory was erroneous was immaterial.

4. JUDGES ⟸42—DISQUALIFICATION EXTENDS TO INTEREST IN QUESTION OF LAW AFFECTING INTEREST IN PROPERTY.

The disqualification of a judge to act in an action in which he is interested, under Code Civ. Proc. § 170, extends to an interest in a question of law, as well as to an interest in a question of fact, if it affects or determines his interest in the property involved.

5. JUDGMENT ⟸668(2)—PARTIES ⟸10—PERSONS SIMILARLY SITUATED ARE QUASI PARTIES AND MAY INTERVENE.

Where a suit is brought on behalf of all persons similarly situated, such persons are quasi parties, and may intervene and make themselves actual parties when necessary for the protection of their interest, and they are bound by the decree.

6. JUDGES ⟸42 — MAY BE DISQUALIFIED IN SUIT FOR INJUNCTION THOUGH INJURY IS TOO SLIGHT TO AUTHORIZE JUDGE TO SUE.

That the injury to a city lot owned by a judge within the delta of a river from the diversion of water from the underground flow of the river would be so slight that he would not be allowed to sue for an injunction, or intervene in such an action, does not prevent his disqualification to sit in a suit for an injunction brought by other landowners.

7. INJUNCTION ⟸48—MAY BE GRANTED TO PREVENT ACT WHICH WILL RIPEN INTO EASEMENT THOUGH DAMAGE IS INAPPRECIABLE.

An injunction will lie to prevent a wrongful act, if the continuance of such acts will in time ripen into an easement in favor of defendant, which will operate to deprive plaintiff of the use of his property, or some part thereof, or where it takes from him the substance of his estate, though the immediate damage inflicted is inappreciable.

8. JUDGES ⟸42—INJURY TO CITY LOT FROM DIVERSION OF UNDERGROUND FLOW HELD NOT SO INAPPRECIABLE AS TO PREVENT DISQUALIFICATION.

The injury to a city lot owned by a judge within the delta of a river from the threatened diversion of at least one-tenth of the underground flow of such river, which penetrates the soil of the entire delta, is not so inappreciable as to prevent disqualification to hear a suit to enjoin such diversion, even though the lot is so near the business section of a city that it is likely to be soon devoted to business uses.

9. JUDGES ⟸51(4) — EXTENT OF INTEREST OR EFFECT UPON RULINGS WILL NOT BE INQUIRED INTO IN DETERMINING DISQUALIFICATION.

If a judge has an interest in the subject-matter of the action, or has property which may be directly affected by the result of the judgment, and his interest is a certain definable, pecuniary, or proprietary interest, or relation which will be directly affected, the court will not consider the extent of his interest, nor inquire into the effect it would have upon his rulings in determining whether he is disqualified.

10. JUDGES ⟸53—ESTOPPEL TO RAISE QUESTION OF DISQUALIFICATION BY INTEREST CANNOT ARISE PRIOR TO FINAL JUDGMENT.

Under Code Civ. Proc. § 170, subd. 1, disqualifying a judge to sit or act in an action in which he is interested, there can be no estoppel to raise the question of disqualification by

the acts of the party, at least prior to final judgment; especially in view of subdivision 2, authorizing a written waiver of disqualification by relationship.

11. STATUTES ⊂⊃225¾ — RE-ENACTMENT IS ADOPTION OF PRIOR CONSTRUCTION.

Code Civ. Proc. § 170, having been several times re-enacted since its first enactment, it must be supposed that the Legislature intended it to have the meaning and effect given it by previous decisions of the Supreme Court.

12. JUDGES ⊂⊃54 — CONSENT CANNOT MAKE PROCEEDINGS VALID WHERE JUDGE IS INTERESTED.

Where a judge is disqualified by interest in the action, consent of the parties cannot impart validity to the proceedings.

13. JUDGES ⊂⊃44—IRRIGATION DISTRICT INCLUDED IN STATUTE DISQUALIFYING JUDGE OF COUNTY IN CASES BY OR AGAINST "PUBLIC AGENCY" RELATING TO LAND.

Under Code Civ. Proc. § 170, subd. 5, providing that in actions by or against the reclamation board, or any reclamation, levee, swamp land or drainage district, or public agency affecting or relating to real property, the judge of the superior court of the county in which the real property is situated shall be disqualified, an irrigation district is included within the phrase "public agency."

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Agency.]

Olney, J., dissenting in part.

In Bank.

Original application by the Lindsay-Strathmore Irrigation District, for a writ of prohibition, directed to the Superior Court of Tulare County, and W. B. Wallace, Judge of such court. Writ granted.

Sloss, Ackerman & Bradley, of San Francisco, Power & McFadzean, of Visalia, W. G. Irving, of Riverside, and L. L. Dennett, of Modesto, for petitioner.

Larkins & Bailey and Farnsworth & McClure, all of Visalia, for respondents.

SHAW, J. This is a proceeding in prohibition begun in this court to prevent further proceedings in an action pending before Judge Wallace in the superior court of Tulare county, wherein Tulare Irrigation District and many others, corporations and individuals, are plaintiffs and Lindsay-Strathmore Irrigation District is defendant.

The ground of this proceeding, stated generally, is that by reason of the ownership by Judge Wallace of a certain lot of land 85 feet by 123 feet in size, situated in the city of Visalia, the action is one "in which he is interested," and consequently one in which, under the provisions of section 170 of the Code of Civil Procedure, he is forbidden to sit or act as judge.

Said action was begun in said superior court on July 16, 1916, and it has proceeded to trial before Judge Wallace, who has signed and filed his decision in writing, stating his findings of fact and conclusions of law upon the issues in the case. It is alleged that he has been the owner of said lot for more than 30 years last past, and still remains such owner; that it is situated over subterranean waters, which add substantial value to the said lot, and that the judgment sought by the plaintiffs in the action will have the effect of protecting his interest as owner of said lot in the waters underlying the same. The defendant in the action is engaged in pumping water from land, which pumping operations plaintiffs seek to enjoin, and it is claimed that said pumping will deplete the subterranean waters under said lot in the same manner as it will deplete the subterranean waters under the plaintiffs' land, and which the plaintiffs by said action are attempting to preserve undiminished. If this claim is well founded, a judgment enjoining such pumping operations would protect the rights in said subterranean waters pertaining to said lot as fully as it would protect the rights of plaintiffs in the action, and under our decisions its claim that the judge is "interested" within the meaning of section 170 aforesaid would be well founded. North Bloomfield, etc., Co. v. Keyser, 58 Cal. 315. The question whether or not the judge is so interested in that action must be determined by a consideration of the allegations of the complaint in the action. It will be necessary to set forth at some length the facts alleged.

The Kaweah river has its sources in the west slope of the Sierra Nevada Mountains in the Eastern part of the county of Tulare. It flows down the mountain slopes and reaches the plains at a point known as McKay Point, where it divides into several channels, extending westerly from McKay Point for many miles, forming a fan-shaped comparatively level area containing many thousands of acres, which for brevity we designate as the Kaweah Delta. With respect to this Kaweah Delta, the complaint contains the following allegation:

"That upon said tract of land extending from said McKay Point, as hereinbefore alleged the said upper Kaweah river channel has from time immemorial deposited and distributed, and does now, by means of said channels and subterranean flow, deposit and distribute, its waters thereon, in consequence of which vegetation has sprung up, agricultural products have been produced in large quantities, and upon which tract are located the cities of Visalia and Tulare, and other towns, and many hundreds of farms upon which are growing fruit trees, timber, alfalfa, and other agricultural crops, and upon which there are many thousands of people, and large numbers of live stock; that all of said farms and lands have required, and do now require, the whole of the waters of said

Kaweah river, both surface and subterranean flow, for the irrigation thereof, and for moistening and keeping the same supplied with moisture from the underground flow thereof, and for watering live stock thereon, and for domestic and other beneficial uses of the persons residing thereon; that even during very wet or flood seasons, which occur but seldom, all of said surface and underground flow is needed and required for said tract of land, for the purposes above alleged."

Also the following:

"That at all times during the irrigation of lands in said tract or during times of growing crops of grasses thereon, or in the use thereof the underground flow from said Kaweah river is necessary to furnish a foundation for the surface waters flowing in said channels and to keep up the supply thereof, *and to hold up the underground water table beneath the surface of said lands*, in order to make the same productive; *that any lowering of said water table or underground flow* during such time will greatly diminish the productive qualities of said land and also diminish the amount of surface water carried, during said time, in said channels." (Italics ours.)

The land lying on the northerly and southerly sides of said Kaweah Delta tract is slightly higher, and is composed of more impervious material than that in said delta, so that the surface and underground flow of said Kaweah River is confined to said Kaweah Delta tract. The waters of said river penetrate into and completely fill the lands of said Kaweah Delta tract down to bedrock the whole width of said tract. In some places and at some times these waters appear as surface streams, but whether high enough to form such streams or not, they move down always as an underground supply slowly southwesterly toward the westerly portion of said tract.

The several plaintiffs respectively own various tracts of land situated in said delta and divers ditches and water rights pertaining to their lands, and rights to take water from the said streams, and they use the waters of the branches of said Kaweah river as aforesaid to irrigate lands within said delta and for domestic use thereon. Some of these water rights are rights by appropriation only, and others are rights pertaining to the land as riparian to one or the other of said streams. Certain of said plaintiffs owning land riparian to some one of the said streams have for many years past maintained upon their respective tracts of land wells and pumping plants by means of which each of them has at all times pumped and used water from said underground supply aforesaid for irrigation, domestic, and other purposes. The lands of said plaintiffs so pumping water require the underflow of said Kaweah river underneath said land for irrigation and domestic use thereof, and the whole thereof is necessary to pass by and through said lands for said purposes. The whole of the said underground flow is necessary to support and to supply the surface streams from which the plaintiffs divert water for irrigation and other uses. All of the lands of the plaintiffs are situated within said Kaweah Delta, and below the point therein wherein said defendant's pumping plant now to be mentioned is situated.

The Lindsay-Strathmore irrigation district is a public corporation, organized under the act of 1897 and amendments thereto. Stats. 1897, p. 254. The area of the land embraced in said district is about 14,000 acres. It is situated about 12 miles southerly of McKay Point, and the lands within its limits are higher in elevation than those of the Kaweah Delta. It was organized to obtain water and furnish the same to the lands within its limits for the irrigation thereof. Said Lindsay-Strathmore irrigation district has not a sufficient water supply to irrigate the lands thereof. In order to obtain an additional supply it has purchased some 800 or 900 acres of land lying along said Kaweah river and within said Kaweah Delta and overlying the said underground body of water supplied by said Kaweah river, which constitutes a common underground supply for all the land included in said Kaweah Delta, and has bored wells in said tract of land to a depth of about 100 feet into said underground body of water, and it is now pumping, and threatens to continue pumping, from said wells water taken from said underground supply and transport the same to the lands within the said Lindsay-Strathmore irrigation district, and there distribute the same for the irrigation thereof. It is alleged that if said defendant is permitted to continue said pumping operations "the water so taken and diverted by said defendant will substantially diminish the quantity of water in said underground body of water available to the lands of said plaintiffs as riparian owners, pumpers, and the stockholders of said ditch company, plaintiffs herein, and the lands of each of said plaintiffs and of the stockholders in said company will thereby be rendered less productive and will be diminished in value, and the early and late supply of water to which each of said plaintiffs is entitled as hereinbefore alleged will be greatly diminished."

It appears from the foregoing, in connection with other allegations of the complaint, that all the waters used by the plaintiffs are derived wholly from the surface streams of the Kaweah river and its branches and from the underground waters of said Kaweah Delta tract, and that the lands within said Lindsay-Strathmore Irrigation District to which it proposes to conduct the waters obtained from its pumping plant are "entirely outside of said watershed (of the Kaweah river), and outside of, and not a part

of, any land or lands included in said" Kaweah Delta tract.

The complaint concludes with the following allegations:

"That all of the parties owning lands or diverting water in said tract extending westerly and southwesterly from said McKay Point are united in interest with said plaintiff, in the use of said underground water, but they are so numerous that it is impracticable to bring them all before this court, and therefore said plaintiffs bring this suit in behalf of themselves and also for the benefit of all of said parties."

The relief prayed for is a judgment declaring that the defendant has no right as against the plaintiffs or any of them to take or divert any of the underground waters underlying the said tract or land purchased by the defendant away from said lands or to the lands within the said defendant irrigation district, and that said defendant be permanently enjoined from so doing.

It clearly appears from this statement of facts averred in the complaint that the lot of Judge Wallace, being in the city of Visalia, is within the limits of said tract known as the Kaweah Delta. It is alleged that the waters of Kaweah river penetrate into and completely fill the lands of said Kaweah Delta tract throughout its width down to bedrock; that they move down always as an underground supply southwesterly toward the lower points thereof, and that this underground flow is necessary to hold up the water table in the soil, in order to make the same productive, and is needed for the irrigation of the lands therein and for domestic and other uses of the persons residing thereon. These allegations apply to the entire Kaweah Delta tract. It necessarily follows that the flow of said underground water extends to and under said lot of Judge Wallace and is available for use thereon. If such flow is beneficial to all lands within the delta, as is alleged, it must be beneficial to said lot in the same way, although the amount of the benefit may be very small, as compared to that which may inure to the larger bodies of land specifically described in the complaint as belonging to the respective plaintiffs who are landowners.

It does not appear that Judge Wallace directly uses on said lot any part of said underground flow; indeed, it is conceded that he does not. He obtains water on his lot for domestic use and for watering plants and trees from the Visalia City Water Company. This company obtains its water from wells situated within said city, from 85 to 100 feet deep, derived from the same supply as that in which the plaintiffs claim to be interested and which they seek to protect. As a resident of the city he has a right to receive water from that company upon payment of established water rates. It may be that this conditional and secondary right to the water is not sufficient to constitute an interest in the subject of the action, but we need not determine the question. The water underlies his lot and is, while there, a component part of his land. Following natural laws, as it must, when one particle of the water flows out from under that lot, another particle immediately replaces it. This movement ensures a permanent supply of water in his soil of which he may avail himself for the benefit of said lot and for any use he sees fit to devote it to thereon. The complaint in the main action proceeds on the theory that each owner of land within the Kaweah Delta, which includes Judge Wallace's land, possesses this right as a part of his land, and that consequently each of them has an interest in the continuance of said underflow.

[1] Respondents insist that the proposition that Judge Wallace is interested in the action because he owns said lot is founded on a misconstruction of the complaint and a misapprehension of the object of the action. They say that the only underground water in which the plaintiffs are interested is that from which some of them pump water on their own lands and that which underlies the Kaweah river and its branches at and in the vicinity of the places of diversion of the respective ditches from which the other plaintiffs are supplied with water; that in order to state a good cause of action for the relief asked by the plaintiffs it was only necessary to state that the underflow would be substantially diminished at those places by the threatened pumping operations of the defendant, that its effect elsewhere is immaterial, and that all the averments in the complaint as to such effect are surplusage; that therefore the allegations of the complaint, to the effect that the waters of the Kaweah river penetrate and fill the soil of the entire Kaweah Delta tract down to bedrock, including lands not belonging to any of the plaintiffs, that said underground water is always moving westerly and moistens and makes productive the soil of such lands of other parties, and that all such lands require the continuance of said underflow for that purpose and for domestic use, are all unnecessary to the cause of action sued on, and must be disregarded in construing the complaint. If this be done, so the argument runs, there is nothing properly alleged in the complaint from which the conclusion would follow that Judge Wallace, by reason of his ownership of said lot, can be in any manner interested.

There are at least two reasons which completely dispose of this argument:

First. These averments now claimed to be superfluous show that there are many other landowners who, with respect to this underflow, are in the same situation as the plaintiffs, and who will, in like manner, be injured by the pumping operations of the defendant. Other allegations show that these persons are very numerous, amounting to "many thou-

sands of people," and the last paragraph which we have above quoted states, in apt language, that these persons are united in interest with the plaintiffs, but are too numerous to make it practicable to bring them before the court, and that therefore this suit is brought by the plaintiffs for the benefit of all of said parties. These are proper allegations to show that the suit is begun for the benefit of all who are interested therein, and for that purpose the above allegations, which are now claimed to be surplusage, are necessary to show the interest of the other persons. The cause of action is not for plaintiffs alone, but for all other persons within the delta who have a like interest with the plaintiffs. Code Civ. Proc. § 382.

[2] Second. Even if these allegations had been omitted, it would be competent for the petitioner herein to show the disqualification of the judge by allegations of the facts disclosed in the complaint, and said to be surplusage, coupled with the statement of his ownership in the aforesaid lot, and, upon that showing, to claim the disqualification. The disqualification of the judge, by reason of his interest, need not be shown upon the face of the complaint. It seldom does so appear. He will be held to be disqualified by this cause if the facts stated in the complaint, taken in connection with the extrinsic facts shown in support of the application for prohibition or for change of judge, make his interest appear. For example, in North Bloomfield, etc., Co. v. Keyser, supra, the action was by the city of Marysville to enjoin the North Bloomfield and other mining companies from depositing tailings from their mines in the channel of the Yuba river, and it was alleged that such deposit would fill up said channel and cause the waters to overflow the lands of the said city and deposit such tailings thereon. There was nothing in the complaint to indicate that the judge was in any way interested in the subject-matter of the action, or in the relief awarded therein. But upon the application for change of venue, and also in the proceeding for prohibition against the judge, it was shown that he owned two small lots bordering upon and extending to the center of Feather river in the nearby town of Yuba City, that the tailings so brought down in the Yuba river from said mines would also be carried to, be deposited in, and would fill up, the channel of the Feather river opposite to and on said lots, and would endanger and injure said lots in like manner as it would injure the lands of the plaintiff sought to be protected by the injunction. The case is exactly parallel with the present case. The court said:

"If the relief prayed for is awarded, the same judgment that stops the flow of tailings or débris onto the lands of the city of Marysville stops its flow onto the lands of the respondent. The very judgment that will protect Marysville will protect him. His interest, therefore, is not merely in the questions of law involved in the controversy, nor is it uncertain or remote; but it is a direct and immediate interest in the result of the action."

He was therefore held to be disqualified. The case of Meyer v. San Diego, 121 Cal. 102, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22, was an appeal from an order refusing to change the place of trial. The complaint did not show any interest on the part of the judge. The object of the action was to declare a contract between the city and a certain water company illegal and void, and to enjoin the issuance and sale of the bonds necessary to carry out the contract. The statute authorizing the bond issue required an annual levy of taxes for 40 years thereafter, upon all property within the city, to pay the principal and interest of the bonds. Upon the hearing of the application to change the venue it was shown that he owned real property situated and taxed in said city for municipal purposes which would be subject to such annual taxes for the payment of said bonds during the time they would run. This was held to show that he was interested, and he was adjudged to be disqualified. For these reasons we are of the opinion that the petitioner has not misconstrued the complaint or misunderstood the object of the action.

[3-5] Judge Wallace has not hitherto used the underflow available in his lot, and it is not shown that he has any intention to do so. The argument that this removes the disqualification is contrary to the theory of the complaint, as above set forth, and contrary to the theory upon which the plaintiffs assume therein to be representing all the owners of land within the Kaweah Delta. The complaint, in effect, alleges that they each have the right, at any time, to use the underflow beneath their respective lots, although they have not previously done so and may not presently intend to do so. It does not help the argument if we should admit that this theory is erroneous in law, for to the judge is committed the duty of determining the law, as well as the facts, and he may determine it according to his interest as well as contrary to it. The disqualification extends to an interest in a question of law as well as to an interest in a question of fact if it affects or determines the interest of the judge in the property involved. Furthermore, all the persons thus represented are regarded as quasi parties, and "may intervene and make themselves actual parties when necessary for the protection of their interests." 15 Encyc. of Pl. & Pr. 634, 642. And they are bound by the decree. Id. 635. The complaint, in effect, made Judge Wallace a potential party to the action.

[6, 7] The respondents claim that, inasmuch as the lot of Judge Wallace can suffer but a very slight injury from the diversion in question, he would not be allowed to maintain an action for injunction to restrain such

diversion or to intervene in such action, and therefore that he is not a party interested in this action. In support of this proposition they cite Newport v. Temescal W. Co., 149 Cal. 531, 87 Pac. 372, 6 L. R. A. (N. S.) 1098, and Cohen v. La Canada, etc., Co., 151 Cal. 681, 91 Pac. 584, 11 L. R. A. (N. S.) 752. The Cohen Case merely holds that one who has no interest in water diverted from land adjoining his own, and who is not injured by the diversion, cannot enjoin such diversion. The Newport Case states the familiar rule that where a public service company has appropriated to the public use property belonging to a third person and has begun the service, without first compensating him for its value, he cannot enjoin the public service if he can be adequately compensated in damages; and the other well-known rule that when the injury to the plaintiff is slight, as compared to that which will be suffered by the defendant if the injunction is granted, a court of equity may, in its discretion, deny the injunction. This argument does not answer the objection that the judge is interested in the action. The judge may be disqualified by reason of his interest in the subject-matter where, because of the form of the particular action or the kind of relief asked, he would be unable to become a party to such action if he so desired. It is sufficient if the result of the action will directly affect him in his property interests. It is proper to say here, though not necessary to the discussion, that under the established rule in this state an injunction will lie to prevent a wrongful act if the continuance of such acts will, in time, ripen into an easement in favor of the defendant which will operate to deprive the plaintiff of the use of his property, or some part thereof, or where it takes from him the substance of his estate, although the immediate damage inflicted by the act is inappreciable. Moore v. Clear Lake Water Wks., 68 Cal. 150, 8 Pac. 816; Stanford v. Felt, 71 Cal. 250, 16 Pac. 900; Heilbron v. Canal Co., 75 Cal. 431, 17 Pac. 535, 7 Am. St. Rep. 183; Learned v. Castle, 78 Cal. 461, 18 Pac. 872, 21 Pac. 11; Vestal v. Young, 147 Cal. 718, 82 Pac. 381.

One of the principal points urged by the respondent is that the possible injury to the lot of Judge Wallace from the effect of the threatened diversion in lowering the underflow in said lot is so entirely unsubstantial and inappreciable that it comes within the operation of the maxim stated in section 3533 of the Civil Code, "The law disregards trifles," or, as expressed in the familiar Latin phrase, "de minimis non curat lex."

From the admissions and facts shown at the hearing it appears that the pumping plant of the defendants is in the Kaweah Delta on the Kaweah river and is situated about 12 miles easterly of the said lot; that the said delta tract slopes gently from the site of said plant to and beyond the city of Visalia. Affidavits were filed on behalf of the respondents to the effect that while the pumping proposed to be done by the defendant will, in time, lower the plane of the water table under the lands of the plaintiffs and those who are receiving the water distributed by the corporation plaintiffs and will greatly reduce the crops that may be grown on said lands, it would not "in any way affect the value or productive qualities of said lot of Judge Wallace, because it is not used for any such purpose as are the lands of said plaintiffs * * * or for the production of crops of any kind, or anything which requires the use of said, or any, underground water," and that, consequently, even if the waters underlying said lot should be diminished or lowered by such pumping, the productive qualities and value of the lot would not be affected.

It is conceded by the petitioner that its proposed pumping operations threaten no immediate injury to said lot, and that the lowering of the water plane in said lot, so far as may now be seen will never be very great, and it is also freely admitted that the well-known high character of Judge Wallace for probity and fairness would preclude all who know him, or who know his well-earned character, from entertaining the suspicion that he would be influenced by such an interest, or that he would consent to sit in a case as to the result of which he knowingly had an interest, or in which he was conscious of any bias whatever. But this, they assert, does not determine the case, inasmuch as even with the showing made by the respondents the lot of Judge Wallace will be, to some slight degree, directly affected by the pumping threatened by the defendants, and its potential qualities will be either protected or endangered to some extent by the result of the judgment, which, they contend, is sufficient to disqualify him.

[8] It cannot be said that, as matter of law, the possible injury that may accrue to said lot from the pumping operations of the defendant will be inappreciable. The appearance of thousands of windmills throughout the state, both in the country and in the smaller cities, with the accompanying water tank, demonstrate the fact that wherever there is an underground supply of water it is customary to obtain water therefrom by means of wells and pumps. It is a well-known fact that a very large part of the extensive region cultivated to citrus fruits in the part of the state in which this controversy arose has been irrigated with water obtained in this manner from the ground beneath the orchards. The owner of this lot could readily become independent of the Visalia City Water Company and supply himself with the same quality of water by putting down a well to the underflow and installing a pump to be moved by wind, electricity, or gasoline. And if, as suggested by the re-

spondents, the lot is so near to the business section of Visalia that it is likely to be soon devoted to business uses so that water for grass and plants will become unnecessary, the underflow will still be a material element of its possible value. It is not uncommon for the owner of a business block over such underflow to erect a tank on the roof, sink a well, install a pump, and keep the tank filled with water by that means, as a protection against fire and for ordinary uses within the building. Such possibilities add materially to the value of such property, as well as to residence or farm property. The defendant in its answer to the complaint, avers that it intends to take out of said water supply a constant flow of 75 cubic feet of water per second. They also allege that the total annual run-off from the entire watershed which collects and supplies the streams and underflow in question amounts to 340,000 acre feet, of which the plaintiffs and other users of water in said delta use for irrigation, and other purposes, 225,000 acre feet, and that of the remaining 125,000 acre feet the defendant purposes to take 30,000 acre feet. The depth of the water-bearing stratum in which the underflow lies is not made to appear. But these figures show the the defendant proposes to take out and away from said delta region approximately one-tenth of the entire water supply coming into it from the only sources available—the rainfall and snows of the watershed. If proper allowance is made for run-off, wastage, and for evaporation and other losses, it will far exceed one-tenth. And it is not unreasonable to suppose that this estimate of the natural supply is not minimized by defendant to its own disadvantage, and that it may be much more than one-tenth. That the extraction of this quantity of water from the underflow will lower its level materially throughout its extent must be obvious. Plaintiffs allege that it will have that effect. Such lowering would, of course, increase the expense of obtaining water on said lot by pumping, and it is altogether probable that the increased cost would amount to an annual sum that would be very appreciable. At all events the court cannot say that it would not be so, and, unless this can be said with certainty, it cannot declare that the injury threatened is too slight to be measured or to be the subject of judicial cognizance, even if that would answer the objection.

[9] Furthermore, the well-established rule is that if the judge has an interest in the subject-matter of the action, or has property which may be directly affected by the result of the judgment that may be rendered therein, the court will not consider the extent of the interest, nor inquire into the effect it would have upon his rulings. It is sufficient to disqualify him if it is a certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by the judgment that may be rendered. Adams v. Minor, 121 Cal. 373, 53 Pac. 815; Meyer v. San Diego, 121 Cal. 105, 53 Pac. 434, 41 L. R. A. 762, 66 Am. St. Rep. 22; North Bloomfield, etc., Co. v. Keyser, supra; Heilbron v. Campbell, 3 Cal. Unrep. 204, 23 Pac. 122. In Minor v. Adams, the court said:

"We cannot take into consideration the amount of the judge's interest in the bank—indeed, it is not given; nor can we say that, of the entire issue of bonds, the part held by the bank was too small for judicial cognizance. It certainly was not so small as to come within the maxim 'de minimis non curat lex.' Parker, C. J., in Pearce v. Atwood, 13 Mass. 324, said: 'No man can lawfully act as judge in a cause in which he may have a pecuniary interest. Nor does it make any difference that the interest appears to be trifling, for the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line.'"

In North Bloomfield, etc., Co. v. Keyser, supra, the court said that this section of the Code should receive a broad and liberal construction and that—

"The immediate rights of litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance." Page 322.

In Meyer v. City of San Diego, the court quoted, with approval, the language of Lord Mansfield in Hesketh v. Braddock, 3 Burr. 1856, as follows:

"There is no principle in the law more settled than this, that any degree, even the smallest degree, of interest in the question depending, is a decisive objection to a witness, and much more so to a juror, or to the officer by whom the juror is returned. If, therefore, the sheriff, a juror, or a witness be in any sort interested in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment, and therefore will not trust him. The minuteness of the interest won't relax the objection, for the degrees cannot be measured. No line can be drawn but that of a total exclusion of all degrees whatsoever."

And the court added that—

"While in terms this case does not include the judge as coming within the principle of disqualification, it is not to be doubted that it applies with equal strength, and with more reason, to such an officer."

The question must be considered as settled in this state. Our decisions on the subject are in harmony with those of other jurisdictions in which there are similar statutes. 17 Am. & Eng. Encyc. of Law, 740; 23 Cyc. 577.

Finally, it is contended that the defendant in the action, by its conduct, has waived the objection on account of the disqualification of the judge, and that it is now estopped to raise it in this manner, or otherwise than by a motion for a new trial or by appeal.

In support of this contention it has been shown that the judge has owned and resided on the said lot for the last 34 years; that the deed conveying said lot to him was duly recorded in the office of the county recorder in the year 1887; that the trial of the action was begun on October 25, 1917, and was not concluded until May 15, 1919; that the taking of testimony therein occupied 164 days, and that on July 9, 1919, said judge announced his decision in favor of the plaintiffs; that during the entire proceedings no objection or suggestion was made to the court by any of the parties that the judge was disqualified to act by reason of his interest; that two of the petitioner's attorneys have resided in Visalia for more than 25 years, during all of which time they knew that the said judge resided and had his home on the said lot; and that no objection to the qualification of said judge to sit and act in the trial of said action was made until after the announcement by said judge of his decision in favor of the plaintiffs as aforesaid. It is apparent, also, that the trial has been very expensive. If an estoppel can arise upon facts of this character to prevent a party from applying for a writ of prohibition, the facts in this case would, we think, be sufficient for that purpose.

[10] The provisions of section 170 clearly imply that no such estoppel can be created, at least prior to final judgment, in an action to which the judge is a party or in which he is interested. Subdivision 1 of the section refers exclusively to such action and the provision that the judge shall not "sit or act" in such case is absolute and unqualified. Subdivision 2 relates to disqualification by relationship, and it expressly provides that such disqualification may be waived by the parties by a stipulation in writing to that effect, signed by them and filed in the action. If the Legislature had intended that a waiver or estoppel could be created by consent, acquiescence, or failure to object to the trial by an interested judge, under the circumstances above stated, it is not reasonably conceivable that it would have left subdivision 1 positive and unqualified on that point, while at the same time expressly providing for a waiver where the disqualification arises from relationship. Also, it is plain that if it be the law that such conduct of itself operates as a waiver to prevent the party from raising the objection during the course of the proceedings, then there was no necessity or reason for providing expressly for a waiver before judgment in the latter subdivision. The insertion thereof in subdivision 2 shows that it was the legislative intent that no waiver or estoppel by conduct could arise prior to judgment under subdivision 1. This conclusion is emphasized by the fact that, although the same provision has been in force in this state ever since the year 1851, no qualification of this kind has ever been inserted in the frequent re-enactments thereof. The history of the law and the decisions thereunder confirm this theory.

Section 111 of the act of March 11, 1851 (Stats. 1851, p. 27), provided that a judge should not "act as such" in an action or proceeding in which he is interested. This provision has been continued in force from that time until the present. It has received interpretation in many cases. In People v. De la Guerra, 24 Cal. 77, the court said:

"Even if no objection is made, he has no right to act, and ought, of his own motion, to decline to sit as judge. * * * The dismissal of the proceeding was void on the ground of the incompetency of the judge to act."

In Estate of White, 37 Cal. 190, the court said that it was no answer to the disqualification arising from interest in the proceedings to say that the decision in the cause was correct, and that—

"The statute does not say that the judge is disqualified to decide erroneously, but that he shall not decide at all."

After these decisions the provision was re-enacted and made a part of the Code as section 170. In Tracy v. Colby, 55 Cal. 67, it was held that a judge could not make a valid order confirming the sale of real property of a decedent if he was interested in the purchase thereof, and that extrinsic evidence was admissible to show such interest. In Johnson v. German, etc., Co., 150 Cal. 336, 88 Pac. 985, speaking of an order made by a judge who was disqualified by relationship, as to which the statute is in the same language, it was held that an order extending time to serve a proposed bill of exceptions was a judicial act, that it was wholly void, and that "any act of the disqualified judge in violation of the provisions of the statute is absolutely void wherever brought in question." Similar expressions are contained in the other California cases hereinbefore cited, and also in Livermore v. Brundage, 64 Cal. 299, 30 Pac. 848. Where the highest court of a state has construed a statutory provision, declaring it to have a particular meaning and effect, and the Legislature afterwards re-enacts it without change, "we are bound to suppose" that it was left unchanged "with the intention that it should be construed now as it was construed before." Estate of Li Po Tai, 108 Cal. 487, 41 Pac. 486; Staude v. Board, 61 Cal. 323; People v. Webb, 38 Cal. 477; People v. Coleman, 4 Cal. 50, 60 Am. Dec. 581; Taylor v. Palmer, 31 Cal. 254.

[11] The provision now contained in section 170 of the Code, forbidding a judge to act in a cause in which he is interested, was first enacted in 1851. Thereafter its meaning and effect was settled by the decisions above mentioned. It has been re-enacted seven times without change, the last re-enactment being in 1915. It must be supposed

that the Legislature intended it to have the meaning and effect that had been given to it by the previous decisions of this court.

[12] It is also the uniform rule, under these statutes, that where such disqualification exists, consent of the parties cannot impart validity to the proceedings, and that a party to the action who desires to attack them is not estopped from doing so by the fact that he attended during the trial without raising the objection. Adams v. Minor, 121 Cal. at page 375, 53 Pac. 815; Oakley v. Aspinwall, 3 N. Y. 547; Converse v. McArthur, 17 Barb. (N. Y.) 413; Matter of Hancock, 91 N. Y. 284; Chambers v. Hodges, 23 Tex. 104; Clayton v. Per Dun, 13 Johns. (N. Y.) 218; Schoonmaker v. Clearwater, 41 Barb. (N. Y.) 200; Richardson v. Welcome, 60 Mass. (6 Cush.) 332; Sigourney v. Sibley, 38 Mass. (21 Pick.) 106, 32 Am. Dec. 248; Peninsular, etc., Co. v. Howard, 20 Mich. 26. The reasons for this rule are so well stated in Oakley v. Aspinwall that we adopt its language:

"But where no jurisdiction exists by law it cannot be conferred by consent—especially against the prohibitions of a law, which was not designed merely for the protection of the party to a suit, but for the general interests of justice. * * * It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases; and it is important, in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined; but the state, the community, is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind.

"The party who desired it might be permitted to take the hazard of a biased decision, if he alone were to suffer for his folly—but the state cannot endure the scandal and reproach which would be visited upon its judiciary in consequence. Although the party consent, he will invariably murmur if he do not gain his cause; and the very man who induced the judge to act, when he should have forborne, will be the first to arraign his decision as biased and unjust. If we needed an illustration of this, the attitude which the counsel for the moving party in this case assumed toward the court, the strain of argument which he addressed to it, and the impression which it was calculated to make upon an audience, are enough to show that, whatever a party may consent to do, the state cannot afford to yield up its judiciary to such attack and criticism as will inevitably follow upon their decisions made in disregard of the prohibitions of the law, under consideration."

[13] The petitioner has called our attention to the question of the disqualification of Judge Wallace under subdivision 5, added to section 170 in 1915. We are satisfied that the case comes within the spirit and scope of its provisions. It declares that in an action or proceeding "by or against the reclamation board of the state of California, or any reclamation, levee, swamp land or drainage district, or *any public agency*, or trustee, officer or employé thereof, affecting or relating to any real property or any easement or right of way, levee, embankment, canal, or any work provided for or approved by the reclamation board of the state of California, the judge of the superior court of the county, * * * in which such real property, or any part thereof, or such easement or right of way, levee, embankment, canal or work, or any part thereof, is situated shall be disqualified to sit or act, and such action, if brought in the superior court, shall be heard and tried by some other judge of the superior court requested to sit therein by the Governor." It further provides that the parties may by stipulation in writing, waive the disqualification and may by like stipulation select some other judge to try the cause.

This subdivision was considered by this court in Sacramento, etc., Drainage Dist. v. Rector, 172 Cal. 385, 156 Pac. 506, and was there held valid. It was also there decided that the expression, "provided for or approved by the reclamation board of the state of California," following the word "work," was a limitation upon that word only, and that it did not qualify or refer to the descriptive words immediately preceding it.

One of the main objects of this statute evidently was to prevent a judge, even if he is not interested, from sitting or acting as such in a cause which is of general interest to the community in which he lives and concerning which there is likely to be developed an active local public opinion and strong feeling which might greatly embarrass him, or affect him, consciously or unconsciously, in his decision, particularly in cases where the other party to the action was an outside agency, operating in a manner that would directly affect local affairs and property interests. Irrigation districts are not specifically mentioned, but they come within the meaning of the phrase "or any public agency." They are public agencies of the same character as those particularly named, and they are organized for the same general purposes to accomplish similar objects. There is no essential difference in these respects between an irrigation district and a reclamation district or a swamp land or drainage district. The latter are organized to reclaim land by draining off the surplus water. Irrigation districts are organized to reclaim land by supplying water thereto. In the desert land regions the word "reclamation" is in common use to indicate the bringing of water on the land for the irrigation thereof. If we apply the ejusdem generis rule of interpretation as

is proper in such cases, we must hold that the above phrase was intended to include irrigation districts, although it may not include public corporations in general.

The facts disclosed in the present case show that it comes within the purpose of the act. The Kaweah Delta embraces a very large area of land, inhabited by many people. The general use of water from the underflow and from the streams fed or supported thereby makes the region very productive. Judge Wallace has lived there for 34 years, and has seen a large part of the country about him gradually change from a comparative desert to a fruitful garden. The petitioner is an outside public agency, organized for the benefit of another community. It proposes to take water from the same source as that which has for years supplied the growing needs of the delta region. The conditions naturally tend to engender feelings of antagonism and to arouse local public opinion. A sound public policy would so provide that the local judge may be relieved from the embarrassment of having to try such a case. We are of the opinion that Judge Wallace is disqualified by reason of the provisions of this subdivision, as well as under the provision of the first subdivision of the section.

The conclusion is that the judicial acts and proceedings of Judge Wallace in said action must be deemed invalid, and that the action must proceed again from the beginning before some judge who is not disqualified.

In view of the extreme length of the trial and the expense incurred therein, it may be unfortunate that the result cannot stand without impeachment, except by appeal, and for reasons going to the merits. But the courts cannot change the statute on the subject. We can only suggest to the Legislature that it may be possible to frame a provision for avoiding such a miscarriage, and which will not contravene a sound public policy on the subject.

Let a writ issue, commanding the superior court of the county of Tulare, and Hon. W. B. Wallace as judge thereof, to refrain from proceeding further in said cause, except that if a qualified judge is called to act as judge thereof the court may proceed with a new trial of said action before such judge.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

OLNEY, J. I concur, but only on the ground that Judge Wallace is disqualified by subdivision 5, section 170, of the Code of Civil Procedure. That he had or has a disqualifying personal interest is not, in my judgment, the fact. It is not necessary, however, to discuss the point. Suffice it to say, that I think it affirmatively appears that whatever right Judge Wallace, as the owner of the lot upon which he resides, may have to the continued maintenance of the water level of the subterranean waters beneath its surface is not merely of only slight value to him, but is of no value or concern to him at all. In other words, his right, if he has any, is purely theoretical, and his so-called interest is not a thing of reality. Oakland v. Oakland Water Front Co., 118 Cal. 249, 252, 50 Pac. 268. I can understand perfectly how it never occurred to Judge Wallace or to the litigants or counsel until a very recent date that his ownership of the lot gave him any personal interest in the litigation, though his ownership was well known, and the fact that it did not occur either to him or to them seems to me strong corroboration of the view that he has no interest in any real sense of the word.

The main opinion might possibly be thought to intimate that under our Code section a judgment of a *court*, rendered by a judge thereof disqualified because of interest or otherwise, is void for want of jurisdiction. I am satisfied that this is not true. It is, however, not necessary to determine the point for the purposes of the present decision, and as I understand it no opinion is expressed upon it by the main opinion.

I also do not concur in the statement that under our statute a party may not estop himself from asserting the invalidity of proceedings theretofore taken before a disqualified judge. But in order that such estoppel exist, it should affirmatively appear, either directly or by reasonable inference, that the party attempting to assert the disqualification knew previously both of the disqualification and of his right to insist upon it, and, nevertheless, made no objection, but permitted the proceedings to go on. This does not appear in the present case. But if it had, I think the petitioner would have been estopped. It would seem to me intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.

182 Cal. 230

SIMONS BRICK CO. et al. v. CITY OF LOS ANGELES. (L. A. 4691.)

(Supreme Court of California. Feb. 17, 1920.)

1. STREET RAILROADS ⊂=28(4)—COUNTY ORDINANCE AUTHORIZING "TURNOUTS" AND "SWITCHES" IN HIGHWAYS DOES NOT AUTHORIZE INDUSTRIAL "SPUR TRACK."

An ordinance of the county board of supervisors, giving an electric railroad a franchise to construct turnouts and switches in public highways, does not authorize the construction and maintenance of an industrial "spur track," in view of the definitions of "turnouts" and "switches."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Switch; Turnout.]

2. FRANCHISES ⊂=2—NOT TO PREVAIL OVER PUBLIC RIGHTS UNLESS PLAINLY GRANTED.

Corporate privileges which are not ordinarily and necessarily an incident of the corporate franchise can be held to prevail over public rights only when it plainly and explicitly appears that such privileges have been in fact granted.

3. STREET RAILROADS ⊂=28(4)—INDUSTRIAL SPUR TRACK NOT INCLUDED IN STATUTORY POWER TO CONSTRUCT "ROAD" ALONG STREETS.

Under Civ. Code, § 465, subd. 5, giving railroad power to construct its "road" along streets or highways, an electric railroad, running along a city street, has no power to construct and maintain an industrial spur track, as subdivision 4, which permits the construction of necessary appendages and adjuncts, cannot be read into subdivision 5, and the amendment of 1907 to section 465, permitting construction of a road with one or more tracks, would not change the construction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Road.]

4. ESTOPPEL ⊂=62(8) — CITY NOT ESTOPPED BY ACQUIESCENCE IN USE BY RAILROAD OF STREET.

Acquiescence in construction and maintenance of an industrial spur track on a city street, which the railroad had no power to construct and maintain, cannot estop the city.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by the Simons Brick Company and the Pacific Electric Railway Company against the City of Los Angeles. From a judgment denying an injunction, plaintiffs appeal. Affirmed.

Frank Karr, R. C. Gortner, A. W. Ashburn, W. R. Millar, Kenton A. Miller, and Frederick W. Smith, all of Los Angeles, for appellants.

Albert Lee Stephens, Charles S. Burnell, and Wm. P. Mealey, all of Los Angeles, for respondent.

LENNON, J. Plaintiffs seek to enjoin the city of Los Angeles from removing a certain industrial spur track maintained by the plaintiff railway company as a part of its electric railway system on Santa Monica boulevard in the city of Los Angeles. This spur track serves the manufacturing plant of the plaintiff brick company which is situated on property adjacent to Santa Monica boulevard. The trial court denied plaintiffs' application for an injunction pendente lite, set aside a temporary restraining order which had been previously granted, sustained a demurrer to the complaint without leave to amend, and entered judgment for defendant. Plaintiffs thereupon prosecuted this appeal.

Defendant seeks to support the judgment and order of the trial court upon the ground that there has at no time existed any legal authority for the building and maintenance of the spur track in question.

The spur track was constructed in June, 1909, in what was, at that time, unincorporated territory of the county of Los Angeles. It is claimed that the said spur track was built pursuant to the terms of an ordinance of the Los Angeles county board of supervisors, granting a franchise to the predecessor of plaintiff railway company which provided "that the right of way be, and the same is hereby, granted to E. P. Clark, and his assigns, over and along the public highways of the county of Los Angeles in this ordinance named [including Santa Monica boulevard] for the period of fifty years from and after the passage hereof, for the purpose of constructing, maintaining and operating a single or double track railway thereon, for passengers, freight, United States mail and baggage; * * * together with the right to construct all switches, turnouts, power houses and other appliances, properties, structures and attachments that may be necessary for the purpose of operating said road and enabling it to be as efficient as the best electric roads."

[1, 2] It is contended, on behalf of defendant, that the words of this ordinance are not adequate to authorize the construction and maintenance of the spur track here in question. This contention must be sustained. No principle of law is better settled than that corporate privileges, which are not ordinarily and necessarily an incident of the corporate franchise, can be held to prevail over public rights only when it plainly and explicitly appears that such privileges have been, in fact, granted. Helena Water Works Co. v. Helena, 195 U. S. 383, 25 Sup. Ct. 40, 49 L. Ed. 245; Indianapolis, etc., Ry. Co. v. Citizens' St. Ry. Co., 127 Ind. 369, 24 N. E. 1054, 1062, 26 N. E. 893, 8 L. R. A. 539; Capital City Light, etc., Co. v. City of Tallahassee, 42 Fla. 462, 28 South. 810. The language of the franchise in question here does not, in terms, nor by any fair implication, contem-

plate and confer the authority to construct and maintain an industrial or any other spur track by the railroad company. With reference to trackage facilities, the only adjuncts to the main line expressly permitted by the franchise are "turnouts" and "switches." As ordinarily understood and employed, the words "turnouts" and "switches" are in a measure interchangeable. In railroad parlance a "switch" consists of "two parallel lengths of rails joined together by rods, pivoted at one end, and free to move at the other end, forming a part of the track at its junction with a branch or siding. * * * Such a switch may be used to connect several lines of rails." Century Dictionary. A "turnout" is a short sidetrack—a siding, having connection with the main line track, upon which one train may be switched to permit another train to pass on the main line track. Century Dictionary; City of Philadelphia v. River Front Co., 133 Pa. 134, 19 Atl. 356; Borough of Bridgewater v. Beaver, etc., Co., 214 Pa. 343, 63 Atl. 796; Erie R. Co. v. Steward, 61 App. Div. 480, 70 N. Y. Supp. 698. Clearly, therefore, the "turnouts" and "switches" permitted by the franchise in question are no more than the customary short tracks, which are usually resorted to for the purpose of enabling and facilitating main line train movement. On the other hand, a spur track is "a short track leading from a line of railway, and connected with it at one end only" (Century Dictionary) and may be said, as a matter of common knowledge, to be a track which is projected and extended laterally or at an angle to the main line, and is not an adjunct usual or necessary to the primary operation of main line trains and cars. Obviously, therefore, a spur track is distinctly different in its purpose and use from a "turnout" or a "switch." A reading of the franchise in question fails utterly to reveal any other words or phrases which may be said to contemplate and grant the authority to construct an industrial spur track, and, in the absence thereof, it must be held that it was not the intention of the board of supervisors, nor the purpose and effect of the franchise, to grant, without more ado, the right to construct industrial spur tracks.

[3] It is contended, however, upon behalf of appellants, that, apart from and without regard to the terms of the franchise in question, authority to construct and maintain the spur track in question is to be found in the provisions of sections 465 and 470 of the Civil Code, and that, in any event, in the face of the facts pleaded in the complaint the city is estopped from interfering with the maintenance of the said spur track. Upon this phase of the case we are in accord with the discussion and disposition of it by Mr. Justice Sloane of the Second Division of the District Court of Appeal for the Second District, and therefore adopt his opinion and conclusions as the opinion of this court, which are as follows:

"* * * we are satisfied, under the decisions of the Supreme Court, that this case turns upon the construction of subdivisions 4 and 5 of section 465 of the Civil Code, and upon the meaning of the words 'road' and 'roads', as used in these subdivisions; and that, in the absence of express legislative authority enlarging the powers of the governing authority of a city or county in this regard, section 465 defines and limits the easement that may be permitted to railroad corporations in the use of a public highway.

"Under section 465, Civil Code, subdivision 5, it is provided that: 'Every railroad corporation has power * * * to construct [its] roads across, along or upon any * * * street, avenue or highway * * * which the route of its road intersects, crosses or runs along.' This provision, however, must be considered in connection with subdivision 4 of the same section, in determining the meaning of the word 'roads' as here used. Under subdivision 4—as it read at the time the track involved here was laid—it is provided that 'every railroad corporation has power * * * to lay out its road, not exceeding ten rods wide, and to construct and maintain the same, with one or more tracks, and with such appendages and adjuncts as may be necessary for the convenient use of the same.' Subdivision 4 clearly refers to the laying out of the railroad over and upon its right of way wherever located. Subdivision 5 refers to the specific location and privileges of a right of way over streets, avenues, highways or other localities enumerated in such subdivision; and, by the omission of the words relating to 'appendages' and 'adjuncts,' appears to limit the term 'roads' as there used, to the main tracks of the railway. In Los Angeles v. Southern Pacific R. R. Co., 157 Cal. 363, 108 Pac. 65, the Supreme Court clearly lays down the limitation of the use of highways by railroad corporations, in the absence of other express legislative authority, to the privileges set out in subdivision 5 of section 465 of the Civil Code; and also limits the application of such use to the construction and maintenance of the spur tracks constituting the main lines of the railway.

"The case just cited is one in which the city of Los Angeles sought to eject the Southern Pacific Railroad Company from the possession of a portion of Alhambra street, in said city. The railroad company, in addition to the two main through tracks of its railway, had constructed and was maintaining a third track over a portion of said avenue, which connected with the grounds used for its shops, and was also used for a side track. It was the right to maintain this third track that was in dispute. The railroad constructed these tracks under an ordinance of the city of Los Angeles purporting to set apart to the unreserved and unrestricted use of the Southern Pacific Railroad Company all of the street in question. It is held in the opinion that this ordinance is effective to the extent that the city had power to grant the use of the street for railroad purposes. The court in this connection says: 'Admittedly the city council at that time had only such power in this regard as had been conferred upon them by the Legislature of the state. Their authority to

grant such a use of the street by the railroad company as includes the maintenance of this third track must be found, so far as we have been able to ascertain, in sections 465 and 470 of the Civil Code, as the same stood at the time of the adoption of this ordinance. * * * At the time of the adoption of this ordinance the only legislative authorization of the use of a public street for railroad purposes was in subdivision 5 of section 465 of the Civil Code, the section enumerating the powers of railroad corporations. * * * This subdivision was part of the original Code, and has never been amended. It is to be observed that this provision is limited to the "road" of a railroad corporation; in other words, that it grants to a railroad corporation the right to use a street, avenue or highway only as a place for its "road." Nothing is said therein, as in the next preceding subdivision, to which we will refer later, about "such appendages and adjuncts as may be necessary for the convenient use of the same." This, as we have said, was the only purported legislative authorization of the use of any street for railroad purposes. Section 470 of the Civil Code, as it then and has ever since stood, providing that "no railroad corporation must use any street, alley, or highway, or any of the land or water, within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate," is simply a limitation upon such authorization, making such a grant by the town or city authority a condition precedent to the exercise of the power given by the Legislature so far as streets in incorporated cities or towns were concerned. See Arcata v. Arcata, etc., R. R. Co., 92 Cal. 645, 28 Pac. 676. * * * The city council of Los Angeles was limited, therefore, to a grant of the right described in said subdivision 5 of section 465 of the Civil Code, and in so far as the ordinance exceeded this, it was without legislative authority and ineffectual to give the railroad company any rights. The power given by that subdivision was simply "to construct their roads across, along or upon" a street or highway. What was meant by the term "roads" as therein used? We think it must be held to have meant the single or double-track road referred to in subdivision 4 of the same section as it stood at that time. * * * Doubtless the words "and with such appendages and adjuncts," etc., as used in this subdivision, include necessary side tracks, but this subdivision is not one dealing with the right to use a street or highway. When we come to that subdivision (subdivision 5), we find that right limited to the "road." * * * The omission of any reference thereto [to appendages and adjuncts] in the subdivision relative to the use of public highways shows the intention to confine such use to the road itself, consisting of not exceeding two tracks.' As applied to the case at bar, this decision of the Supreme Court plainly limits the rights of the plaintiffs under the provisions of section 465 of the Civil Code to use the street for the main tracks of their railway line, without the 'adjuncts and appendages' referred to in subdivision 4.

"Counsel for appellants seek to distinguish the conditions as shown in City of Los Angeles v. Southern Pacific R. R. Co., supra., from the case at bar for the reason that at the time of the construction of the contested work in the case cited subdivision 4 of section 465 empowered the railroad corporation to construct and maintain its road 'with single or double tracks'; whereas, at the time of the construction of the spur track here in controversy subdivision 4 had been amended to empower the construction of a road 'with one or more tracks.' We do not understand the decision above cited to rest upon the question as to the number of tracks of which the 'road' might consist, but upon the proposition that a side track or turnout is not one of the tracks of the road, but an 'adjunct' or 'appendage' for the 'convenient use' of the road. We think it clear that 'spur tracks' constructed and used in connection with the business of individual shippers, and, as in this case, constructed long after the road is built and in operation, are not such component parts of the corporation's 'road,' however few or many tracks the road may have, as to be included within the meaning of the word 'roads,' as used in subdivision 5 of section 465. Rather, they are 'appendages' or 'adjuncts,' and as such appellants refer to them in their brief.

"In Arcata v. Arcata, etc., R. R. Co., 92 Cal. 639, 28 Pac. 676, so much relied upon by the learned counsel for appellants, the interpretation of the terms of section 465, Civil Code, as to what constitutes the 'roads' which a railroad may build in a public highway was not discussed. In so far as the matter is referred to at all, the word 'road,' as used in section 468 of the same chapter, is held to apply only to the 'main road provided for in the company's articles of incorporation'; and the switch or side track under consideration is referred to as 'a mere convenience in the operation of the road,' and as no more a part of the work referred to in the section 'than the site for a depot or landing place in a street of the town would be.' The amendment of 1907, permitting, under section 465, 'one or more tracks,' instead of a 'single or double track,' does not change the meaning of the word 'road' as there used. It still refers to the main line of the road proper.

"Appellants strongly protest against any such interpretation of this Code section, asserting that, because spur tracks such as here involved are an essential part of every railroad system, the right to construct them in public highways should not be questioned. Of even greater necessity to the proper equipment of a railroad system are the stations, depots, and roundhouses, which are the 'appendages' and 'adjuncts' of every modern railroad, and yet no one would seriously look to subdivision 5 of section 465 of the Civil Code for authority to use the roads of a county for such purposes. * * *

[4] "Appellants make the further point that the city of Los Angeles is estopped to deny the right of the plaintiff railway company to maintain this spur track. Attention is called to the fact as shown by the record that the spur track was constructed and put in operation in June, 1909; that it came within the city limits by annexation of the locality in which it was situated in October of that year, and has been maintained and operated ever since, until September 1, 1911, without protest or interference; that the plaintiff Simons Brick Company, in reliance upon the maintenance of this spur, has built up an extensive business dependent on the

spur track for its service; and that expensive improvements have been made by the plaintiffs, at the instance of the city, to conform the spur track to the paving and grading requirements of the city of Santa Monica boulevard. In fact, a strong showing is made for the application of the equitable doctrine of estoppel, if the city of Los Angeles and the public interests concerned are in a position to be subject to estoppel by conduct and acquiescence. But, as is said in Gardella v. County of Amador, 164 Cal. 555, 129 Pac. 993: 'The doctrine of estoppel cannot, we think, be applied so as to validate, as against the public, grants in excess of the limited powers conferred upon the public agents who assumed to make them.' If the right to an easement on Santa Monica boulevard arises solely from the provisions of the Civil Code, subject only to its ratification by the city of Los Angeles, then the city is without power to extend the rights of plaintiffs either by its positive act or passive acquiescence. If it is subject to power vested in the city under section 2 of its charter, for permitting the construction of spur or side tracks, then it would be subject to revocation under the proviso of the same section that all permits granted thereunder 'shall be revocable at the pleasure of the council.' In either event, whether the city was without power by direct action to authorize the building of this spur, or, having the power, was privileged at any time to revoke its consent, we do not see how it could be held by estoppel to an obligation which it could not assume by express agreement, or which, if assumed, it could revoke at its pleasure. Detroit v. Detroit City R. R. Co. (C. C.) 56 Fed. 867; St. L., A. & T. H. R. R. Co. v. Belleville, 122 Ill. 376, 12 N. E. 680; Ashland v. Chicago, etc., R. R. Co., 105 Wis. 398, 80 N. W. 1101; Sutro v. Pettit, 74 Cal. 336, 16 Pac. 7, 5 Am. St. Rep. 442; City R. R. Co. v. Citizens' St. R. R. Co., 166 U. S. 566, 17 Sup. Ct. 653, 41 L. Ed. 1114.

"The facts as set out in the pleadings do not entitle plaintiffs to the relief demanded."

The order and judgment appealed from are affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHAW, J.; OLNEY, J.; LAWLOR, J.; KERRIGAN, Judge pro tem.

45 Cal. App. 511

DAMMANN v. HYDRAULIC CLUTCH CO. et al. (Civ. 2543.)

(District Court of Appeal, Second District, Division 2, California. Jan. 20, 1920.)

1. APPEAL AND ERROR ⊂⊃917(1)—ON APPEAL FROM JUDGMENT ON DEMURRER COMPLAINT MUST BE TAKEN AT ITS FULL VALUE.

On appeal from a judgment rendered on a demurrer to a complaint, the complaint must be taken at its full face value.

2. INJUNCTION ⊂⊃9—COURT WILL NOT RESTRAIN DOING OF LAWFUL ACT.

Equity will not restrain any person from doing that which the law authorizes him to do.

3. CORPORATIONS ⊂⊃620 — ASSESSMENT ON CAPITAL STOCK TO PAY DEBTS AND TO DISINCORPORATE IN CALIFORNIA AND INCORPORATE ELSEWHERE WILL NOT BE ENJOINED AT SUIT OF ASSESSED STOCKHOLDER.

In view of Civ. Code, § 285, providing a method for incorporating, and under Code Civ. Proc. § 1227 et seq., providing the method of winding up corporate affairs and the process of disincorporation and making it a prerequisite that the debts of the corporation be paid, and under Civ. Code, § 331, providing for the levy of an assessment for that purpose, the acts of a corporation and its officers and directors in imposing an assessment which would discharge its debts, in order to disincorporate in California and to incorporate in Arizona, was not a violation of law which would be restrained at the instance of a stockholder so assessed.

Appeal from Superior Court, Los Angeles County; Grant Jackson, Judge.

Suit for injunction by O. S. Dammann against the Hydraulic Clutch Company and others. Demurrer to second amended complaint sustained, and plaintiff appeals. Affirmed.

David D. Sallee and Gesner Williams, both of Los Angeles, for appellant.

R. T. Linney, of Los Angeles, for respondents.

THOMAS, J. This is an action brought praying for injunctive relief. The second amended complaint, it is claimed, states a cause of action. A demurrer was interposed, was sustained with leave to amend, and, plaintiff having failed to amend within the time allowed, judgment was entered accordingly. The appeal is from the judgment so entered.

Plaintiff alleges that he is the owner of 3,400 shares of the capital stock of the defendant Hydraulic Clutch Company; that said company "has been and now is a corporation duly incorporated and existing under the laws of the state of California"; and that the defendants named herein, excepting said defendant company, "have been and now are the and all the directors and officers of said corporation." It is alleged, "on information and belief," that the defendant corporation is the owner of certain United States patents for the construction of certain hydraulic machinery, which said patents "are the total and only assets of said corporation, except the sum of $500 in lawful money of the United States." The complaint further avers that—

For the purpose of evading the laws of this state, the officers and directors of said corporation "declared that they would cause to be paid all the debts of the corporation, solely for the purpose of being able to disincorporate under the laws of the state of California, and for the further purpose of reincorporating * * * under the laws of the state of Arizona, and

solely for the purpose of evading the said statute of the state of California, and not becoming and being subject to said commissioner of said state of California"; and that for said purpose, and to pay the debts of said corporation as required by the laws of this state, "before they could cause to be disincorporated the said corporation," the officers and directors caused an assessment to be "duly and regularly levied * * * upon the capital stock of the corporation; * * * that when the said assessment is collected (if this court permits it to be so done) said corporation and said officers and directors will carry out the aforesaid purpose * * * unless restrained by the court," and by so doing "plaintiff's stock and interest in said Hydraulic Clutch Company and its assets will be thereby rendered worthless and of no value whatever; that plaintiff is without adequate remedy at law, and is informed and believes that the defendants are insolvent, and unless an injunction is issued * * * the plaintiff will receive great and irreparable injury."

[1-3] The complaint, taking it at its full face value, as we must in this instance, discloses, we think, not one illegal act on the part of the officers or directors of the defendant corporation. A court of equity will not restrain any person from doing that which the law authorizes that person to do. People v. Gold, etc., Mining Co., 66 Cal. 155, 4 Pac. 1150. The law which prescribes the method for incorporating as a corporation (section 285, Civ. Code) provides also the method of winding up its affairs as such (section 1227 et seq., Code Civ. Proc.), as well as the actual process of disincorporation. In order to accomplish the latter result, it is a legal prerequisite that the debts of the corporation be paid (section 1228, Code Civ. Proc.), and, if necessary, an assessment may be levied for that purpose (section 331, Civ. Code). When the disincorporation has been accomplished, the corporation is dead. Obviously the "right, title, and interest" of a dead corporation cannot be transferred anywhere. The fact that the same individuals who at present comprise the officers and directors of the defendant corporation may hereafter go to another state, under the laws of which they may believe more freedom of action will be given to them, while one may not approve of that course, still it is a violation of no law, and is but the exercise of a right guaranteed under the Constitution of the United States.

Appellant contends that "there is but one point raised by this appeal, to wit: Can a corporation invoke the laws of the state for the purpose of evading the laws of the state?" But after a careful perusal and close study of the complaint we fail to find therein any hook upon which that question may be hung.

The authorities cited by appellant throw no light whatever on the real question with which we are confronted.

The appeal, we think, is without merit. The ruling of the trial court was correct.

Judgment affirmed.

We concur: FINLAYSON, P. J.; SLOANE, J.

45 Cal. App. 462

HORTON v. TRAVELERS' INS. CO.

(Civ. 3043.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1920. Hearing Denied by Supreme Court March 11, 1920.)

1. INSURANCE ⊂⊃635—COMPLAINT ADOPTING LANGUAGE OF ACCIDENT POLICY SUFFICIENT AS AGAINST GENERAL DEMURRER.

As against general demurrer, a complaint in an action on an accident policy was sufficient where, adopting the language of the policy, it averred in general terms that the insured met his death from bodily injuries effected directly through "external, violent, and accidental means," and that his death was occasioned by such means alone, without averring the particular facts and circumstances attending the death or injury.

2. PLEADING ⊂⊃34(1) — GENERAL AVERMENTS MAY BE LOOKED TO TO COMPLETE THE ESSENTIALS OF A CAUSE OF ACTION WHERE NOT INCONSISTENT WITH SPECIAL AVERMENTS.

Although specific averments must be given precedence over general averments, inasmuch as the general allegations are deemed explained, limited, and controlled by the specific allegations, this is true only where there is an inconsistency between the general averments and specific averments, and, in the absence of any inconsistency, the general averments, if necessary, may be looked to to complete the essentials of a cause of action.

3. INSURANCE ⊂⊃455—NO RECOVERY ON ACCIDENT POLICY IF INSURED DOES VOLUNTARY ACT NATURALLY RESULTING IN INJURY; "ACCIDENTAL MEANS."

There can be no recovery under an accident policy if the insured does a voluntary act the natural, usual, and to-be-expected result of which is to bring injury upon himself; injury or death so occurring not being produced by "accidental means" in any sense of the word, legal or colloquial.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accidental Means.]

4. INSURANCE ⊂⊃455—NOT ENOUGH THAT INJURY SHOULD BE UNEXPECTED OR UNFORESEEN UNDER POLICY INSURING AGAINST INJURIES EFFECTED BY "ACCIDENTAL MEANS."

Where a policy does not insure against accidental death or accidental injuries, but against death or injuries effected by accidental means, it is not enough that the death or injury should be unexpected or unforeseen, but there must be something of an unexpected or unforeseen character in the means through which the injury was sustained, or the death produced.

5. INSURANCE ⊂=455 — DEATH FROM BLOOD POISONING RESULTING FROM GERMS ON DENTAL INSTRUMENTS CAUSED BY "EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS" WITHIN ACCIDENT POLICY.

Where insured voluntarily underwent a dental operation, and the dentist unintentionally introduced into insured's system virulent germs contained on what he supposed were clean and aseptic instruments, resulting in blood poisoning and the death of insured, death was effected, "directly and independently of all other causes, through external, violent, and accidental means" within the meaning of accident insurance policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, External, Violent, and Accidental Means.]

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Action by Jessie Balch Horton against the Travelers' Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed.

H. T. Morrow and A. R. Truex, both of Los Angeles, for appellant.

Walter K. Tuller, O'Melveny, Stevens & Tuller, and Sayre Macneil, all of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action upon an accident insurance policy executed by defendant to plaintiff's deceased husband, George Ray Horton, whereby he was insured against death "from bodily injuries effected, directly and independently of all other causes, through external, violent, and accidental means." A general demurrer to the complaint was sustained by the court below. From the judgment thereupon entered, plaintiff has taken this appeal.

The question presented is: Do the facts alleged in the complaint show that the insured died from bodily injuries effected solely through "external, violent, and accidental means"? The complaint alleges the circumstances attending the death of the insured as follows:

"On or about December 8, 1914, at Los Angeles, Cal., and while said accident insurance policy was in force, said George Ray Horton received bodily injuries, effected directly and independently of all other causes, through external, violent, and accidental means, to wit, by the introduction of virulent germs by and through dental instruments with virulent germs unexpectedly and unintentionally thereon, causing blood poisoning, and said injuries directly and proximately caused and resulted in the death of said George Ray Horton on January 4, 1915. The use of said dental instruments with virulent germs thereon, as aforesaid, and the introduction of said virulent germs, as aforesaid, were, and each of them was, unforeseen, unintended, and unexpected by said deceased, or by any one else, and said introduction of said virulent germs and the use of said dental instruments with virulent germs thereon, as aforesaid, were, and each of them was, external, violent, and accidental."

[1, 2] As against a general demurrer, a complaint is sufficient where, adopting the language of the policy, it avers in general terms that the insured met his death from bodily injuries effected directly through "external, violent, and accidental means," and that his death was occasioned by such means alone, without averring the particular facts and circumstances attending the death or injury, as plaintiff has done in this case. Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; 1 C. J. 489. It is, it is true, the general rule that specific averments must be given precedence over general averments, inasmuch as the general allegations are deemed explained, limited, and controlled by the specific allegations; but this is true only where there is an inconsistency between the general and specific averments. In the absence of any inconsistency, the general averments, if necessary, may be looked to to complete the essentials of a cause of action. If, in the instant case, the general allegations alone be looked to, the complaint unquestionably alleges a cause of action (Richards v. Travelers' Ins. Co., supra), and we think the specific averments are entirely consistent with the general averments and with the statement of a cause of action.

The circumstances attending the death of the insured, as disclosed by the complaint, appear to be substantially these: The death was the result of blood poisoning as the immediate cause; this blood poisoning was caused by the introduction of virulent germs into the body of the insured; these germs were on dental instruments; the infected dental instruments were used in the course of a dental operation that was had upon the insured shortly before his death; thus were the germs introduced into the body of the insured, and, as alleged, the presence of the germs upon the instruments was unforeseen, unintended, and unexpected by the insured or by any one else; the use of the instruments with the germs thereon was "external, violent, and accidental."

[3, 4] Respondent contends that there can be no recovery where the injury or death is the result of the voluntary act of the insured, although such result may be entirely unexpected and undesigned. Without doubt, there can be no recovery if the insured does a voluntary act the natural, usual, and to-be-expected result of which is to bring injury upon himself. An injury or death so occurring is not produced by "accidental means" in any sense of the word, legal or colloquial. Lickleider v. Traveling Men's Ass'n (Iowa) 166 N. W. 363, 3 A. L. R. 1295. Where, as here, the policy does not insure against accidental death or accidental injuries, but

against death or injuries effected by accidental means, it is not enough that the death or injury should be unexpected or unforeseen; there must be something of an unexpected or unforeseen character in the means through which the injury was sustained or the death produced. Admittedly this is the established rule in this state. Rock v. Travelers' Ins. Co., 172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196. But, though this unquestionably is the law, it is not applicable to the facts as alleged in the complaint now under consideration. Here, according to the complaint, the element of unexpectedness was in the preceding act or means which led to the death, namely, the use of instruments with virulent germs thereon, the presence of the germs being wholly unsuspected, and justly so, perhaps, for it is common knowledge that in modern surgery great pains are usually taken to avoid using unsterilized instruments, though, doubtless, whether this is the common experience is a question of fact for the jury.

In Western Com. Travelers' Ass'n v. Smith, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653, a leading case, it is said that the term "accidental means" is descriptive of "means which produce effects which are not their natural and probable consequences." See, also, Lickleider v. Traveling Men's Ass'n, supra, a recent and well-considered case. The introduction into the insured's body of virulent, disease-producing germs was not the natural and probable consequence of the use by the dentist of dental instruments in the mouth of the insured, when proceeding in the manner usual and customary in such operations, if, as we are bound to infer from the allegations of the complaint, the usual and customary practice in such operations is to use none but clean and sterilized instruments. It doubtless is true that the insured knowingly and intentionally permitted the dentist to introduce the dental instruments into his mouth, but he did not know that he was permitting germ-infected instruments to be used in his mouth. The result, the death of the insured, was not the natural and probable consequence of using sterilized and aseptic instruments.

[5] The introduction of germs into decedent's system, and his resultant death, was not only an unexpected, unforeseen, unusual, and improbable consequence, but the means through which the death was produced—i. e., the dental instruments—contained something of an unexpected and unforeseen character, namely, the disease-producing germs. For this reason, while we quite agree with respondent's counsel when they say that the means must be accidental, and that a mere accidental result would not suffice under the language of this policy, nevertheless we are of the opinion that the unintentional introduction into the insured's system of virulent germs contained on what he supposed were clean and aseptic instruments constituted "accidental means," within the meaning of the policy; in other words, it may well be that the alleged "accidental" feature of the case was an accidental and unsuspected infection of the dental instruments, or an accidental use by the dentist of the wrong instruments, as, for instance, the use of infected instruments accidentally and unintentionally commingled with his sterilized instruments or accidentally placed where none but his sterilized instruments were usually kept.

The case is clearly within the principle of those cases where it is held that, if one drinks from a glass containing poison under the supposition that it is a glass of pure water, and death ensues, the death is caused by "external, violent, and accidental means." In support of this principle we cite the following: Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355 (a case where the insured died as the result of taking, by his own hand, carbolic acid in place of medicine which he desired to take for a sickness from which he was suffering); Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359 (a case where the insured died from poison which he drank by accident, intending to drink distilled water); Healey v. Mutual Acc. Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637 (deceased died not knowing that what he drank was poison; he took it and drank it accidentally); U. S. Casualty Co. v. Griffis, 186 Ind. 126, 114 N. E. 83, L. R. A. 1917F, 481 (death due to ptomaine poisoning from eating mushrooms supposed to be edible); Maryland Cas. Co. v. Hudgins, 97 Tex. 124, 76 S. W. 745, 64 L. R. A. 349, 104 Am. St. Rep. 857, 1 Ann. Cas. 252 (death caused by eating unsound oysters in ignorance of their unsound condition); Johnson v. Fidelity & Cas. Co., 184 Mich. 406, 151 N. W. 593, L. R. A. 1916A, 475 (death from ptomaine poisoning, resulting from eating tainted food); Carnes v. Iowa Travelers' Ass'n, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306 (death was caused by taking morphine; held that if, by mistake or inadvertence, insured took more than he intended, the death was accidental); Dezell v. Fidelity, etc., Co., 176 Mo. 253, 75 S. W. 1102 (death from an overdose of morphine, taken to relieve neuralgia); Dent v. Railway Mail Ass'n (C. C.) 183 Fed. 843; Id., 213 Fed. 981, 130 C. C. A. 387, L. R. A. 1915A, 314 (death from poison ivy, with which insured came in contact while cutting a stick in the woods); Sullivan v. Modern Brotherhood, 167 Mich. 524, 133 N. W. 486, 42 L. R. A. (N. S.) 140, Ann. Cas. 1913A, 1116 (a washerwoman's eye destroyed by gonococci with which her eye became infected from water in the washtub accidentally splashed into the eye); Columbia, etc., Co. v. Fidelity, etc., Co., 104 Mo. App. 157, 78 S. W. 320 (kid-

ney disease or dropsy engendered by absorption of poison, resulting from handling infected rags or wall paper). See, also, Omberg v. U. S. Mut. Acc. Ass'n, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413 (death caused by blood poisoning resulting from the bite of a mosquito); also Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758, and Pickett v. Pac. Mut. Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618 (cases where death resulted from asphyxia caused by inhaling deadly gas).

The above cases, while not involving the identical facts here presented, lay down the principle which must govern. Applying the rules there announced, we must hold that the facts alleged in this complaint show that the insured's death was the result of "accidental means," as that term is used in the policy.

To support its theory, respondent has cited a large number of cases. These cases are so numerous that any attempt to notice them in detail would unduly prolong this already too extended opinion. Suffice it to say that every case relied on by respondent can readily be differentiated from this. Of the cases that respondent relies upon, the one which, in its facts, most closely approaches this is, we believe, the case of Smith v. Travelers' Ins. Co., 219 Mass. 147, 106 N. E. 607, L. R. A. 1915B, 872. There the insured, who was affected with nasal catarrh, was in the habit of using a nasal douche. On one occasion, while using the instrument, he "snuffed" harder than usual, with the result that streptococci, germs frequently found in the outer nose, were carried from the nostrils through the Eustachian tube in the middle ear, and thence penetrated the brain, resulting in death from spinal meningitis. There was a hole or perforation in the mastoid bone through which the germ could pass from the ear into the brain. This, the opinion states, is a most unusual condition, found only in about one out of every 1,000 skulls. The court held that there was nothing accidental in the inhalation; that, while the deceased "snuffed" harder than he had formerly done, he intended to do so, and the external act was what he proposed; that, though the result was unexpected, the means employed was not, and under such a policy recovery can be had only when the means employed is accidental. In that case the presence of the germs in a place where they are harmless, the outer nose, and the existence of the perforation in the mastoid bone, were not operating causes, but, as the Massachusetts court says, were internal "conditions." The only operating cause was the too violent inhalation; but that act, which was the sole efficient cause of the death, was the voluntary act of the insured. The facts of that case presented a conscious and voluntary act co-operating with unknown internal conditions, and the ensuing death followed naturally from the one conscious and voluntary act of the insured. There was nothing accidental in the voluntary act, the inhalation of the douche, which, as the court says, was not harder nor more violent than the insured intended it to be. The case was within the doctrine of the Rock Case (172 Cal. 462, 156 Pac. 1029, L. R. A. 1916E, 1196), because the external act of the insured was exactly what he intended it to be, though it produced internal consequences which he had not foreseen. In the case before us the external act, namely, the introduction into the mouth of the germ-infected instruments, was not what the insured intended it should be. He intended that aseptic, not septic, instruments should be used in the dental operation; and the external act that resulted in blood poisoning, and consequent death, was as much accidental as if the insured had swallowed a lethal draught of poison under the mistaken supposition that it was a glass of crystal-pure water.

Not only was the insured's death due to "accidental" means, but the means was "external and violent," within the meaning of those words as used in the policy. The means is external when the cause of the injury or death is external to the person, though it acts internally. "The insurance is not, by the first clause quoted, limited to an external effect, nor to one beginning at the surface. The accidental operation of external means may be wholly internal." Miller v. Fidelity & Cas. Co. (C. C.) 97 Fed. 836. Here the disease-producing germs were introduced into decedent's system from without; therefore the means or cause of the death was an external cause. The means not only was external, it was "violent," within the meaning of the policy. The degree of violence is not a controlling consideration. The term "violent" signifies merely that the external cause is efficient in producing a harmful result. "It it not necessary that it shall be violent in the sense of breaking tissues or otherwise physically and visibly affecting the body." Vance on Insurance, p. 569. The root meaning of the word "violent" is force. But any force, however infinitesimal, will suffice, if it is efficient in producing the harmful result. A bacillus, if it enter the system with injurious results, moves from some force, however infinitesimal. The force that enables virulent bacilli to enter the system is itself the efficient external cause of an internal result, septicæmia. Noxious gas in the atmosphere has been held to be a violent agency, in the sense that it works upon the insured so as to cause death. Paul v. Travelers' Ins. Co., supra. The words "external" and "violent" were inserted in the contract to protect the company against hidden or secret diseases. One defi-

nition of "violent" is "unnatural," and in using the word "violent" the company was but attempting to prevent the insured from asserting a claim when the injury or death was the result of some natural cause. American Acc. Co. v. Reigart, 94 Ky. 550, 23 S. W. 191, 21 L. R. A. 651, 42 Am. St. Rep. 374. Hence it has been held that, where death or injury is the result of accident, and therefore is unnatural, there necessarily is an external and a violent agency as a cause of the death or injury. "That a death is the result of accident, or is unnatural, imports an external and violent agency as the cause." Paul v. Travelers' Ins. Co., supra.

It is contended by respondent that, according to the allegations of the complaint, the insured died of a disease, namely, blood poisoning. Though blood poisoning may have been the immediate cause of the death, it also appears from the complaint, in substance and effect, that the death was effected through external, violent, and accidental means, independently of all other causes, and that the blood poisoning was but the result of such external, violent, and accidental means. Blood poisoning, or septicæmia, is, it is true, a disease. But, even though disease be the immediate cause of the death, nevertheless where, as here, it can be seen from the facts, as alleged, that the disease is a mere link in the chain of causation between the accidental means and the death which it produces, it is not an intervening and independent cause, and the death must be regarded as due to the accidental means as the causa causans. In short, if it can be shown that the original cause to which the disease can be traced was an "accidental means," then, not the disease, but the original accidental means, will be deemed to be the true cause of the death. "If the accidental injury produces morbid change in the exercise of vital functions, which in turn results in death, the injury, and not the morbid change, is held to be the cause of death." Clarke v. New Amsterdam Cas. Co. (Sup.) 179 Pac. 195. It is held, therefore, that if inoculation with disease-producing germs is a part of the accident, the accident is, in law, the sole and proximate cause of the death, though blood poisoning ensue. Western Commercial Travelers' Ass'n v. Smith, supra; Omberg v. U. S. Mut. Acc. Ass'n, supra; Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, 5 L. R. A. (N. S.) 933, 110 Am. St. Rep. 235, 5 Ann. Cas. 155; Bailey v. Interstate Cas. Co., 8 App. Div. 127, 40 N. Y. Supp. 513.

Respondent has cited a number of "sunstroke" cases, among others, Sinclair v. Insurance Co., 3 El. & El. 478, and Dozier v. Fidelity & Cas. Co. (C. C.) 46 Fed. 446, 13 L. R. A. 114. Sunstroke is a disease. It is a disease that not unusually follows from exposure to excessive heat. One who voluntarily exposes himself to the atmospheric conditions that ordinarily cause sunstroke cannot claim that his condition is due to accident or to accidental means. Says Chief Justice Cockburn in the Sinclair Case:

"* * * If, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by wreck or other disaster to quit the ship and take to the sea in an open boat, he remained exposed to wind and cold for a time, and death ensued therefrom, the death might properly be held to be, the result of accident."

A like distinction is made in Northwest, etc., Ass'n v. London, etc., Co., 10 Manitoba L. Rep. 537. There the insured froze to death on a prairie in consequence of the accidental breaking down of a conveyance, together with a sudden and unexpected change in the weather to great severity; and it was held that the death was caused by external, violent, and accidental means. Sunstroke does not, as is commonly supposed, come like a stroke of lightning from a piercing ray of the sun. It is a pathological condition. The conditions under which the human system may be affected by it belong to natural causes which may reasonably be anticipated, as they come not by chance. It is a result that ordinarily and naturally follows from a known cause; and disease produced by a known cause, to which one has knowingly and voluntarily exposed himself, cannot be considered as accidental. Dozier v. Fidelity & Cas. Co., supra. The case before us bears no analogy to the "sunstroke" cases. One who voluntarily exposes himself to atmospheric conditions that ordinarily and naturally cause the disease known as sunstroke is not exposing himself to a hidden, but to a known, danger. In the case before us, if the allegations of the complaint be true, the insured unintentionally exposed himself to a hidden, unknown, and unexpected danger.

There is a marked distinction between a voluntary act and a voluntary exposure to danger. The act done may be voluntary, but it cannot imply a voluntary exposure to the danger that turns out to be the real efficient cause of the death or injury, unless the danger is known and realized. Says the court in Burkhard v. Travelers' Ins. Co., 102 Pa. 267, 48 Am. Rep. 205:

"* * * A great distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist; yet the exposure thereto without any knowledge of the danger does not constitute a voluntary exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. * * * The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental."

A good illustration of a case of hidden danger where the insured was held entitled

to recover, notwithstanding his own voluntary act exposed him to the danger, is afforded by the case of Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638. Lovelace, the insured, was shot by a drunken and boisterous man whom he was attempting to eject from a hotel office. The court held that the death of Lovelace was an accident, and not a risk voluntarily assumed, inasmuch as he had made the attempt to eject the other by force without knowing that the other was armed. So here the danger that lurked in the dental instruments was not known to the insured; it was a hidden danger, to which the insured exposed himself without any knowledge of its dangerous character and without reason to suspect its existence. Indeed, the danger was not known to any one, nor, according to the allegations of the complaint, could it have been foreseen by any one, and the insured's contact therewith, though it was the means that resulted in his death, was without his foresight, expectation, design, or voluntary act. It is true that the insured's submission to the dental operation was his voluntary act; and his agent, the dentist, doubtless used the instruments in the insured's mouth exactly as he intended to use them; but it does not therefore follow that, in the eye of the law, the death was the result of the voluntary act of the insured. Practically speaking, every injury produced by accidental means may be traced in some line of causation to the voluntary act of the victim. For example, he is a hunter, and is wounded or killed by the explosion of his gun; or he is a carpenter, and the ladder on which he climbs slips and breaks, precipitating him to the ground; or a surgeon or embalmer, and his instrument slips and wounds his hand, inducing fatal blood poisoning. In each of these instances the result would not have taken place had the person suffering the injury not voluntarily done an act that placed him in the position where he received the harm complained of. And yet we are satisfied no court would give ear to the plea that the injury was not caused by accidental means. In the case before us the insured's death was the result of exposure to danger. But because the exposure was without knowledge of the danger and the result was not the usual and probable consequence from the use of dental instruments—if the allegations of the complaint be true—it cannot be said that the death was due to the insured's voluntary act or voluntary exposure to danger.

For these reasons we think the complaint was sufficient to repel the defendant's demurrer, and that the judgment should be reversed, with directions to overrule the demurrer and grant defendant leave to answer, should it be so advised.

It is so ordered.

We concur: SLOANE, J.; THOMAS, J.

45 Cal. App. 446

LOPIZICH et al. v. SALTER et al.

(Civ. 2531.)

(District Court of Appeal, Second District, Division 1, California. Jan. 12, 1920. Hearing Denied by Supreme Court March 11, 1920.)

1. LANDLORD AND TENANT ⊂⊃78(1) — LESSEE OR ASSIGNEE TAKING POSSESSION AND PAYING RENT BOUND BY LEASE OR ASSIGNMENT, THOUGH NOT SIGNED.

In case of a lease or assignment of lease, signed by the lessor, under which, without signing, the lessee or assignee enters into possession of the demised premises, and pays rent in accordance with the terms of the lease or assignment, it is of the same binding force and effect as though the lessee or assignee had signed it.

2. LANDLORD AND TENANT ⊂⊃79(3)—LIABILITY AFTER REASSIGNMENT OF ASSIGNEE OF LEASE WHICH EXPRESSLY AGREED TO PAY RENT TO END OF TERM.

Where a lease was assigned to a brewing company which obligated itself expressly to pay the rent to the end of the term, the lessors consenting to the assignment, the brewing company's act in reassigning the lease to another did not terminate its contract to pay rent, or relieve it from the liability assumed thereby, and on default the lessors were entitled to stand on the lease and the contract between the lessee and the brewing company for their benefit, and to sue both parties as though both were original obligors.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by John Lopizich and another against Charles E. Salter and the Maier Brewing Company, a corporation. From judgment for defendants, plaintiffs appeal. Reversed as to defendant corporation, and judgment against it directed.

Robert A. Todd, of Los Angeles, for appellants.

Edw. F. Wehrle, Victor T. Watkins, and Ralph F. Graham, all of Los Angeles, and Russell Graham, of Whittier, for respondents.

SHAW, J. Action brought to recover certain installments of rent alleged to be due plaintiffs from defendants under the terms of a lease and an assignment thereof, both made in writing.

The court found, in substance, that on April 4, 1912, R. H. Howell and C. T. Crowell, by written lease, let and demised to Charles E. Salter the premises therein de-

scribed for a term of five years, at a monthly rental of $225, and that the rent for the months of September, October, and November, 1915, remained due and unpaid; that on February 4, 1913, plaintiffs succeeded to all right, title, and interest of the lessors in and to said lease; that under the terms of the lease the lessee named therein entered into possession of the demised premises, and continued to occupy the same and pay the rent until about November 1, 1913, at which time he, with the written consent of plaintiffs, as required by the terms of the lease, transferred the same to defendant Maier Brewing Company by an instrument in writing, as follows:

"For a valuable consideration, the undersigned lessee named in the foregoing lease, does hereby sell, assign and transfer the same to Maier Brewing Company, a corporation, and the said Maier Brewing Company hereby accepts said assignment, and hereby obligates itself upon said lease from and after November 1st, 1913,"

—which said instrument was duly subscribed by Salter, and with the lease delivered to Maier Brewing Company, as assignee named therein, which, without causing its name to be subscribed thereto, accepted the same, and thereupon entered into the possession and occupation of the premises, and continued in possession and occupation thereof under said assignment until the 31st day of August, 1915, at which time, it having paid to plaintiffs all rent accruing to and including said date, sold, assigned, and transferred all its right, title, and interest in the lease to Ed Schultz, to whom it surrendered possession of the premises, and at the same time notified plaintiffs that the said Maier Brewing Company disclaimed all liability for the payment of any further rental under the terms of said lease which had been so transferred to it, and thereupon vacated the premises. As conclusions of law, based upon these findings, the court found that the plaintiffs were not entitled to recover anything from the Maier Brewing Company, in favor of which judgment followed, and from which plaintiffs prosecute this appeal.

[1] Upon the facts found, the validity of the assignment is unaffected by the failure of the Maier Brewing Company to cause its name to be affixed thereto. By the express terms of the instrument transferring the lease, acceptance of which was manifested by defendant's act in entering into possession of the premises and for a year and a half complying with its covenants, it obligated itself to pay the rent, commencing with November 1, 1913, to the end of the term. This covenant on the part of defendant constituted the consideration, not only for the assignment made, but for the consent thereto given by the lessors. It could not, in thus accepting the lease, appropriate to itself the benefits thereof and repudiate the burden attached to the transfer. In the case of a lease signed by the lessor under which, without signing, the lessee enters into possession of the demised premises and pays the rent in accordance with the terms thereof, it is of the same binding force and effect as though the lessee had signed the same. Castro v. Gaffey, 96 Cal. 421, 31 Pac. 363. And in Dodd v. Pasch, 5 Cal. App. 686, 91 Pac. 166, it is said:

"In the case at bar, defendants, by paying the rent and entering into possession of the premises, accepted the lease. It was not necessary for the lessee to sign the lease."

To the same effect is Doxey's Estate v. Service et al., 65 N. E. 757, and State Board v. Carpenter, 16 Colo. App. 436, 66 Pac. 165. That, by reason of the defendant's acts, so found by the court, the assignment must be deemed of the same binding force upon defendant as though it had signed the instrument, to our minds, admits of no doubt; indeed, such contention on the part of appellants is not made the subject of serious controversy by respondent.

[2] The ground upon which respondent insists on an affirmance of the judgment is that, as such assignee of the lease, defendant's liability was, as to the landlord, limited to the time during which it occupied the premises as tenant, and terminated with its reassignment of the lease and abandonment of possession. As said by this court in Chase v. Oehlke et al., 185 Pac. 425:

"This is true where the tenant holds under a mere naked assignment of the lease, since the sole basis of his obligation is what is termed the privity of estate." Section 822, Civ. Code; Samuels v. Ottinger, 169 Cal. 209, 146 Pac. 638, Ann. Cas. 1916E, 830.

But in that case, in discussing a question identical with the one here presented, we said:

"Where, however, as in the instant case, the assignees by express terms in writing covenant and agree to pay the rent reserved in the lease, it presents two sets of obligations and rights; one comprising those due to the relation of landlord and tenant based upon privity of estate, and the other due to privity of contract by the terms of which the obligation of assignees of the lease is to be measured." Samuels v. Ottinger, supra; Tiffany on Landlord and Tenant, § 181; 18 Am. & Eng. Ency. of Law, 675; Springer v. De Wolf, 194 Ill. 218, 62 N. E. 542, 56 L. R. A. 465, 88 Am. St. Rep. 155.

Quoting further from the same case language which is pertinent here:

"The contract was for the benefit of the lessor, and, regardless of whether or not he was a party to the transfer, he was entitled to maintain an action thereon." Tiffany on Landlord and Tenant, § 158; Civ. Code, § 1559; Williams v. Naftzger, 103 Cal. 440, 37 Pac. 411; Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868.

The transfer of the lease and the landlord's consent thereto was the consideration

for defendant's assumption of the obligation to pay the rent for the balance of the term, and its obligation as to the landlord is identical with that of the original lessee. This being true, it follows that defendant's act in assigning the lease to another could not terminate the contract or relieve it from the liability thereby assumed. Wilson v. Lunt, 11 Colo. App. 56, 52 Pac. 296; Consumers' Ice Co. v. Bixler, 84 Md. 437, 35 Atl. 1086; Dickinson Co. v. Fitterling, 72 Minn. 483, 75 N. W. 731. Upon default being made in the payment of the rent, plaintiffs were entitled to stand upon the terms of the lease and the contract made between the lessee and his assignee for the lessor's benefit, and sue both parties to recover the rent which they had agreed to pay, in the same manner and to the same extent as though both parties were the original obligors under the terms of the lease. The error of counsel for respondent is due to the fact that he assumes the action to be based upon privity of estate alone, arising from the relation of landlord and tenant, rather than upon express covenants.

In support of the affirmance of the judgment, respondent cites the cases of Bonetti v. Treat, 91 Cal. 223, 27 Pac. 612, 14 L. R. A. 151, and Baker v. Maier & Zobolein Brewery, 140 Cal. 530, 74 Pac. 22. In the first of these cases, one Porter, as assignee of a lease, was sued, and a judgment against him affirmed, upon the ground that he was in possession of the premises, and hence by privity of estate liable for the rent. Assuming that language is used in the opinion which might be construed in support of respondent's contentions, it was not necessary to the decision. The facts in the second case are entirely different from those in the instant case, and nothing therein is helpful in the determination of the question involved.

From the foregoing it follows that the judgment as to the Maier Brewing Company should be and is reversed, and the trial court is directed to enter judgment upon the findings against said defendant as prayed for in the complaint.

We concur: CONREY, P. J.; JAMES, J.

45 Cal. App. 501

Ex parte CAPANNA. (Cr. 497.)

(District Court of Appeal, Third District, California. Jan. 19, 1920. Hearing Denied by Supreme Court March 18, 1920.)

1. HABEAS CORPUS ⊜111(1)—GRANTED WHERE THERE IS AN ENTIRE FAILURE OF COMPLAINT IN JUSTICE COURT TO STATE OFFENSE.

Where there is an entire failure of the complaint in a justice court to state an offense, a defendant, even after conviction, is entitled to a discharge upon an application for a writ of habeas corpus.

2. GAMING ⊜87(1)—BANKING OR PERCENTAGE GAME MUST BE ALLEGED TO HAVE BEEN PLAYED FOR MONEY OR OTHER REPRESENTATIVE OF VALUE.

Complaint charging that defendant did "knowingly and unlawfully conduct a percentage and banking gambling game—Secchinetta" did not state an offense under Penal Code, § 330, because it failed to charge that the game was played "for money, checks, credit, or other representative of value."

3. HABEAS CORPUS ⊜111(1)—PETITIONER ENTITLED TO DISCHARGE UNDER COMPLAINT CHARGING CONDUCTING OF BANKING OR PERCENTAGE GAME.

A complaint in justice court, charging that defendant did "knowingly and unlawfully conduct a percentage and banking gambling game, Secchinetta," entirely failed to state an offense under Penal Code, § 330, and defendant was entitled to discharge on application for habeas corpus.

In the matter of the application of N. Capanna for a writ of habeas corpus prayed to be directed to the sheriff of Humboldt county. Writ granted.

Thomas H. Selvage, of Eureka, for petitioner.

Arthur W. Hill and H. C. Nelson, both of Eureka, for respondent.

BURNETT, J. [1] Petitioner was convicted in the justice court of Scotia township, county of Humboldt, Cal., of the alleged charge of gambling, and was sentenced to pay a fine of $100, and in default of payment, to be imprisoned in the county jail of said county of Humboldt one day for every dollar of the fine. The charging part of the said complaint was as follows:

"Personally appeared before me this 22d day of August, 1919, S. Catargli, of Wildwood, in the county of Humboldt, who, first being duly sworn, complains and says: That said N. Capanna on the 17th day of August, 1919, at Wildwood, in said county of Humboldt, state of California, did then and there knowingly and unlawfully conduct a percentage and banking gambling game, Secchinetta."

The point upon which petitioner relies is that said complaint utterly fails to state any offense known to the law. Being so defective, it is the claim of petitioner that he is entitled to his discharge upon habeas corpus. The nature and scope of this writ have been considered often by the courts, and it is unnecessary to treat the subject with any degree of elaboration. It is sufficient to refer to the well-considered case of In re Avdalas, 10 Cal. App. 507, 102 Pac. 674. It must be deemed settled that, where there is an entire failure of the complaint in a justice

court to state an offense, a defendant, even after conviction, is entitled to his discharge upon an application for this writ.

[2] It is obvious that the proceeding in said justice court was taken against petitioner by virtue of section 330 of the Penal Code. But it appears from said section that, to make the conducting of a banking or percentage game a crime, it must be played "for money, checks, credit, or other representative of value," and it is equally apparent that in the complaint before us there is no allegation that the percentage and banking game was so played, nor is there any equivalent words used in said complaint. It is thus to be seen that there is an entire omission to state an essential element of the crime contemplated by said section of the Penal Code; in other words, defendant was charged with a perfectly innocent act, since it is no crime to merely conduct a percentage or banking game. The situation is not changed by the fact that the term "unlawful" was used as a modifier in said complaint or that the game was designated as a gambling game. These terms constitute mere conclusions that do not change the force or effect of the facts set forth in said complaint. The case falls clearly within the principle enunciated in People v. Carroll, 80 Cal. 153, 22 Pac. 129, Ex parte Greenall, 153 Cal. 767, 96 Pac. 864, and In re Correa, 36 Cal. App. 512, 172 Pac. 615. In the Carroll Case the information was similar to the complaint in the case at bar, and the court said:

"The information charges no offense under this section of the Code, or any other. To constitute it an offense to conduct the game, it must be 'played for money, checks, credit, or any other representative of value.'"

It is true that the decision rendered in that case was upon appeal, but, under the view of said information thus expressed by the Supreme Court, if it had been a complaint in a justice court, the defendant would have been entitled to his discharge upon a writ of habeas corpus. In this connection it may be stated that, at the time the case of People v. Carroll was pending, the penalty for the violation of said section 330 was such as to bring the case within the jurisdiction of the superior court.

In Ex parte Greenall, supra, the Supreme Court distinguished between a case brought in the superior court and one brought in a justice court, and the court held that "in order to bring any person" within the provisions of the act of March 14, 1907, making it a misdemeanor for any person to practice or attempt to practice or advertise or hold himself out as practicing medicine or surgery, or osteopathy, or any other system or mode of treating the sick or afflicted in this state, without having, at the time of so doing, a valid, unrevoked certificate, as provided in the act, it must appear that he is engaged in the line of work as a business or holding himself out as being so engaged. The court further held that the complaint charging that the defendant "did willfully and unlawfully treat the sick or afflicted by practicing the system or mode known as chiropractic without having at the time of so practicing a valid, unrevoked certificate from the board of medical examiners of the state of California entitling him so to do, as provided by an act of the Legislature of the state of California entitled," etc., did not show the facts required to constitute a crime and was not sufficient to support a conviction, and that the defendant was entitled to his discharge upon habeas corpus.

In the Correa Case, supra, the defendant was prosecuted in the justice court of Anaheim township, in Orange county, for a misdemeanor charged to have been committed under section 311 of the Penal Code. He was convicted and committed to the custody of the sheriff and thereafter made application for his discharge on a writ of habeas corpus. The complaint in the justice court omitted the term "lewdly," and the District Court of Appeal for the Second District held that this was fatal, the court saying:

"It is manifest, upon an inspection of the complaint, that it failed to charge the offense described in the statute. It was not alleged that the acts described were done 'lewdly,' nor were any words of equivalent meaning used in the complaint. An essential element of the crime being thus omitted, the complaint did not state a public offense."

[3] Following the rule enunciated and applied by the foregoing cases, we must hold that the petitioner herein was not charged with any offense, and is therefore entitled to be released. It is ordered that petitioner be discharged from custody.

We concur: ELLISON, Presiding Judge pro tem.; HART, J.

45 Cal. App. 457

PEOPLE v. PETERSON et al. (Civ. 3215.)

(District Court of Appeal, First District, Division 1, California. Jan. 12, 1920. Hearing Denied by Supreme Court March 11, 1920.)

1. NUISANCE ⟸84—NOT NECESSARY TO ALLEGE THAT OWNER PERMITS OR MAINTAINS NUISANCE.

In proceeding under the Redlight Abatement Act charging commission of a nuisance in a leased building, complaint, averring that owners had the means of knowing and should have known, and by the use of reasonable and ordinary care could have known, and in fact well knew, that the building is and at all times was used for purpose of lewdness, assignation, and prostitution, was sufficient to warrant injunction against the owners; it not being necessary to allege that owners either permitted or maintained the nuisance.

2. NUISANCE ⟸84 — OWNER OF BUILDING MAY BE ENJOINED THOUGH HE HAS NO ACTUAL KNOWLEDGE.

In proceeding under the Redlight Abatement Act, findings that owners had the means of knowing and should have known, and by the use of reasonable and ordinary care could have known, that the acts of lewdness were occurring in the building, support judgment against the owners of the building and their property.

3. JURY ⟸14(12) — IN PROCEEDING UNDER REDLIGHT ABATEMENT ACT, DEFENDANTS NOT ENTITLED TO JURY TRIAL.

In proceedings under the Redlight Abatement Act charging commission of a nuisance in a leased building, defendants were not entitled to a jury trial.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Proceedings by the People against Mrs. J. A. Peterson and others. From an adverse judgment, the unnamed defendants appeal. Affirmed.

C. C. Haskell, of San Bernardino, for appellants.

T. W. Duckworth, of San Bernardino, and M. O. Hert, of Colton, for respondent.

WASTE, P. J. The district attorney of San Bernardino county instituted this action against Mrs. J. A. Peterson, lessee of the Monte Vista hotel and rooming house, and R. F. Drew and the Andreson Company, owners of the building, charging the defendant Mrs. Peterson with committing a nuisance in said building in violation of the provisions of the "Redlight Abatement Act" (Stats. 1913, p. 20). The owners of the building appeared separately from the other defendants, and interposed a demurrer to the complaint, which was overruled. They thereupon answered, admitting ownership of the building, but substantially denying every other allegation of the complaint, especially in so far as the existence of any nuisance was concerned. At the proper time Drew and the Andreson Company demanded that the cause be tried by a jury, which was refused.

By the judgment, the trial court found that the acts complained of constituted a nuisance, perpetually enjoined all the defendants from permitting the same to continue, ordered the third story of the building closed for one year, and the furnishings therein sold, unless released by the owners giving bond in the sum of $5,000. Costs were awarded to the plaintiff. From this judgment the owners of the building appeal, seeking a reversal upon three grounds.

[1] It is first contended that the trial court committed an error of law in overruling the demurrer, in that it nowhere appears in the complaint that the owners of the rooming house at any time, either directly or indirectly, permitted or maintained the nuisance complained of. After specific allegations describing the building definitely, and setting out the nature of the acts committed therein, the complaint contains this averment:

"That said building now is, and at all times herein mentioned was, used by the defendant Mrs. J. A. Peterson and by divers persons unknown to this plaintiff for the purpose of lewdness, assignation and prostitution, and that at all times herein mentioned the defendants R. F. Drew and the Andreson Company had the means of knowing and should have known, and by use of reasonable and ordinary care could have known, and in fact well knew, that the said building now is and at all times herein mentioned was used for the purpose of lewdness, assignation and prostitution."

Appellants argue that—

"It is not enough to allege in the complaint that the owner of leased property had either knowledge, or means of knowledge, of the nuisance in order to hold him subject to an injunction under the 'Redlight Abatement Act'; it must be alleged that he either permits or maintains the nuisance."

The allegation avers actual knowledge on the part of appellants. However, the precise question raised by them has been well considered by the appellate court of this state. In People v. Barbiere, 33 Cal. App. 770, 166 Pac. 812, the District Court of Appeal of the Third Appellate District, in an elaborate discussion of the whole subject-matter covered by the "Redlight Abatement Act," first discussed the question. Later this court, in People v. Casa Co., 35 Cal. App. 194, 169 Pac. 454, after a careful re-examination of the same matter, said, in an opinion written by Mr. Presiding Justice Lennon:

"This point and the other points raised on this appeal are fully discussed and decided adversely to appellant's contention in a recent decision of

the appellate court of the third district in the case of People v. Barbiere, 33 Cal. App. 770 (166 Pac. 812), and we are satisfied with the reasoning of, and the conclusion arrived at by, Mr. Justice Hart in that case, and concurred in by his associates."

A petition to have the last-named cause heard in the Supreme Court was denied. The Supreme Court and the District Court of Appeal considered the act in Selowsky v. Superior Court, 181 Pac. 652, 177 Pac. 301. For the reasons stated in those opinions, we are satisfied that the demurrer to the complaint was properly overruled.

[2] The finding of the lower court as to the knowledge had by the owners as to the maintenance of the nuisance on these premises is:

"That R. F. Drew and Andreson Company, a corporation, had the means of knowing and should have known, and by the use of reasonable and ordinary care could have known, that acts of lewdness and prostitution were occurring in said building."

Appellants contend, therefore, that the judgment is not supported, in so far as it runs against the owners of the building and their property. There is no merit in the contention. The statute provides that the proceeding shall be "an action in equity to abate and prevent such nuisance and to perpetually enjoin the person or persons conducting or maintaining the same, and the owner, lessee or agent of the building, or place, in or upon which such nuisance exists, from directly or indirectly maintaining or permitting such nuisance." The precise point, among others, was directly passed upon in People v. Barbiere, supra, where, at page 779 of 33 Cal. App. (166 Pac. 815), the court said:

"If, therefore, a building or other property is so used as to make it a nuisance under the statute, the nuisance may be abated and the property, if personal, confiscated, and, if real, subjected to the consequences of reasonable forfeitures, notwithstanding that the owner had no knowledge that it was used for the unlawful purpose constituting the nuisance. [Citing cases.] But it has been held that 'the owner of property is presumed to know the business conducted thereon.'" [Citing cases.]

Therefore, it was not necessary, as contended by appellant, for the trial court to find either that the appellants threatened, and unless restrained would continue, to maintain, aid, and abet, the nuisance, or that they knew the building was used in violation of the act. The issues raised by the allegation and denials as to those matters were immaterial under the statute. "If the existence of the nuisance be established in an action, as provided" therein, the parties and their property are subjected to the provision of the act. The existence of the nuisance was the ultimate fact in this case, and, having been found, supports the judgment.

If it be argued that the judgment permitted by the statute is too broad in its scope, if it includes an injunction against the nonconsenting owners maintaining the nuisance on their premises, the answer may be found in the language of the court in People v. Dillman, 174 Pac. 951, in which case an injunction, but no abatement order, was granted. The court there said:

"The effect of the decree is merely to prevent the defendants from using the building as a place for the commission of unlawful acts, or, expressing the proposition in another form of language, the effect of the decree is only to require the defendants to obey a legislative mandate, viz., not to use their property or permit it to be used for the purposes of prostitution or other like acts of immorality. It adjudges nothing as against the defendants which is not a duty, per se, resting upon all the people of the state. * * *"

It was pointed out in Selowsky v. Superior Court, supra, page 656 of 181 Pac., that the injunctive relief, permitted by the statute, may be granted to prevent any one from maintaining the nuisance, whether owner or tenant. The abatement order is a remedy only against the owner's property. If the owner acquiesces in the order and is guilty of no contempt, he may, by filing a bond, stay the abatement order, which apparently runs out of itself in a year. As in the case of the injunctive relief, the statute makes no distinction between owners having knowledge of the kind of business conducted on their premises, and those informed. If it did, it would but serve to put a premium upon ignorance in such cases.

[3] Appellants' third, and last, point is that the trial court erred in denying their demand for a jury trial. This point was given full consideration in the Barbiere Case, and the court there quoted and approved the language in State v. Fanning, 96 Neb. 123, 127, 147 N. W. 215, holding that in such cases the right to a jury trial did not exist; the action being an equitable proceeding to abate a nuisance. See, also, State v. Gilbert, 126 Minn. 95–103, 147 N. W. 953–956, where it is said:

"Since, therefore, a review of the act as a whole leads irresistibly to the conclusion that its purpose is repression of the evil, to be worked out by equitable attack upon the property of those engaged in or abetting it, and not punishment of the offenders by infliction of personal penalties, except as for contempt of court, the contention that, because the thing itself—the lewd place—declared a nuisance by the act, would, in its maintenance, have constituted a criminal offense at the time of the adoption of the Constitution, a jury trial is indispensable, has no foundation, and is thus answered by the authorities:

" 'The fallacy of the argument lies in part in disregarding the distinction between a proceed-

ing to abate a nuisance, which looks only to the property that in the use made of it constitutes the nuisance, and a proceeding to punish the offender for the crime of maintaining a nuisance. These two proceedings are entirely unlike. The latter is conducted under the provisions of the criminal law, and deals only with the person who has violated the law. The former is governed by the rules which relate to property, and its only connection with persons is through property in which they may be interested. That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. The people, speaking through their representatives, have proclaimed it to be offensive and injurious to the public, and the law will not tolerate it. The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance' "—citing Carleton v. Rugg, 149 Mass. 550, 553, 22 N. E. 55, 5 L. R. A. 193, 14 Am. St. Rep. 446.

For the foregoing reasons the judgment is affirmed.

We concur: RICHARDS, J.; KNIGHT, Judge pro tem.

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